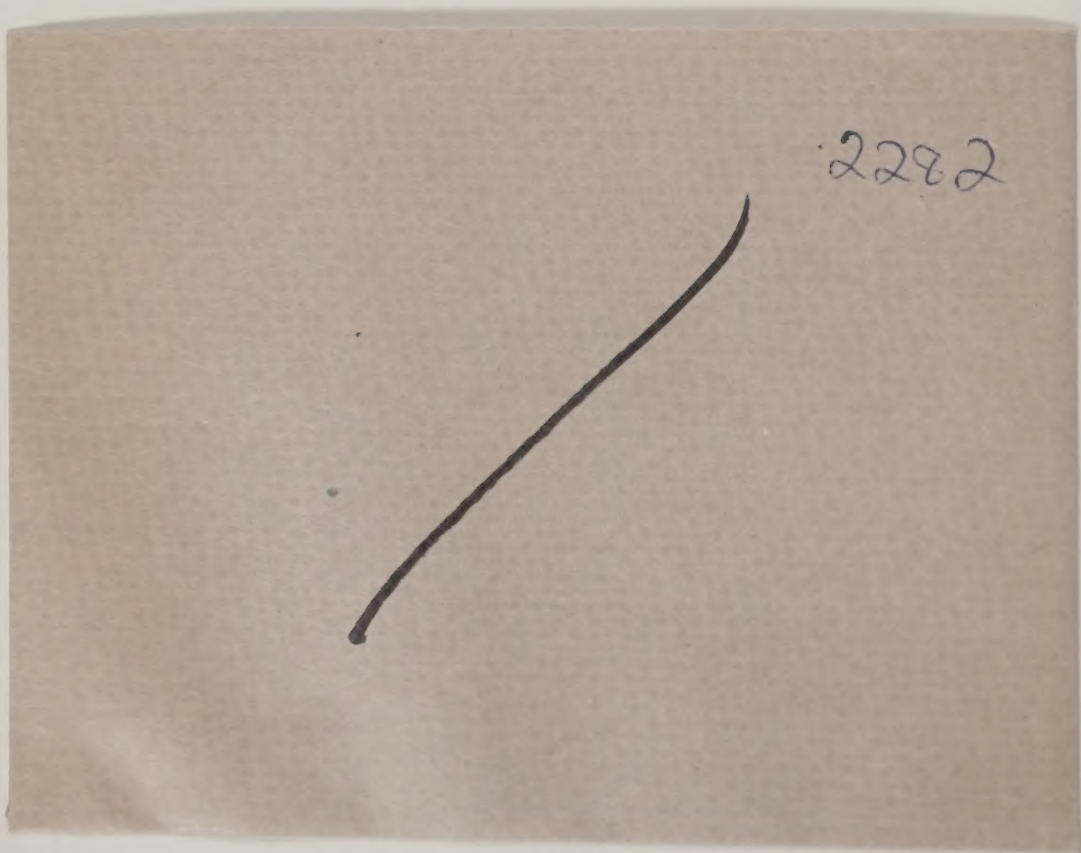
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THE ALL ENGLAND LAW REPORTS REPRINT

Being a selection from the
LAW TIMES REPORTS
1843—1935

REVISED AND ANNOTATED

1914-1915

Editor
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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.
1961

These Reports are cited thus:

[1914-15] All E.R. Rep.

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1961

Made and printed in Great Britain by
William Clowes and Sons, Limited, London and Beccles

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THE
ALL ENGLAND
LAW REPORTS
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LOCAL GOVERNMENT BOARD *v.* ARLIDGE

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Shaw, Lord Moulton and Lord Parmoor), June 15, 16, 17, July 20, 1914]

[Reported [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109]

Constitutional Law—Government department—Quasi-judicial functions—Need to adopt strictly judicial procedure—Observation of principles of natural justice. Housing—Closing order—Objection—Public local inquiry—Right of objector to see report of inspector and be heard orally by Local Government Board.

Where a government department or other public authority has been given jurisdiction to decide questions affecting the rights and property of the individual it need not adopt strictly judicial methods or procedure, which may, in many points of administration, be entirely unsuitable, but it must observe the principles of natural justice and in that sense act judicially. The assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded, but the authority must deal with the question before it impartially and without bias, and must give to the parties before it the opportunity of being heard and adequately presenting their case, and its decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice, preserving a judicial temper, performing its duties conscientiously and with a proper feeling of responsibility, and availing itself of the powers conferred on it solely for the purpose of carrying into effect in the best way the provisions of the Act from which those powers are derived.

Where a local authority refused to determine an order which they had made under s. 17 of the Housing, Town Planning, &c., Act, 1909, closing a house of which the respondent was lessee under a long lease on the ground that it was unfit for habitation and the respondent appealed to the Local Government Board against that decision,

Held: the Board were not bound to disclose to the respondent the report made to them by their inspector who had held a public local inquiry under s. 39 of the Act, at which the respondent was present and presented his case, nor was the respondent entitled to be heard orally by the Board before they came to their decision; the Board had followed their customary procedure, which was necessary if they were to do their work efficiently; and the decision of the Board dismissing the respondent's appeal could not be impugned.

Certiorari—Public authority—Order imposing liability or determining rights or property.

Per LORD PARMOOR: The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, i.e., acts or orders of a court of law

sitting in a judicial capacity. It extends to the acts and orders of a competent public authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties, e.g., a housing authority.

Notes. The provisions with regard to closing orders and local inquiries are now to be found in the Housing Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 314), ss. 17, 26, 27, 28, 181.

Applied: *Hall* v. *Manchester Corpn.*, post; *R.* v. *Central Tribunal* (1916), 86 L.J.K.B. 799; *R.* v. *London Appeal Tribunal* (1918), 62 Sol. Jo. 383; *R.* v. *Housing Appeal Tribunal*, [1920] 3 K.B. 334; *Ridge* v. *Baldwin*, [1961] 2 All E.R. 523. Considered: *Errington* v. *Minister of Health*, [1934] All E.R.Rep. 154; *William Denby & Son, Ltd.* v. *Minister of Health*, [1935] All E.R.Rep. 304; *Marriott* v. *Minister of Health* (1935), 105 L.J.K.B. 125; *Offer* v. *Minister of Health*, [1935] All E.R.Rep. 148. Referred to: *R.* v. *Amphlett*, [1915] 2 K.B. 223; *Cassel* v. *Inglis*, [1916] 2 Ch. 211; *Clements* v. *County of Devon Insurance Committee*, [1918] 1 K.B. 94; *De Verteuil* v. *Knaggs*, [1918] A.C. 557; *Dowling* v. *Great Eastern Rail. Co.* (1919), 88 L.J.K.B. 380; *Wilson* v. *Esquimault and Nanaimo Rail. Co.*, [1922] 1 A.C. 202; *Brown* v. *Dagenham U.D.C.*, [1929] 1 K.B. 737; *Frost* v. *Minister of Health*, [1935] 1 K.B. 286; *Leslie* v. *L.N.E.R. and L.M.S.* (1936), 24 Ry. & Can. Tr. Cas. 182; *Ex-Army Transport, Ltd.* v. *Diamond & Co.* (1936), 24 Ry. & Can. Tr. Cas. 303; *Cooper* v. *Wilson*, [1937] 2 All E.R. 726; *Robins & Son, Ltd.* v. *Minister of Health*, [1939] 1 K.B. 520; *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338; *General Medical Council* v. *Spackman*, [1943] 2 All E.R. 337; *R.* v. *Archbishop of Canterbury*, [1943] 2 All E.R. 791; *R.* v. *Architects' Registration Tribunal, Ex parte Jaggar*, [1945] 2 All E.R. 131; *Stafford* v. *Minister of Health*, [1946] K.B. 621; *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851; *Johnson & Co. (Builders), Ltd.* v. *Minister of Health*, [1947] 2 All E.R. 395; *Darlassis* v. *Minister of Education* (1954), 118 J.P. 452; *Beethem* v. *Trinidad Cement, Ltd.* [1960] 1 All E.R. 274; *University of Ceylon* v. *Fernando*, [1960] 1 All E.R. 631; *R.* v. *Registrar of Building Societies*, [1960] 2 All E.R. 549.

As to the quasi-judicial functions of public authorities, see 30 HALSBURY'S LAWS (3rd Edn.) 716–719; and for cases see 38 DIGEST (Repl.) 100–106. As to closing orders and local inquiries, see 19 HALSBURY'S LAWS (3rd Edn.) 581, 582, 623–626; and for cases see 26 DIGEST (Repl.) 688–692. As to certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 124 et seq.; and for cases see 16 DIGEST 398 et seq.

Cases referred to:

(1) *Board of Education* v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, *290*.

(2) *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; 54 L.J.M.C. 81; 53 L.T. 157; 40 J.P. 420; 33 W.R. 661; 1 T.L.R. 313, H.L.; 26 Digest (Repl.) 571, *2357*.

(3) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516; 69 L.J.Ch. 299; 82 L.T. 662; 64 J.P. 276; 48 W.R. 403; 16 T.L.R. 251; 44 Sol. Jo. 294, C.A.; 37 Digest 226, *188*.

(4) *The Banshee* (1887), 56 L.T. 725; 6 Asp.M.L.C. 130, C.A.; 1 Digest (Repl.) 278, *1796*.

(5) *A.-G.* v. *Nottingham Corpn.*, [1904] 1 Ch. 673; 73 L.J.Ch. 512; 90 L.T. 308; 68 J.P. 125; 52 W.R. 281; 20 T.L.R. 257; 2 L.G.R. 698; 38 Digest (Repl.) 158, 7.

(6) *Ex parte Evans* (1846), 9 Q.B. 279; 115 E.R. 1280; sub nom. *R.* v. *Denbighshire Justices*, 1 New Mag. 547; 2 New Sess. Cas. 422; 15 L.J.Q.B. 335; 7 L.T.O.S. 256; 10 Jur. 542; 10 J.P.Jo. 371; 16 Digest 420, *2798*.

(7) *R.* v. *Inham* (1864), 5 B. & S. 257; 4 New Rep. 141; 33 L.J.Q.B. 183; 10 L.T. 456; 28 J.P. 580; 10 Jur.N.S. 968; 12 W.R. 793; 9 Cox, C.C. 508; 122 E.R. 827; 13 Digest (Repl.) 161, *241.*

(8) *Buchanan* v. *Rucker* (1808), 9 East, 192; 103 E.R. 546; 11 Digest (Repl.) 506, *1226.*

(9) *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, *1220.*

(10) *Ochsenbein* v. *Papelier* (1873), 8 Ch. App. 695; 42 L.J.Ch. 861; 28 L.T. 459; 37 J.P. 724; 21 W.R. 516, L.C. & L.J.; 11 Digest (Repl.) 516, *1307.*

(11) *Crawley* v. *Isaacs* (1867), 16 L.T. 529; 11 Digest (Repl.) 511, *1269.*

(12) *Messina* v. *Petrococchino* (1872), L.R. 4 P.C. 144; 8 Moo.P.C.C.N.S. 375; 41 L.J.P.C. 27; 26 L.T. 561; 20 W.R. 451; 1 Asp.M.L.C. 298; 17 E.R. 352, P.C.; 11 Digest (Repl.) 516, *1306.*

(13) *Dent* v. *Smith* (1869), L.R. 4 Q.B. 414; 10 B. & S. 249; 38 L.J.Q.B. 144; 20 L.T. 868; 17 W.R. 646; 3 Mar.L.C. 251; 11 Digest 521, *1354.*

(14) *Boissière & Co.* v. *Brockner & Co.* (1889), 6 T.L.R. 85; 11 Digest (Repl.) 508, *1243.*

(15) *Parsons* v. *Lakenheath School Board* (1889), 58 L.J.Q.B. 371.

(16) *R.* v. *Local Government Board for Ireland*, [1911] 2 I.R. 331; 44 Digest 1315, *r.*

Appeal by the Local Government Board from a decision of the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., HAMILTON, L.J., dissenting) reversing a decision of the King's Bench Division (RIDLEY, LORD COLERIDGE and BANKES, JJ.) discharging a rule for a writ of certiorari to remove an order of the Local Government Board into the King's Bench Division to be quashed.

The facts and proceedings are set out fully in the opinion of the Lord Chancellor.

The Attorney-General (*Sir John Simon, K.C.*), *the Solicitor-General* (*Sir Stanley Buckmaster, K.C.*) and *G. A. H. Branson* for the appellants.

Macmorran, K.C., *Upjohn, K.C.*, and *J. Brooke Little* for the respondent.

Their Lordships took time for consideration.

July 20. The following opinions were read.

VISCOUNT HALDANE, L.C.—The question which has to be decided in this case is whether the appellant, the Local Government Board, has dealt validly with an appeal brought before it under the provisions of s. 17 of the Housing and Town Planning Act, 1909. The respondent is the assignee of a lease of a dwelling-house, No. 83, Palmerston Road, in the metropolitan borough of Hampstead. On Jan. 12, 1911, the borough council made an order under s. 17 (2) of the Act to which I have referred, prohibiting the use of the house for habitation until in their judgment it had been rendered fit for that purpose. On Mar. 7, 1911, the respondent gave notice of appeal to the Local Government Board. That Board intimated, in accordance with s. 39 of the Act and of the rules which it had made thereunder, that it would not decide the appeal without having held a local inquiry. A public inquiry was, as the result, held on May 24, 1911, before Mr. Edward Leonard, one of the housing inspectors of the Board designated for that purpose, and he also made a personal inspection of the house on June 2 following. The respondent had furnished the Board with copies of reports of certain experts whom he had consulted, such reports being to the effect that the house was perfectly habitable, and that there was no justification for the closing order. The respondent had intimated that he should decline to attend the inquiry, and he did not appear or tender evidence. On June 6 the inspector submitted to the Board his report of the inspection, and on July 29, 1911, the Board, after considering the report and the other documents before them, confirmed the closing order. On Aug. 11 the respondent applied to the Board to state a Special Case under s. 39 (1) (a) of the Act for the opinion of the High Court, raising the points that the order of July 29 was invalid, because (a) the report of the inspector had been treated as a confidential

document and had not been disclosed to the respondent, and (b) because the Board had declined to give the respondent an opportunity of being heard orally by the person or persons by whom the appeal was finally decided, in addition to the opportunity which he had had of stating and arguing his case before the inspector. The Board declined to state a Case, and the respondent did not, as he could have done under the Act, apply to the High Court for an order calling on the Board to state it. In the meantime the respondent applied to the borough council to determine the closing order, having regard to repairs which he had effected, and on Oct. 5, 1911, the council refused on the ground that the house had not been rendered by such repairs fit for habitation. On Oct. 19 the respondent appealed again to the Board, this time against the refusal to determine the closing order. On Nov. 25, 1911, the Board gave notice to the respondent of their intention to hold a second public local inquiry with respect to his appeal against the refusal of the borough council to determine the closing order. The inquiry was held on Dec. 8 before the same inspector. The respondent was present with his solicitor and witnesses, and the borough council and the London County Council were also represented. The respondent's solicitor argued his case, and the respondent and his witnesses gave evidence. On Dec. 13 the inspector submitted to the Board his report, together with a shorthand note of the evidence and speeches. On Jan. 8, 1912, the Board intimated to the respondent that it would be willing to consider any further statement in writing which he desired to submit to it. The respondent did not avail himself of this opportunity, but applied for a writ of certiorari to remove the order of the Board into the King's Bench Division to be quashed, on the ground that the appeal had not been determined in the manner provided by the law. The points taken were that the appeal had been decided neither by the Board nor by anyone lawfully authorised to act for them, and that the procedure adopted by the Board was contrary to natural justice in that the respondent had not been afforded an opportunity of being heard orally before the Board. I assume, further, what appears to have been the case, that the point was also taken that the report of the inspector on the second inquiry was not disclosed to the respondent. The point was certainly argued afterwards in the Court of Appeal.

The case was heard before RIDLEY, LORD COLERIDGE and BANKES, JJ. Among the affidavits which they had before them was one by Sir Horace Monro, the permanent secretary of the Board, who stated that the decision was come to after full and careful consideration of the reports made by the inspector and of the evidence and documents, including the observations and objections put forward in the correspondence by the respondent's solicitors. He referred to the invitation already mentioned, addressed by the Board to the respondent's solicitors, to place before it in writing any further statement which the respondent might desire it to consider. He said that the appeal had been determined judicially on the report of the inspector, and the evidence taken by him (although without any oral hearing of the respondent beyond that at the inquiry) in the same manner in all respects as it had been customary as regards all other appeals to the Board. He referred to a formal order of the Board, signed by the president and by the assistant secretary, dismissing the appeal. On these facts the learned judges of the King's Bench Division declined to hold that the appeal had not been properly disposed of both in form and in substance. They considered that the statute and the rules made under it, to which I will presently refer, provided for a public local inquiry at which any party interested might appear and state his case orally and that it was not intended that there should be a subsequent hearing before the Board analogous to that before a court of law. They thought that there was nothing contrary to natural justice in such procedure.

The Court of Appeal, consisting of VAUGHAN WILLIAMS, BUCKLEY and HAMILTON, L.JJ., by a majority took a different view and reversed the decision. VAUGHAN WILLIAMS, L.J., held that the appeal was one inter partes, the respondent and the Hampstead Local Board being the opposing parties. He thought that the duty of the Board was to hear both sides and to disclose all the evidence of fact placed

before them and the conclusions of law adopted by them as the basis of their decision. He held that the non-production to the respondent of the inspector's reports was contrary to the principles of natural justice, and that, in the absence of a plain direction in the statute abrogating the necessity of observing these principles in dealing with the reports, the principles of English justice had been violated. He appeared further to think that the absence of any statement by or on behalf of the Board as to which of its members considered the appeal was a further objection to the validity of the Board's order. BUCKLEY, L.J., thought the importance of the general question which was raised very great. It was increasingly common for statutes to empower government Departments to decide questions affecting rights of property, and it was of the first importance that their proceedings should be so conducted as to command the confidence of the public, and that the principles applicable to their conduct should be well understood. A mere power to make rules determining the procedure in such appeals did not obviate the necessity of such rules being in accordance with natural justice. It was essential that each of the parties should know the case the other made and should be heard in the other's presence. Assuming that it could be validly provided that the original hearing should assume the form of a statement in writing, it was not clear that a party who subsequently desired to be heard orally could be debarred from claiming to be so heard. The learned lord justice thought that, as the local authority was the authority against which the appeal to the Board was brought, it was in one sense not a party litigant, but, as it could be ordered to make a counter-statement and to pay or receive costs, for all material purposes it was not to be distinguished from a party litigant, and, therefore, the other party ought to know the case it made. Having regard to the terms of s. 5 of the Local Government Board Act, 1871, which constituted the Board and provided that anything to be done on its behalf might be done by the president or any member, or by a secretary or assistant secretary authorised by its general order, the inspector was not within the class of persons who could decide anything. If he made a report on a public inquiry held by him it should be made public. A case could not be argued before one man and decided by another. The respondent had, therefore, no real opportunity of presenting his case when he was invited by the letter of Jan. 8, 1912, to do so, for he was not permitted to see the report. HAMILTON, L.J., was of a different opinion. The practice, he said, of the Board, like that of its predecessor the Poor Law Board, had always been to dispose by correspondence of appeals even in important matters such as an auditor's disallowance of items, and in treating the inspector's report as confidential it was only following an old and well-known practice. The question was whether, if the statute itself did not in terms authorise the practice, it was contrary to natural justice, "an expression sadly lacking in precision." He referred to several precedents, and came to the conclusion that it was a sound inference, to be drawn as a matter of construction, that the legislature, aware, as he took it to have been, of the practice as to these inquiries and its incidents, intended that the local inquiry which it prescribed should be the usual local inquiry, and that the usual incidents should attach in default of any special enactment, including the incident that the Board should treat the report as confidential. He was of opinion that what had been done was in accordance with the Act of 1909.

I have thought it important to set out with some fullness the conflicting views in the Court of Appeal. It is obvious that two of the judges there based their conclusions on the principle that in the absence of a direction to the contrary, which they could not find in the statute, the analogy of the procedure in a court of justice must guide them. HAMILTON, L.J., on the contrary, thought that he found in the statute a scheme of procedure which excluded this analogy. Which of these opinions was right can only be determined by referring to the language of the legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing at what Parliament had in mind, excepting so far as the language enables us to do so. There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is

his own. Such rights are not to be affected unless Parliament has said so. But Parliament, in what it considers higher interests than those of the individual, has so interfered with such rights on other occasions, that it is dangerous for judges to lay much stress on what a hundred years ago would have been a presumption considerably stronger than it is to-day. I, therefore, turn to the Acts of Parliament which are relevant with the sense that there is little justification for looking in advance for the embodiment of one scheme as more probable than the embodiment of another.

The closing of dwelling-houses as being dangerous or injurious to health, or unfit for habitation, is no new jurisdiction. The Housing of the Working Classes Act, 1890, gave to the local authority the power to take proceedings to enforce penalties and closing orders before courts of summary jurisdiction, to be followed, in certain circumstances, by demolition orders. Under that Act the owner of the house had an appeal to quarter sessions. This power of closing was somewhat extended by the Housing of the Working Classes Act, 1903, but the principle of the application being to a court of justice remained the same. A change of this principle was introduced in the Housing and Town Planning Act, 1909. The local authority was empowered itself to make the closing order, certain conditions having been complied with, and it was given power to determine the closing order if satisfied that the house in respect of which the order had been made had subsequently been rendered fit for habitation. In respect of both a closing order and a determining order, the owner was given a right of appeal. But the appeal was to be, not as before to quarter sessions, but to the Local Government Board. Stringent powers of inspection were given, to both the local authority and the Local Government Board. In the case of an appeal, the procedure as to everything, including costs, was to be such as the Board might by rules determine. The Board was to have power to make such order on any appeal as it should think equitable. It could state a Case, but only on a question of law, for the opinion of the High Court, and could be compelled by the High Court to do so. The rules were to provide that the Board should not dismiss any appeal without having first held a public local inquiry. In the application of the Act to Scotland, the sheriff was to be substituted for the Board. This provision, however, although relied on in the argument before us, throws but little light on the question as to the character of the jurisdiction created by the Act, for, as is matter of common knowledge, the sheriff in Scotland is an administrative as well as a judicial officer, and the Local Government Board in Scotland is, on the other hand, only one of the subordinate Departments under the Secretary for Scotland. It is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported.

When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of presenting adequately the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions.

A In this it resembles other great Departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by LORD LOREBURN. In *Board of Education* v. *Rice* (1), he laid down that, in disposing of B a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on anyone who decided anything. But he went on to say that he did not think that it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way which C it thought best, always giving a fair opportunity to those who were parties to the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it might itself be the subject of mandamus.

I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result D of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible, not only for what he himself does, but for all that is done in his Department. The volume of work entrusted to him is E very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff. F When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of the Local Government Board Act, 1871, the Act constituting the Local Government Board to which I have already referred. Provided that the work is done judicially and fairly in the sense indicated by LORD LOREBURN, the only authority which can review what has been done is the Parlia- G ment to which the Minister in charge is responsible. The practice of the Department in the present case was, I think, sufficiently shown by Sir Horace Monro's affidavit to have been followed. In accordance with that practice the Board, in order to obtain materials with which to decide, appointed one of its health inspectors to hold a public inquiry. This was in accordance with the rules which it had made under the section of the statute which I have quoted and with its H usual practice. It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so, any more than it would have been bound to disclose all minutes made on the papers in the office before a decision was come to. It is plain from Sir Horace Monro's affidavit that the order made was the order of the Board, and so long as the Board followed a procedure which I was usual, and not calculated to violate the tests to which I have already referred, I think that the Board was discharging the duty imposed on it in the fashion which Parliament must be taken to have contemplated when it deliberately transferred the jurisdiction, first, from a court of summary jurisdiction to the local authority, and then, for the purposes of all appeals, from quarter sessions to an administrative Department of the State. What appears to me to have been the fallacy of the judgment of the majority in the Court of Appeal is that it begs the question at the beginning by setting up the test of the procedure of a court of justice, instead of the other standard which was laid down for such cases in

Board of Education v. *Rice* (1). I do not think that the Board was bound to hear the respondent orally, provided that it gave him the opportunities which he actually had. Moreover, I doubt whether it is correct to speak of this case as a lis inter partes. The Hampstead Borough Council was itself acting administratively, although it had a right to appear, and did appear, before the inspector and on the appeal, and might have to pay or receive costs. For the reasons I have given, I have arrived at the conclusion that the judgments of the Divisional Court and of HAMILTON, L.J., in the Court of Appeal* were right, and that this appeal should be allowed with costs here and in the Court of Appeal, and that the order of the Divisional Court should be restored.

LORD SHAW.– HAMILTON, L.J., delivered an opinion in the Court of Appeal in this case which in all but one particular to which I shall refer so exactly expresses my own judgment, that I feel loth to add any words of my own.* But the action has been represented to be one of such importance that I feel called upon, however reluctantly, to state separately my view.

As to the form of the pronouncement of the Local Government Board. It is said that the appellant, as the lessee of a house declared to be insanitary, is entitled to get behind that pronouncement and to ascertain which, in his great Department of State, were the actual mind or minds which judged his case. I state this simpliciter in order to test it. In my opinion, this demand is unjustifiable. It is not supported by statute, it would be inconsistent with past administrative practice, and it would not tend to, but might seriously impair, administrative efficiency.

By s. 5 of the Local Government Board Act, 1871, provision is made as to the seal, style and acts of the Board. The Board itself is composed of several men of eminence. It is provided by s. 3 that it may appoint secretaries, assistant secretaries, inspectors and others such as may be determined by it with the sanction of the Treasury. And as to its seal, style and acts,

> "a rule, order, or regulation made by the Local Government Board shall be valid if it is made under the seal of the Board and signed by the president or one of the ex officio members of the Board, and countersigned by a secretary or assistant secretary."

It is provided that the production of such primâ facie evidence shall,

> "until the contrary is shown, be a sufficient proof that any such rule, order, or regulation of the Local Government Board was duly made."

It is admitted that in form the decision of the Local Government Board upon the appeal against the decision of the Hampstead Borough Council is according to statute. This is so both as regards the confirmation on July 29, 1911, of the closing order and as regards the confirmation of Feb. 26, 1912, of the refusal of the local authority to determine the closing order. In each case the decision is under seal and is signed by Mr. John Burns, president of the Board, and by an assistant secretary. But it is said that the appellant is entitled to know his particular judge or judges, to individualise the Board, and to demand that that person or those persons so discovered shall give him, the appellant, an audience on the whole material available, including the result of the public local inquiry and the report made thereupon by the Board's inspector. In the first place, of the demand to know the individual judge or judges. How can the judiciary be blind to the well-known facts applicable not only to the constitution but to the working of such branches of the executive? The Department is represented in Parliament by its responsible head. On the one hand, he manages its affairs with such assistance as the Treasury sanctions, and, on the other, he becomes answerable in Parliament for every Departmental act. His Board—that is all the members of it together—may never meet, or they may only be convened on some question

* For judgment of HAMILTON, L. J., see post, p. 16.

of policy; but a determination signed and sealed and issued in correct form, stands as the deliverance of the Board as such, for which determination the president becomes answerable to Parliament. This is the general rule, acknowledged and familiar, of departmental action and responsibility.

With regard to the making of this rule, however, and on the assumption that the grotesque demand to individualise the Department for private purposes is put on one side, the next proposition is that when a public local inquiry has been held in compliance with statute, the person whose interests are affected is entitled to something more—namely, a disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the Department in dealing with the case. It is here (and the matter is not a strictly legal one) that I venture to hold an opinion somewhat different from that of HAMILTON, L.J. I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure; and I feel certain that if it were laid down in courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants, and consultants of various degrees of experience, many of whose opinions may differ, but all of which form the material for the ultimate decision. To set up any rule that this decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, both with efficiency, with practice, and with the true theory of complete Parliamentary responsibility for Departmental action. All this is, in my opinion, implied as the legitimate and proper consequence of any Department being vested by statute with authority to make determinations. This is no way changed by the determinations being, in point of fact, upon appeal from the deliverances of another or inferior authority. The judgments of the majority of the court below appear to me, if I may say so with respect, to be dominated by the idea that the analogy of judicial methods or procedure should apply to Departmental action. Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. The Department must obey the statute. For instance, in the present case it must hold a public local inquiry, and upon a point of law it must have a decision of the Law Courts. Quoad ultra it is, and, if administration is to be beneficial and effective, it must be the master of its own procedure, for it must always be borne in mind that its procedure, if not in defiance of elementary standards—say, by hearing one side and refusing to hear the other—is simply the plan which it adopts to satisfy itself that the decision come to by a local authority was a good or a bad decision.

These views may be illustrated by the demand in the present case. The appellant admits that a public local inquiry was held, but he asks: (i) to see as of right what report was made to the Department upon it, and (ii) to be heard thereafter over again on the whole case. I think neither demand to be justified, and with regard to the latter, I would add that the very fact that the Act expressly imposes publicity upon the local inquiry—for reasons, in cases of sanitation and the public interest therein, not far to seek—by implication negatives anything of the kind in regard to the numerous other steps taken in the working of an administrative Department. I entirely agree with HAMILTON, L.J., in his view on this head.

The words "natural justice" occur in arguments and sometimes in judicial pronouncements in such cases. When a central administrative Board deals with an appeal from a local authority it must do its best to act justly and to reach just ends by just means. If a statute prescribes the means, it must employ them. If it is left without express guidance, it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely be imitated, and lawyer-like methods may find especial favour from lawyers. But

that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation, and the assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term "natural justice" means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous. I have looked through these proceedings more than once, and I cannot see from beginning to end of them that the Local Government Board did not act justly to the appellant or to the case. They showed extreme patience, and they handled the case with scrupulous regard to their statutory duties and to the rights of all concerned.

LORD MOULTON.—In the year 1890 an Act was passed dealing with the housing of the working classes, which forms the basis of the legislation to which this litigation relates. Its title is the Housing of the Working Classes Act, 1890, and it will be referred to herein as the principal Act. The scheme for dealing with unhealthy dwelling-houses in that Act rested normally upon the initiative of the local authority on the information of their medical officer of health, but very small executive powers were given by that Act to the local authority in respect of enforcing their views as to a house being unfit to be used as a human dwelling-house. All that they were empowered to do was to apply to a justice of the peace for a summons to the owner and occupier of the house and initiate proceedings by that summons before justices of the peace under the provisions of various sanitary and nuisance Acts. Power was given to justices before whom such proceedings were taken to prohibit the using of the dwelling-house until it had been rendered fit for habitation to their satisfaction. The usual appeal to quarter sessions against any order so made by the justices existed. This enactment underwent various amendments between the years 1890 and 1909, the details of which are not necessary for the purposes of this judgment. But in the year 1909 a new Act was passed, entitled the Housing, Town Planning, &c., Act, 1909, which amended the principal Act and those which had followed it in various matters of prime importance. That which concerns the present case is the procedure of closing orders which it introduced. This procedure differs widely from the procedure for the like purpose under the previous Acts. It gave to the local authority the power of making orders prohibiting the use of a dwelling-house for human habitation until, in the judgment of the local authority, it was rendered fit for that purpose in all cases in which it appeared to them to be unfit for human habitation, and, indeed, it imposed upon them the duty of making such an order if the dwelling-house appeared to them to be in the above state on the representation of their medical officer of health or any other of their officers or on other information given. It directed that notice of such a closing order when made should be forthwith served on every owner of the dwelling-house in respect of which it was made, and any owner aggrieved thereby was given an appeal against the order to the Local Government Board. The local authority was empowered to determine any such closing order if it was satisfied that the necessity for it no longer existed, and if on application by any owner of the dwelling-house to terminate the closing order they refused so to do, that owner had a right to appeal to the Local Government Board against such refusal.

To my mind the above changes go far beyond mere changes in procedure. The closing order was made by them an executive act within the powers of the local authority in cases where, in their opinion, the circumstances justified its being made. They were no longer obliged to seek the authorisation of the magistrates subject to an appeal to quarter sessions. In like manner the appeal to the Local Government Board was made to take the place of the appeal to quarter sessions. I have no doubt that the new procedure as to appeal was intended to be an appeal

A to a superior executive body as such, and that it was not intended that the Local Government Board should act in a purely judicial capacity. There is no doubt that it must act "in a judicial temper." Its order might confirm an order of the local authority interfering with the property of a private individual, and thereupon that order would be capable of legal enforcement. In the exercise of such powers the Local Government Board would be bound to treat the matter in a judicial spirit, B availing itself of its wide powers solely for the purpose of carrying into effect in the best way the provisions of the Act. But although in this sense it must act judicially, there was not, in my opinion, any obligation upon it to follow wholly or in any special respects the procedure of a court of justice, provided that the procedure adopted by it was consistent with its performance of its duties judicially in the sense to which I have referred. The Act is not silent with regard to the C procedure to be adopted by the Local Government Board in the discharge of the above functions. By s. 39 of the Act of 1909 it is left to them to determine by rules what this procedure shall be, subject to two restrictions. In the first place, after giving to them the power to state a Special Case for the opinion of the court on any point of law arising in the course of the appeal, it is enacted that they shall state such a Case if directed so to do by the High Court. In the second place it D is enacted that the rules so to be made by the Local Government Board shall provide that the Board shall not dismiss any such appeal without having first held a public local inquiry. The wisdom of this last provision is evident. The local authority, who are empowered to make the original closing order, are presumably acquainted with the local conditions and the actual facts as to the dwelling-house in question. But the Local Government Board can originally have no such special E knowledge. In order, therefore, to protect the individual owner fully, the Local Government Board, before deciding an appeal against a closing order, is bound to hold a public local inquiry that it may be able to learn first hand the facts of the case before deciding that the closing order shall be affirmed. The inquiry is termed a "public local inquiry." Although it appears to be novel to speak of a "public" local inquiry being held by the Local Government Board, yet local inquiries have F for many years been held by them in connection with the exercise of other functions of the Board, and such inquiries were commonly held in public. The effect of the insertion of the word "public" appears to me to be that every member of the public would have a locus standi to bring before the inquiry any matters relevant thereto so as to ensure that everything bearing on the rights of the owner or occupier of the house affected, or the interests of the public in general, or of the G public living in the neighbourhood in particular, would be brought to the knowledge of the Local Government Board for the purpose of enabling it to discharge its duties in connection with the appeal.

Such is the legislation which we have to apply to the facts of the present case. Those facts are very simple. The respondent is an owner of a dwelling-house, No. 83, Palmerston Road, in the metropolitan borough of Hampstead. On Jan. 12, H 1911, the mayor, aldermen, and councillors of that borough, who were the "local authority" referred to in the legislation, made an order prohibiting the use of that house for human habitation until, in their judgment, it was rendered fit for that purpose. This "closing order" was in due form and duly served. An inquiry was duly held by the Local Government Board and the closing order was confirmed, and against that confirmation no appeal has been brought. On July 10, 1911, the I respondent, through his solicitors, applied to the local authority to determine the closing order on the ground that the necessary and proper repairs had been effected. The local authority did not consider that such was the case, and on Oct. 7, 1911, by an informal notice to the respondent, and on Nov. 2, 1911, by a notice in due and proper form, they informed the respondent that they refused to determine the said closing order. On Nov. 15, 1911, the respondent duly gave notice of appeal against this refusal, and it is out of the proceedings on that appeal that the present litigation arises. All the formalities required by statute, or by the rules made by the Local Government Board under their statutory powers relating to appeals of

the kind in question, were duly carried out. An inspector was sent down to hold a public inquiry. It was held on Dec. 8, 1911. The respondent was represented on that occasion by his solicitor. He was called as a witness on his own behalf, and there is no question that every opportunity was given to him and to every other member of the public of bringing forward any relevant matter at that inquiry. After it had taken place the inspector, who was an expert in such matters, made a personal examination of the house in company with persons representing respectively the respondent and the local authority. He made his report to the Local Government Board, and on Feb. 26, 1912, the Local Government Board made an order in the matter confirming the refusal of the local authority to determine the closing order. On April 18, 1912, the respondent applied to a Divisional Court of the King's Bench Division and obtained a rule nisi, calling on the appellants to show cause why a writ of certiorari should not issue to remove into the King's Bench Division the said order of the Local Government Board of Feb. 26, 1912, in order that it might be quashed on the ground that the Local Government Board had not determined the appeal against such refusal in manner provided by law. I do not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a Department of State as the Local Government Board under statutory powers such as we have here to deal with, but the point was not argued, and I, therefore, assume in favour of the respondent that the procedure he adopted was correct. Cause was shown against the rule, and on Dec. 18, 1912, it was discharged, but on appeal to the Court of Appeal the order of the King's Bench Division discharging the rule was reversed by a majority (HAMILTON, L.J., dissentiente), and it is from this decision of the Court of Appeal that the present Appeal is brought.

Shortly stated, the grounds on which the majority of the Court of Appeal proceeded, was that the procedure adopted by the Local Government Board was contrary to natural justice; first, because the appellant had no opportunity of being heard by the member or members of the Local Government Board, who in fact decided the appeal as to the closing order; and, secondly, because the Local Government Board refused to disclose the report or reports of their inspector who held the public inquiries. I confess that I am unable to understand the meaning of the phrase "contrary to natural justice" in connection with such a matter as is involved in the present case. The original closing order and the refusal to determine it were administrative acts which the local authority was authorised to do in the interests of public health. Their authority was purely statutory, and if the statute had authorised them to do these acts without giving any appeal, the legislation might be considered to be unwisely drastic, but it would have to be recognised and enforced by the courts, and no such question whether or not it was "contrary to natural justice" could possibly be considered by the courts. Such a question would be unmeaning in such a connection. And although the legislature has not followed such a course in connection with closing orders, it is easy to call to mind many matters in which prompt action is so necessary that provisions as drastic as those which I have described might be necessary. Cases of quarantine regulations or the destruction of unwholesome food exposed for sale might under certain circumstances be well left to the decision of executive officers without any appeal being given. In the present case, however, the legislature has provided an appeal, but it is an appeal to an administrative Department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. Those matters are beyond

A the criticism of the courts, and it is not their business to add to or to take away from them, or even to discuss whether, in the opinion of the individual members of the court, they are adequate or not. In the present case they appear to me to be abundantly sufficient to secure that the Local Government Board shall be fully seized of the facts of the case in which it is called in, and that it can and will get all necessary guidance as to the law. But even if my opinion were the reverse B it would only indicate that I disapproved of the legislation. It could not give rise to any question as the statutory procedure conforming or not conforming to any notions of my own as to "natural justice."

I shall not, therefore, deal specifically with any of the points on which the majority of the Court of Appeal have criticised the procedure of the Local Government Board on abstract grounds, but there is one point which needs notice, C namely, the claim that the respondent was entitled as of right to see the report of the inspector who held the public inquiry. No such right is given by statute or by an established custom of the Department. Like every administrative body the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the Department should be made public. It would, in my opinion, cripple the usefulness of these D inquiries. It is not for me to express my opinion of the desirability of an administrative Department taking any particular course in such matters, but I entirely disassociate myself from the remarks which have been made in this case in favour of a Department making reports of this kind public. Such a practice would, in my opinion, be decidedly mischievous. I am, therefore, of opinion that the Court of King's Bench was right in discharging the rule nisi, and that this appeal should E be allowed, and that the respondent should pay the costs of all the proceedings.

LORD PARMOOR.—The appellants on Feb. 26, 1912, issued an order under seal, signed by the president and countersigned by an assistant secretary, confirming the refusal of the Hampstead Borough Council to determine a closing order which prohibited the use of the dwelling-house known as 83 Palmerston Road, in F the said borough, for human habitation. The respondent is assignee of a lease of the said house for a term of years, of which at the date of the closing order more than fifty years were unexpired. The respondent obtained a rule nisi in the High Court of Justice, calling upon the Local Government Board to show cause why writ of certiorari should not be issued, directed to the Board to remove into court the order of Feb. 26, 1912, on the ground that the Board had not determined G the appeal against such refusal in manner determined by law. This rule was discharged on argument, but the decision of the Divisional Court was overruled in the Court of Appeal, and it is against this decision that the appeal is brought to this House.

By the Housing and Town Planning, &c., Act, 1909, a new procedure was introduced in connection with the closing of houses so dangerous or injurious to H health as to be unfit for human habitation. The duty was placed on the local authority of making a closing order, if, on the representation of the medical officer of health, or of any other officer of the authority, or on any other information given, any dwelling-house appeared to them to be so dangerous or injurious to health as to be unfit for human habitation. A closing order in the present case was made by the local authority and an appeal against such order was dismissed by the I Local Government Board. There is a further provision that the local authority shall determine any closing order made by them, if they are satisfied that the dwelling-house in respect of which the order has been made has been rendered fit for human habitation. An application to determine the closing order was refused by the local authority, and the order of Feb. 26, 1912, confirmed this refusal on appeal. The procedure to be followed when an appeal is brought to the Local Government Board is regulated in and defined by the Act. In the first place, the Board is directed to make rules. Such rules were duly made on Jan. 11, 1910, and were followed in the present instance. In the second place, it is

provided that the Board may at any stage of the proceedings on appeal, and shall, if so directed by the High Court, state, in the form of a Special Case for the opinion of the court, any question of law arising in the course of the appeal. Thirdly, it is provided that the Board shall not dismiss any appeal without having first held a public local inquiry.

No point was raised whether the case was one to which procedure by writ of certiorari was appropriate, and it is not necessary to attempt to define the exact ambit within which such procedure can be properly applied. The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense—that is to say, acts or orders of a court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties. Where, however, the question of the propriety of procedure is raised in a hearing before some tribunal other than a court of law, there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in accordance with the principles of substantial justice.

In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal. The general tests to be applied have been expressed in two cases which have come before this House, *Spackman* v. *Plumstead Board of Works* (2) and *Board of Education* v. *Rice* (1). In the earlier case of *Spackman* v. *Plumstead Board of Works* (2) the question raised was whether the certificate of the superintending architect was conclusive in fixing the general line of building under the Metropolis Management Act, 1862. Lord Selborne, in the course of his opinion, says (10 App. Cas. at p. 240):

> "No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word, but he must give the parties an opportunity of being heard before him and stating their case and their views."

In the present case there are special provisions for procedure, and the Local Government Board have, in my opinion, given the parties a fair opportunity of being heard before them and stating their case and views. In the later case of *Board of Education* v. *Rice* (1) it was held that the Board of Education had not determined the questions submitted to them. It was on this ground that the order of the Board was quashed and a mandamus was issued commanding the Board to determine the real questions submitted for determination. In expressing his opinion to the House, Earl Loreburn, L.C., stated his views on the propriety of procedure:

> "In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon anyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their views."

Applying this test to the present case, the Local Government Board have given to the respondent a full opportunity of stating his case before them, and the respondent had a further right under the statute to a public hearing at the local inquiry and to bring before the High Court any question of law which might emerge at any stage of the appeal. Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi-judicial character, appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to

A have the matter determined in a judicial spirit, in accordance with the principles of substantial justice.

The objections raised in the present case range themselves under three heads. The first objection raised by the respondent to the order of the Local Government Board is that there has been no hearing or determination at all before the Board, and that the order complained of has not been made by the statutory tribunal. B If such a contention could be established I agree that a writ of certiorari should issue. I find some difficulty in appreciating the argument on which this contention is founded. In substance the respondent says that his appeal should be heard before some definitely specified person or persons, and that unless this is done the whole matter is coram non judice. In my opinion, such a claim is inconsistent with the ordinary system of procedure when the determining authority is a large C administrative Department. I can find nothing in the statute to indicate that in appeals to the Local Government Board against an order of a local authority, or a refusal to make an order under the Act of 1909, a specialised system of procedure should be adopted. In support of this argument reliance was placed on the affidavit of Sir Horace Monro. This states that after careful and impartial consideration of the facts and evidence given at the public local inquiry, and affording the D respondent an opportunity of making any further statement, the appeal was determined in all respects as appeals have been accustomed to be determined, and that the order was made under the seal of the Board signed by the president and countersigned by an assistant secretary. So far from supporting the claim of the respondent this appears to me to negative conclusively his objection that there was no hearing or determination of the appeal by the Board. The second objection raised E is that the respondent was entitled to see the report of the inspector, and that to withhold this document deprived him of a fair hearing in accord with the principles of substantial justice. The only word in the statute on which a claim to see the report can be based is the word "public" prefixed to "local inquiry." This word is said to have been used for the first time in the 1909 Act. In my opinion, a public local inquiry means no more than that an inquiry should be held in the F locality and open to the public. It was well known in 1909 that the Local Government Board did not in ordinary cases publish the reports of inspectors before whom local inquiries were held. Unless an opposite intention is declared, or can be inferred, a statutory form of procedure should be construed so as to conform to prevailing practice. It was argued that there was a particular reason why in this instance the report should be published on the ground that its non-disclosure would G be an interference with the right to obtain a Special Case for the opinion of the court on any question of law arising in the course of an appeal. It is just possible that the non-disclosure of the terms of the report might make it more difficult in some particular instance to formulate a claim for a Special Case, but in substance the materials on which to base a right to such a case would be independent of the inspector's report and the view of the inspector on a matter of law would not be H material.

The present case is a good illustration. If the respondent was desirous of raising, as a matter of law, any question as to the constitution of the tribunal, the non-disclosure of the report or the right to give oral testimony, all the material for raising any of these questions was open to him quite apart from any information to be obtained from an inspection of the inspector's report. Any opinion expressed I by the inspector on such matters could in no way have altered the legal obligation. It is true that there is no statutory prohibition against the publishing of the inspector's report. If I thought that this non-disclosure deprived the respondent of a fair hearing in accord with the terms of substantial justice, I should accede to the argument on behalf of the respondent, and should hold the same view whether the appeal is to be regarded as a lis inter partes or as a decision on review of the administrative action of the local authority. I am unable, however, to come to any such conclusion, and doubt whether assistance is to be gained from arguments based on analogous cases. The analogy of an official referee referred to in argument

appears to me to have as much weight as the analogies on the other side referred to by the Attorney-General. If the report of the inspector could be regarded as in the nature of evidence tendered either by the local authority or the owner of the house, there would be a strong reason for publicity. In my opinion, it is nothing of the kind, and is simply a step in the statutory procedure for enabling an administrative body, such as the Local Government Board, to hear effectively an appeal against the order of the local authority. The obligation on the Board to hold a public inquiry in the locality is to enable the facts on either side to be ascertained by oral testimony subjected to the test of cross-examination, if either party should so require, and to ensure in this respect a full opportunity to the appellant of being heard before dismissing his appeal against the decision of the local authority.

The third objection raised is that the respondent was entitled to give oral testimony before the determining tribunal in addition to any oral testimony which might be given at the public local inquiry, and that in the denial of his claim to be so heard his appeal had not been determined in accordance with the principles of substantial justice. The provisions of the statute are not inconsistent with the right to give oral testimony, and if in any particular instance the Local Government Board are of opinion that such evidence might help in the determination of an appeal it is within their competency to hear it. I can, however, find no obligation to admit such oral testimony in all cases, and there is a strong inference against the claim in the provision that an appeal shall not be dismissed without first holding a public local inquiry at which there is full opportunity of giving oral testimony. The rules made by the Local Government Board are not framed to allow oral testimony in an ordinary case, and it is extravagant to suggest that these rules are ultra vires having regard to the statutory powers under which they are made. Can it be said that in a case in which the statute gives the right to a public local inquiry, and in which the statutory rules of procedure do not provide for oral testimony before the Local Government Board, the mere refusal to hear such oral testimony amounts to a denial of the principles of substantial justice? I am unable to come to any such conclusion, and it appears to me that in the present case the respondent had every fair opportunity of bringing his case before the determining tribunal, and that he has no substantial ground for complaint. In my opinion, the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*; *Rubinstein, Nash & Co.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

The case came before the Court of Appeal—sub nom. R. *v.* Local Government Board; Ex parte Arlidge—in July, 1913, judgment being given reversing a decision of a King's Bench Divisional Court on Oct. 16, 1913.

HAMILTON, L.J., then read the dissenting judgment referred to by Lord Shaw (ante p. 8). He said: The appellant's points are, first, that he was never allowed to know his judge's name, to see him face to face, or to address him viva voce: and, secondly, that before deciding the appeal, his judge saw, what he himself was never allowed to see, certain material documents, particularly the reports made by Inspector Leonard to the Local Government Board.

By the Housing, Town Planning, &c., Act, 1909, the Local Government Board is made the final judge of appeals under the Act from the local authority. Formally

A the decision is to be that of the Board, and in this case it is so expressed, and is correct in form. Practically I will assume that it is the decision of some particular official, duly deputed for the purpose. The appellant asks who he was. He complains that he was never told. What does this matter? Curiosity apart, there seem to be only two reasons why an appellant should seek, as it is put, "to know his judge." One is to hold him up to public criticism; this may be quite right, B but it is none of our business. The other is in order that he may be able to shape his arguments in accordance with the deciding official's personal equation. I think, therefore, that this claim is only part of the general claim for a "hearing" coram judice, for a viva voce appeal, for the right to stand in person before the judgment seat.

In my opinion, whether the deciding officer "hears" the appellant audibly C addressing him or "hears" him only through the medium of his written statements, is, in a matter of this kind, pure procedure. The practice of the High Court, past and present, as to hearing motions on affidavits, and taking evidence before special examiners, or the examiners of the court, shows that there is nothing universally essential in the judge seeing and hearing the witnesses for himself. One must remember what the subject-matter of these appeals is. Under this jurisdiction D only two questions can come before the Local Government Board on appeal, first: "On such and such a day was the appellant's house fit or unfit for human habitation?" Secondly: "Since the closing order was made, has it or has it not become or been made fit?" This is not the first occasion on which such an objection as the appellant's might have been taken. There is an analogous case. The Public Health Act, 1875, by s. 247 (8), permits any person, who is aggrieved by E an auditor's disallowance of an item during the audit of the accounts of an urban authority, not being a council of a borough, to proceed either by certiorari to get the disallowance removed and quashed, or to appeal against it to the Local Government Board [see now s. 229 of Local Government Act, 1933]. The matter may readily involve pecuniary interests as grave as those involved in the present case. The practice of the Local Government Board has always been to do what its F predecessor, the Poor Law Board, did—namely, to dispose of such an appeal simply by correspondence between the aggrieved person, the auditor, and the Board, supplemented occasionally by an inquiry into facts, which is held by an inspector: LUMLEY'S PUBLIC HEALTH ACT (7th Edn.) 557.

In *A.-G.* v. *Merthyr Tydfil Union* (3) it became necessary to argue before this court, on the one side and on the other, whether in the particular case the aggrieved G person ought to have resorted to an appeal to the Board instead of taking the course which was taken. It is scarcely possible that the practice, stated in so standard a work as LUMLEY'S PUBLIC HEALTH ACT, can have escaped the notice both of counsel and of the court, yet neither from the Bench nor at the Bar was any suggestion made that the parties aggrieved were right in not appealing to the Local Government Board because the Board's "hearing" by correspondence was a pro- H cedure both inconvenient and contrary to natural justice. The fact is that for such appeals as are here in question one scheme of procedure may be better than the other, but both the oral and the written scheme remain rival procedures still, and the Act leaves the Board free to elect between them.

The provision that a public local inquiry must be held in a certain event suggests that the legislature contemplated that the other proceedings might be private. It I is said that a written argument is an illusory thing, that there is no eloquence, or at least no persuasion, but in speech. Parliament should know something about that, and it has left the matter to the Board. I find the contention bewildering. Are reasoning and writing mutually exclusive processes? The appellant desires to enjoy what one of his counsel felicitously calls "the bound and rebound of ideas and arguments between the Bench and the Bar." This invests with authority a practice (or should I say a foible?) of judges, which I had believed to be pardonable, and hoped to be not without its uses, but I am unable to see that it is the very pith of the administration of natural justice. It is said again that the appellant

is entitled to a reply. Apart from the separate question of his right to see all the materials eventually considered by the deciding officer, I think this is only procedure again. Even in the various Divisions of the High Court, practice varies both with regard to the number of speeches allowed to counsel and to the stages at which they are made, and there is also a difference between High Court and county court practice with regard to the defendant's address to the court. The bare question of a concluding address by the appellant seems to me to be only a question of the cursus curiæ.

The real and the only difficult question before us is this. Before he gave his decision, the officer of the Board saw what the appellant never saw, the inspector's reports. I assume on the evidence that the officer considered Inspector Leonard's report of the first inquiry as well as of the second, and, failing production of them, that, in addition to reporting the evidence, they stated his opinion on the case, his impression of the witnesses, and the observations which he made on his visits to the premises. Primâ facie, if a deciding officer considers documents containing material statements and not mere matters of form or repetitions of what is already substantially and fully known to the appellant, he should give the appellant the opportunity of dealing with them before he decides the appeal. The Board's case, however, is that in treating the inspector's reports as confidential it followed an old and well-known practice. I make no doubt that it did so for reasons which it honestly deemed sufficient, some of which it is easy to surmise and to appreciate. As the inspector does not perform any judicial function in reporting, the privilege which he could claim for his statements, if sued for libel, would be a qualified privilege only and not absolute. If the appellant, and I suppose the local authority, are ultimately to see it, the inspector might hesitate to express himself in his report as frankly as might be desirable for the guidance of the Board. But, in addition to practice, the Board relies on the language of the statute, as warranting this practice when truly construed.

Accordingly, two questions arise: What is the true construction of the statute? and, if the statute itself does not authorise the practice, is it, as part of the procedure adopted by the Board, so "contrary to natural justice" as to vitiate the decision? On both questions reference to the position before 1909 may be useful. Though inquiries in connection with judicial proceedings of more or less legal character were common enough before 1909, the legislature had not adopted any settled rule with regard to the reports. Sometimes it directed communication of the report to certain persons interested; sometimes it contemplated publication without expressly directing it; sometimes the Act was silent on the subject altogether. I have not found any instance in which in terms the legislature has directed that the report should not be disclosed at all. The Regulation of Railways Act, 1871, by s. 7 (2), directs that inquiries under that Act shall be held "in open court," and, by s. 7 (4), that the Board of Trade "shall cause any such report to be made public in such manner as they think expedient." The Merchant Shipping Act, 1894, consolidating earlier legislation, and the Shipping Casualties Rules made thereunder, which, by s. 479, have the force of statute, provided that the wreck commissioner or the magistrate holding a formal investigation into a shipping casualty should make a report of the proceedings and decision to the Board of Trade, and then r. 18 provided that, when a certificate of a master, mate, or engineer had been cancelled or suspended, the Board of Trade should, on application by any party to the proceedings, give him a copy of the report, while r. 20 (b) contemplates that the report will, as a matter of course, be "issued in print in London by the Board of Trade," in this, no doubt, recognising its existing practice. On the other hand, when a receiver of wreck takes an examination of witnesses on oath under s. 517 (2) and transmits it to the Board of Trade, he is directed to send a copy to Lloyd's for publication there, "and these," says MR. MURTON (WRECK ENQUIRIES, Edn. 1884, p. 38), "are the only depositions on wrecks made public documents." The Workmen's Compensation Act, 1906, sched. 2, r. 15 [repealed by National Insurance (Industrial Injuries) Act, 1946], enables an arbitrator to

refer to controverted questions as to the applicant's actual condition to a medical referee for inquiry and report, but the Act makes no provision as to the use which is to be made of the report. Regulation 28, made under the Act, directs that it is to be sent to the registrar, and is to be in a form which, as a form, is adapted only to communication to him as an officer of the county court. The decisions on the Workmen's Compensation Act carry the matter no further. The Licensing Consolidation Act, 1910, s. 19, and r. 16 made thereunder, provided that parties interested should be entitled to copies of the report made by licensing justices to the compensation authority on payment of a fee [but see now Licensing Act, 1953, s. 15 (2)]. The Criminal Appeal Act, 1907, by s. 8, requires that the trial judge shall be asked to report to the Court of Criminal Appeal upon the case which had been tried before him, for use upon the hearing of the appeal from him to the Court of Criminal Appeal, and by No. 15 (b) of the rules, which have statutory force, it is in the discretion of the court to grant or refuse communication of his report to other persons than to the court itself. By s. 9 (d) the Act further gave power to the Court of Criminal Appeal to depute to special commissioners inquiries involving prolonged examination of accounts, and here again the part to be taken in such inquiry by the appellant and even his presence at it are, by r. 41, in the court's discretion, as is also the communication to him of the special commissioner's report, when made. Further, apart from statute or statutory rules a decision of this court has settled the rule with regard to the Trinity Brethren, who sit as assessors with the judges of the Admiralty Division. The appellant was held not to be entitled to be informed of the answers given by them to the judge's questions: *The Banshee* (4); though in practice the judge very frequently saw fit to mention the gist of them in pronouncing his judgment, without being bound to do so. It is true that in none of these cases is there a close analogy to the present case, but I do not think that important. The analogies are imperfect, but all analogies are. Whether a report be about matter of fact or matter of opinion, whether, if opinion, it is expert opinion or lay, whether the subject involved is personal liberty or real property, whether the maker or the recipient of a report is or is not a judge, one thing is clear—that every one of these cases is a case of a judicial proceeding. Two conclusions may, I think, be drawn from them. It cannot be assumed that the legislature means all such reports to be communicated to those interested, where it does not say the contrary; indeed, if anything, its practice is the other way—namely, to specify how and to whom such reports are to be communicated, when they are intended to be communicated at all. Further, neither in the view of the legislature nor in that of the Court of Criminal Appeal is it, per se, contrary to natural justice and necessarily a fatal blot on judicial proceedings to withhold from an appellant cognisance of a statement made to the appellate tribunal only. In requiring that in a certain event the Local Government Board should hold a public inquiry, the legislature was requiring resort to a proceeding quite well known and in common use, to which was incident the Board's practice to treat the reports made thereon as confidential. The practice is stated in LUMLEY'S PUBLIC HEALTH ACT (7th Edn.), p. 636, and it was commented on, unfavourably but without effect, by FARWELL, J., in *A.-G. v. Nottingham Corpn.* (5). It was enacted, by s. 76 of the Act of 1909, that the Act should be construed as one with the Act of 1890, an Act under which this practice had prevailed. I think it is a sound inference, to be drawn as a matter of construction, that the legislature, aware, as I take it to have been, of the practice as to these inquiries and its incidents, intended that the local inquiry, which it prescribed, should be the usual local inquiry, and that the usual incidents should attach in default of any special enactment, including the incident that the Board would treat the report as confidential.

An argument has been presented to us on the word "public." A "local inquiry" was well known—a "public local inquiry" is admittedly a new expression as such, though the Merchant Shipping Act, 1894, s. 466 (12), required formal investigations into shipping casualties to be held in a "public building," and the Regulation of

Railways Act, 1871, provided that proceedings under it should be held "in open court." The idea of publicity in connection with a local inquiry was, therefore, not new even if the adjective "public" was. I do not see why the publicity of the inquiry should of itself involve the publication of the report, though the decision, where there is one, no doubt must be published more or less ex vi termini. The analogy of public documents does not advance the argument. "Public documents" are well known in the law of evidence, but the expression there means documents which may be proved without production of the originals, or else documents which, for reasons of State, are not to be produced and proved at all. I think that the natural import of the word "public," as qualifying the local inquiry, is to show that the public ought to be admitted to it as of right, because of its interest in such matters, although it is true that the subject-matter of the inquiry is private property, and the decision directly affects only private rights. As a matter of construction I think that the word "public," limited, as it is, to the local inquiry, negatives by implication the publicity of any of the later machinery. Such a conclusion is in harmony with the previous practice of legislation, so far as it went, for that was to provide for publication of reports expressly, where publication was intended, and also with the structure of the Act of 1909 itself. The Local Government Board was left to frame its own procedure. As must have been foreseen, it followed its own precedents, and made no provision for communicating this report under its rules, such as was made, in greater or less measure, in the rules under the Merchant Shipping Act, 1894, and the Licensing (Consolidation) Act, 1910, carrying out the provisions of these statutes. Furthermore, in committing the decisions of these appeals to a composite administrative Board, which must act by officers and cannot be ubiquitous, the legislature departed slightly, but significantly, from the language of prior enactments. The Local Government Board now "holds the inquiry" and not merely "causes it to be held." Being impersonal and corporate, it inquires by one organ and decides by another. The knowledge of the deciding officer as to the result of the inquiring officer's performance of his functions may well be an internal matter, never communicated to any stranger. No one contends that it is any part of the inspector's duty to decide anything. In this, as in other government Departments, an inspector whether regularly or specially employed, merely inquires and reports. His conclusions of fact, if he thinks fit to submit any, bind no one; they are simply stated for the information of the superior officials of the Department. From beginning to end, the appeal is one continuous Departmental exercise of corporate functions. It nowhere involves the communication to the appellant of internal reports, any more than it involves the exposition of the deciding officer's mental processes in arriving at his decision. I have come to the conclusion that the practice of treating the report as confidential has the authority of the Act of 1909. There is nothing in prior legislation to negative it -there is good ground in the adoption of the existing machinery of local inquiries for supposing it; there is support for this supposition in the language of the enactment, and it is sufficient in the absence of anything whatever in that language to the contrary.

So much for the question of construction, but, if I am wrong in this, still, as the Act and rules clearly cannot be construed to require in terms what the appellant contends for, how does the matter stand at common law in view of the decisions of the courts? What standard of natural justice has been recognised in judicial proceedings? Does it require the procedure now contended for? But little guidance is to be got from cases of writs of certiorari to inferior courts. In *Ex parte Evans* (6) LORD DENMAN held that the control which quarter sessions, like other judicial bodies, ought to exercise over its own procedure extended to making a rule giving the Bar exclusive audience at sessions, wherever four or more barristers attended. In *R.* v. *Ingham* (7) a rule nisi for certiorari to bring up a coroner's inquisition was refused so far as the ground relied on was the admission of unsworn testimony. I may be wrong in referring to cases on foreign judgments, for the counsel engaged in this case have not thought it germane to do so, but, as

A the expression "contrary to natural justice" has frequently been before the courts in that connection, I have thought it right to see what import has been given to it there before putting upon it an application of my own. It has often been pointed out that the expression is sadly lacking in precision. At one time it was regarded as setting up for foreign jurisdictions a standard of judicial correctness upon the pattern of our own common law courts, but times have changed. In *Buchanan* v.
B *Rucker* (8) LORD ELLENBOROUGH at nisi prius declared that the practice of the law courts of Tobago to summon a defendant, who was out of the jurisdiction and never had been within it, by nailing the writ on the door of the courthouse "is contrary to the first principles of reason and justice . . . it is mala praxis, and cannot be sanctioned." Nevertheless, this weighty opinion, which having regard to the circumstances seems, I must say, to be very temperately expressed, was
C coldly dismissed as "declamation" by the Court of Queen's Bench in *Schibsby* v. *Westenholz* (9), and, following the judgment of BLACKBURN, J., in that case, the best text-writers on private international law regard the expression "contrary to natural justice," when applied to the procedure of foreign courts, as being no more than a test by which to decide whether the foreign court was a court of competent jurisdiction or not, whether it had so summoned the defendant before it as to give
D it the right, in the eyes of English courts, to proceed in its own way to pass subsequent judgment upon him. The defence that the foreign judgment is contrary to natural justice is now "narrowed down to the question of assumption of jurisdiction over absent defendants": PIGOTT, FOREIGN JUDGMENTS (2nd Edn.), p. 171; and see DICEY, CONFLICT OF LAWS, p. 409; FOOTE, PRIVATE INTERNATIONAL JURISPRUDENCE (2nd Edn.), p. 558. The most complete judicial indications that I can
E find of the meaning of this vague expression are two: First, that of MELLISH, L.J., in *Ochsenbein* v. *Papelier* (10) (8 Ch. App. at p. 700),

> "it was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or want of jurisdiction, or that the judgment was fraudulently
F obtained."

Secondly, that of BRAMWELL, B., in *Crawley* v. *Isaacs* (11) (16 L.T. at p. 531),

> "the term natural justice, which has been referred to in reference to foreign judgments, refers rather to the form of the procedure than to the merits of the case . . . if the proceedings be in accordance with the practice of the foreign
G court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them."

How, then, stand the decisions upon this question of the relation to natural justice of the procedure of foreign courts? The following three cases are significant of the reserve with which our law now affixes this censure to procedure not its own. In *Messina* v. *Petrococchino* (12) the Privy Council decided that a judgment of
H the Greek Royal Commercial Chancery at Constantinople was rightly enforced as a foreign judgment by the Court of Appeal at Malta, and was not impeachable as being "wanting in the conditions of natural justice," although, under the procedure of that court, "without communication or attempt at communication with" the cargo-owner at Malta, and not on account of the condition of the cargo, but because the carrying ship was disabled from proceeding at Malta, the judgment had
I appointed a stranger to be curator of the cargo, and had directed him to borrow money on the security of it by "bottomry bond" for the payment as particular average of the cost of transhipping and forwarding, including the curator's own commission. In *Dent* v. *Smith* (13), when it was contended that all parties were bound by a judgment of the Russian Consular Court at Constantinople, the Court of Queen's Bench so held, declaring that it had "nothing to do" with the defendant's objection that, Russian maritime law being in question, the court had allowed it to be proved by French advocates, because French and Russian law in such matters is almost the same, and because only French advocates were then

resident in Constantinople, and no Russian advocate was to be had. In *Boissière & Co.* v. *Brockner & Co.* (14) CAVE, J., stigmatised as "empty declamation" an objection to the procedure of the Court of Appeal at Rouen, whose judgment he decided to enforce, though the objection was no less than that the court, having given judgment on the questions of principle, appointed the plaintiff's solicitor as referee to settle the accounts between the parties on the basis laid down in the judgment and to report the result to the court, a report which naturally the court adopted.

I cannot but feel deeply impressed by these object-lessons in toleration with regard to the procedure of other tribunals. I cannot but feel that all that can be urged against the Local Government Board might be still more forcibly urged against the Court of Criminal Appeal. Though in the long run I must decide for myself, I cannot but be impressed by the unanimous decision of the Divisional Court in the present case. The decisions which I have cited show that acts done in judicial proceedings, various in form, but all obnoxious to the same kind of objection as is urged here, and all contrary to a first impression of natural, if that means ideal, justice, have still been regarded as entirely consistent with our law. There is no place here for a phrase which was used in argument—namely, the appellant's "common law right" to stand before his judge. There is no question here of rights attaching at common law to common law courts. The Local Government Board here is a statutory tribunal, anomalous as compared with common law courts, created by the legislature for a special class of appeals and endowed by it with the power of formulating its own procedure. We must assume that a Department which the legislature has trusted will be worthy of the trust. The judgment of such a tribunal, regular on its face, is surely entitled to as much credit as that of a foreign court. The observations—made in the cases most cognate—point in the same direction. What is said by FIELD, J., in *Parsons* v. *Lakenheath School Board* (15) is very inconclusive. The language of LORD O'BRIEN, C.J., and MADDEN and WRIGHT, JJ., in *R.* v. *Local Government Board for Ireland* (16) is strong to show that the procedure of such a tribunal as this must necessarily be judged by standards different from those of ordinary courts. I think that just reliance was placed on that case by the learned judges in the Divisional Court. LORD LOREBURN'S words in *Board of Education* v. *Rice* (1) seem to me to be much in point. The Board must "act in good faith and fairly listen to both sides." I think the Local Government Board has done so in the present case. Who is to listen, and who is to be "heard," and when, and how, and how long is matter of procedure to be determined by the Board itself. LORD LOREBURN continues: "I do not think they are bound to treat such a question as if it were a trial." The same is true here. I know it is said that the question in the case of *Rice* (1) was "departmental," whatever that may mean, but in any case that is no sufficient distinction. The question there must have necessarily been deemed to involve a judicial decision, and not merely a ministerial or administrative act, otherwise proceedings by way of certiorari could not have been obtained at all. I fail to see how managers of a non-provided school, as such, can be put off with a less measure of just procedure than is to be meted out to the leaseholder of a house which is unfit for human habitation. LORD LOREBURN'S third requirement—"giving a fair opportunity to those who are parties in the controversy for contradicting or correcting any relevant statements prejudicial to their view"—has, in my opinion, been amply satisfied here. The canon does not involve that the appellant shall enjoy a formal general reply. The appellant had heard the case against him put at its highest by the witnesses at the inquiry. He had enjoyed, as the Act meant him to enjoy, on that occasion the opportunity of "contradicting or correcting" it. The most that he can say of the inspector's report is that he has never known whether the inspector agreed with his adversaries in toto or differed from them to some extent, but he knew the worst that could be said against him, and had contradicted it as far as he could. The inspector's report could not state it any worse for him.

A We are bound to remember that this is an appeal upon a concrete case, and we cannot decide it upon any abstract principle or upon any assumption beyond the facts of the case itself. The issue on this appeal was excessively simple. The only difficulty was to make out what the appellant could have to say for himself. The question of the propriety of the closing order had been concluded against him. It must be deemed to have been rightly made, for the purpose of this appeal B against the local authority's refusal to determine it. I assume, for the purposes of this case, both the good faith and the reasonableness of the appellant, but he made it quite plain on the inquiry that his case was that the closing order ought never to have been made. He had done nothing to cure the alleged dampness of the house—he said that it was not damp. He, therefore, enjoyed at the inquiry the fullest opportunity of knowing what he had to meet and of meeting it. The C inspector's report could not be really material to the conduct of his appeal, and, if the deciding officer was wrong, as I think he was not, in considering the reports without first communicating them to the appellant and hearing him upon them, the error was unsubstantial and could not reasonably affect his decision. In the language of Ord. 39, r. 6, no "substantial wrong or miscarriage has been thereby occasioned."

D That the jurisdiction of the High Court to quash the proceedings of inferior courts is most important, and that its exercise is most wholesome I fully agree. That the jurisdiction should be no less vigilantly exercised in the case of an administrative Department than in the case of justices I also agree. If it was our function to advise the Local Government Board as to its procedure generally, or to criticise the procedure actually adopted as such, I should for my part suggest that the E more open the procedure is the better. By all means let both the appellant and the local authority see the inspector's reports; a discreet and careful officer is not likely to offend, and if, in spite of discretion and care, he is harassed by actions for libel, he may well be defended and indemnified by his Department. By all means let the appellant, and the local authority too if it wishes, see and address the judge; it is all in his day's work. By all means let the appellant have the last F word, and as many of them in reason as he likes. Time spent in removing a grievance, or in avoiding the sense of it, is time well spent, and the Board's officials will, like good judges, amplify their jurisdiction by rooting it in the public confidence. But I am neither the adviser nor the critic of the Local Government Board. For myself, I have no fault whatever to find with the manner in which the Board has stated the facts to us, and has presented for our consideration the G views which it adopts, and the grounds on which it adopts them. The question is: "Did the Divisional Court rightly discharge the rule nisi in this case?" The grant or refusal of a rule absolute for a certiorari is always a matter of judicial discretion and, guiding myself by the prescriptions of the legislature and the decisions of the court, I am of opinion that the discharge of the rule nisi was right, and that the appeal should be dismissed.

H *Rule absolute.*

Solicitors: *Rubinstein, Nash & Co.*; *Sharpe, Pritchard & Co.*; *A. P. Johnson.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

GUARANTY TRUST CO. OF NEW YORK *v.* HANNAY & CO.

[COURT OF APPEAL (Buckley, Pickford and Bankes, L.JJ.), February 8, 9, March 11, 1915]

[Reported [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 21 Com. Cas. 67]

Declaratory Judgment—Declaration in absence of other cause of action—Claimant interested in subject-matter of declaration—Declaration that claimant not liable in existing or possible action.

R.S.C., Ord. 25, r. 5, which provides: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not," is not invalid as being ultra vires the Rules Committee. The rule confers on the court a general power to make a declaration in favour of a party although that party has no cause of action apart from the rule, provided that he is interested in the subject-matter of the declaration. The power is not limited to making a declaration at the instance of a person claiming a right and intending to assert it if it should become necessary. A declaration that a person is not liable in an existing or possible action is one that will hardly ever be made. In practically every case the person asking for it will be left to make his defence in the action when it is brought, but it is not beyond the power of the court in a very exceptional case to make such a declaration. Having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors, the rule should receive as liberal a construction as possible.

So **held** by PICKFORD and BANKES, L.JJ., BUCKLEY, L.J., dissenting.

Notes. Applied: *British Association of Glass Bottle Manufacturers* v. *Forster* (1917), 86 L.J.Ch. 489. Considered: *Re Clay, Clay* v. *Booth*, [1918–19] All E.R.Rep. 94; *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 616. Applied: *Barwick* v. *South Eastern and Chatham Rail. Co.*, [1921] 1 K.B. 187. Followed: *Hanson* v. *Radcliffe U.D.C.*, [1922] 2 Ch. 490. Considered: *Ruislip-Northwood U.D.C.* v. *Lee* (1931), 145 L.T. 208; *Odhams Press, Ltd.* v. *London and Provincial Sporting News Agency (1929), Ltd.*, [1936] 1 All E.R. 217. Applied: *Re Lewis' Declaration of Trust, Lewis* v. *Lewis, Lewis* v. *Ryder*, [1953] 1 All E.R. 1005. Referred to: *Re Staples, Owen* v. *Owen*, [1916] 1 Ch. 322; *Rio Tinto Co., Ltd.* v. *Ertel Bieber & Co., Same* v. *Vereimingte Konigs und Laurahutte Act., Same* v. *Dynamit Act.* (1917), 116 L.T. 810; *Thompson* v. *Amis*, [1917] 2 Ch. 211; *Bombay and Persia Steam Navigation Co.* v. *Maclay*, [1920] 3 K.B. 402; *Markwald* v. *A.-G.*, [1920] 1 Ch. 348; *R.* v. *Cheshire County Court Judge, Ex parte Malone*, [1921] All E.R.Rep. 344; *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade*, [1921] All E.R.Rep. 329; *Prosperity, Ltd.* v. *Lloyds Bank, Ltd.* (1923), 39 T.L.R. 372; *Jaeger* v. *Jaeger Co.* (1927), 44 R.P.C. 437; *Jacobs* v. *Aveling-Barford, Ltd.*, [1936] 1 All E.R. 297; *Stockwell* v. *Southgate Corpn.*, [1936] 2 All E.R. 1343; *Cooper* v. *Wilson*, [1937] 2 All E.R. 726; *Prince De Bearn* v. *La Compagnie D'Assurances La Federale De Zurich* (1937), 42 Com. Cas. 189; *Har-Shefi* v. *Har Shefi*, [1953] 1 All E.R. 783.

As to declaratory judgments, see 22 HALSBURY'S LAWS (3rd Edn.) 746–751; and for cases see 30 DIGEST (Repl.) 165 et seq.

Cases referred to:

(1) *Barraclough* v. *Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 30 Digest (Repl.) 175, *243*.

(2) *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242; 62 L.J.Ch. 294; 67 L.T. 238; 8 T.L.R. 717; 7 Asp.M.L.C. 195; 2 R. 23, C.A.; 30 Digest (Repl.) 172, *229*.

(3) *The Manar*, [1903] P. 95; 72 L.J.P. 41; 89 L.T. 26; 51 W.R. 687; 9 Asp.M.L.C. 420; 30 Digest (Repl.) 179, *272*.

(4) *Williams* v. *North's Navigation Collieries, Ltd.*, [1904] 2 K.B. 44; 73 L.J.K.B. 575; 91 L.T. 3; 68 J.P. 371; 52 W.R. 564; 20 T.L.R. 448, C.A.; on appeal, [1906] A.C. 136; 75 L.J.K.B. 334; 94 L.T. 447; 70 J.P. 217; 54 W.R. 485; 22 T.L.R. 372; 50 Sol. Jo. 343, H.L.; 30 Digest (Repl.) 173, *237*.

(5) *Chapman* v. *Michaelson*, [1908] 2 Ch. 612; 78 L.J.Ch. 272; 100 L.T. 109; 24 T.L.R. 795; affirmed, [1909] 1 Ch. 238; 78 L.J.Ch. 272; 100 L.T. 109; 25 T.L.R. 101, C.A.; 30 Digest (Repl.) 173, *231*.

(6) *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324; 75 L.J.Ch. 178; 94 L.T. 56; 54 W.R. 370; 22 T.L.R. 178; affirmed, [1906] 2 Ch. 498; 75 L.J.Ch. 720; 95 L.T. 178; 22 T.L.R. 724; 50 Sol. Jo. 650, C.A.; 30 Digest (Repl.) 169, *201*.

(7) *Offin* v. *Rochford R.D.C.*, [1906] 1 Ch. 342; 75 L.J.Ch. 348; 94 L.T. 669; 70 J.P. 97; 54 W.R. 244; 50 Sol. Jo. 157; 4 L.G.R. 595; 30 Digest (Repl.) 173, *236*.

(8) *Burghes* v. *A.-G.*, [1911] 2 Ch. 139; 80 L.J.Ch. 506; 105 L.T. 193; 27 T.L.R. 433; 55 Sol. Jo. 520; affirmed, [1912] 1 Ch. 173; 81 L.J.Ch. 105; 105 L.T. 758; 28 T.L.R. 72; 30 Digest (Repl.) 169, *210*.

(9) *Jenkins* v. *Price*, [1907] 2 Ch. 229; 76 L.J.Ch. 507; 23 T.L.R. 608; on appeal, [1908] 1 Ch. 10, C.A.; 30 Digest (Repl.) 174, *238*.

(10) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; 80 L.J.K.B. 531; 103 L.T. 707; 27 T.L.R. 143; 55 Sol. Jo. 168, C.A.; subsequent proceedings, [1912] 1 Ch. 158; 81 L.J.K.B. 217; 105 L.T. 753; sub nom. *Dyson* v. *A.-G.*, Burghes v. *A.-G.*, 28 T.L.R. 72, C.A.; 30 Digest (Repl.) 168, *193*, *194*.

(11) *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (1904), 9 Com. Cas. 289; 30 Digest (Repl.) 178, *265*.

(12) *Lofthouse Colliery, Ltd.* v. *Ogden*, [1913] 3 K.B. 120; 82 L.J.K.B. 910; 107 L.T. 827; 29 T.L.R. 179; 57 Sol. Jo. 186; 30 Digest (Repl.) 179, *270*.

(13) *Cox* v. *Barker*, *Barker* v. *Cox* (1876), 3 Ch.D. 359; 35 L.T. 685; 2 Char. Pr. Cas. 265, C.A.; 30 Digest (Repl.) 166, *176*.

(14) *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494; 68 L.J.Ch. 289; 80 L.T. 332; 47 W.R. 385; 15 T.L.R. 202; 43 Sol. Jo. 258, C.A.; affirmed sub nom. *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; 30 Digest (Repl.) 489, *3718*.

(15) *Brooking* v. *Maudslay, Son and Field* (1888), 38 Ch. 636; 57 L.J.Ch. 1001; 58 L.T. 852; 36 W.R. 664; 4 T.L.R. 421; 6 Asp.M.L.C. 296; 30 Digest (Repl.) 172, *223*.

(16) *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (1885), 30 Ch.D. 387; 55 L.J.Ch. 744; 52 L.T. 839; 34 W.R. 217; 1 T.L.R. 641, C.A.; 1 Digest 36, *283*.

(17) *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141; 75 L.J.K.B. 218; 94 L.T. 153; 54 W.R. 270; 22 T.L.R. 187, C.A.; 11 Digest (Repl.) 542, *1508*.

(18) *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604; 10 T.L.R. 7; 37 Sol. Jo. 756; 6 R. 1, H.L.; 11 Digest (Repl.) 371, *374*.

(19) *Rooke* v. *Lord Kensington* (1856), 2 K. & J. 753; 25 L.J.Ch. 795; 28 L.T.O.S. 62; 4 W.R. 829; 69 E.R. 986; 30 Digest (Repl.) 166, *178*.

(20) *Evans* v. *Levy*, [1910] 1 Ch. 452; 79 L.J.Ch. 383; 102 L.T. 128; 30 Digest (Repl.) 173, *232*.

(21) *Jenner* v. *Jenner* (1866), L.R. 1 Eq. 361; 35 L.J.Ch. 329; 12 Jur.N.S. 138; 14 W.R. 305; 17 Digest (Repl.) 376, *1823*.

(22) *Bushby* v. *Munday* (1821), 5 Madd. 297; 56 E.R. 908; 11 Digest (Repl.) 547, *1548.*

(23) *Hyman* v. *Helm* (1883), 24 Ch.D. 531; 49 L.T. 376; 32 W.R. 258, C.A.; 11 Digest (Repl.) 547, *1545.*

(24) *Re Connolly Bros., Ltd., Wood* v. *Connolly Bros., Ltd.*, [1911] 1 Ch. 731; 80 L.J.Ch. 409; sub nom. *Re Conolly Bros., Ltd., Wood* v. *Conolly Bros., Ltd.*, 104 L.T. 693, C.A.; 16 Digest 196, *1014.*

Also referred to in argument:

Zinc Corpn., Ltd. & Romaine v. *Skipwith* (1914), 31 T.L.R. 107, C.A.; 30 Digest (Repl.) 179, *267.*

Hope v. *Hope* (1854), 4 De G.M. & G. 328; 2 Eq. Rep. 1047; 23 L.J.Ch. 682; 23 L.T.O.S. 198; 2 W.R. 545; 43 E.R. 328, L.C.; 2 Digest (Repl.) 198, *182.*

Re Mills' Estate, Ex parte Works and Public Buildings Comrs. (1886), 34 Ch.D. 24; 56 L.J.Ch. 60; 55 L.T. 465; 51 J.P. 151; 35 W.R. 65; 3 T.L.R. 61, C.A.; 11 Digest (Repl.) 267, *1518.*

Appeal by defendants from an order of BAILHACHE, J., on a summons in the Commercial Court.

The defendants were cotton dealers carrying on business in Liverpool, and in the years 1909 and 1910 they made purchases of cotton from a firm in the United States. The course of business with regard to such transactions was for the sellers upon shipment of the cotton to draw a bill of exchange for the price of the cotton, to affix thereto the bills of lading and insurance certificate, and to transmit the documents to the defendants so that they might accept the bill of exchange and pay the amount thereof. A number of bills of exchange so accepted were purchased in good faith by the plaintiffs, a company carrying on business in New York and having a branch in London, and were presented by them with the accompanying documents to the defendants, who accepted and paid the same. It subsequently appeared that the bills of lading attached were forgeries, being for cotton which never had any existence and which had never been shipped. In January, 1911, the defendants commenced an action against the plaintiffs in the United States, claiming repayment of the amount of the bills of exchange, their claim being based on grounds depending mainly upon English law, and they recovered judgment. The plaintiffs appealed, and a new trial was ordered. The plaintiffs then brought the present action in England, claiming declarations that they had not, by presenting the bills for acceptance with the bills of lading attached, warranted or represented that the bills of lading were genuine, but that all the bills of exchange had been accepted by the defendants unconditionally, so that they were not bound to repay the amounts of the bills. Upon an application by the defendants to strike out, under R.S.C., Ord. 25, r. 4, the claim for the declarations on the ground that they disclosed no cause of action, BAILHACHE, J., in giving judgment, said: The practice in the Commercial Court has been to make declarations when they serve some real practical purpose, such, for instance, as guiding parties in their future conduct in relation to commercial contracts, and with a view rather to avoid litigation than in aid of it. I am not prepared to hold that declarations can only be made at the instance of the party for the purposes of an action in which he proposes to be plaintiff. BUCKNILL, J., in the circumstances not distinguishable in principle from those of the present case, made such a declaration as I am asked to make in *The Manar* (3), and, in my judgment, it is open to the courts to entertain the plaintiff's action if they see fit. The power is discretionary, but I think it exists. The next question is: Ought it to be exercised in this case? The advantages of the course taken by the plaintiffs are obvious. There will be a decision of the English court upon the precise point instead of the conflicting opinions of English lawyers. Of course, the decision will not be binding upon the American courts, but it will afford them the best procurable evidence, and I see no reason to doubt that they will welcome the assistance which such a decision would give. I shall follow the precedent of *The Manar* (3) and entertain the action.

A Accordingly, he dismissed the application, and the defendants appealed.

Greer, K.C., and *A. R. Kennedy* for the defendants.

Duke, K.C., and *D. M. Hogg* for the plaintiffs.

Cur. adv. vult.

Mar. 11, 1915. The following judgments were read.

B **BUCKLEY, L.J.**—In the course of the discussion in this court the defendants have limited themselves to asking that, from the endorsement on the writ, there should be struck out the three declarations therein contained, leaving paras. 4, 5 and 6, which ask for injunctions and payment of costs, as being, as in fact they are, a separate matter. The declarations do not lead to, and have no bearing upon, the injunctions. If the declarations, if granted, would lead to or bear upon the C injunctions, my conclusion of this appeal would be different. But the fact is that they do not.

The question to be decided is whether a plaintiff can have a declaration in respect of a cause of action residing in the defendant, and not in the plaintiff, or, in other words, whether a plaintiff who is under an obligation can, as against a defendant to whom he owes its performance, have a declaration delimiting the obligation. D To put a concrete case, exhibiting the matter in what may be thought an extravagant form: Will an action lie by a plaintiff, who, upon allegations that he is indebted to the defendant for goods sold and delivered and that the goods are not according to sample, claims a declaration to that effect, and a declaration that he is liable, not for the contract price, but for some smaller sum?

In my opinion, an action in such a case will not lie. Such a declaration at the E instance of such a plaintiff is impossible. An action is a legal proceeding in which a plaintiff claims against a defendant or against a fund enforcement of some obligation towards the plaintiff binding the defendant or the fund. The plaintiff must allege facts which, if true, give rise, as matter of law, to such an obligation. Such alleged facts constitute a cause of action. In the absence of such alleged facts, in other words, if there is no cause of action alleged, an action will not lie. F Before the Judicature Acts it was familiar that a plaintiff in the Court of Chancery often alleged in his bill imaginary facts with a view to interrogating upon them, and seeing whether he had a case or not, knowing full well that, if he did not allege facts which raised a cause of action, his proceeding would come to an abrupt end on demurrer. An injunction is a remedy which the court applies under proper circumstances to enforce an obligation. A declaration is a pronouncement of the G court upon the construction of a document, on which an alleged obligation towards the plaintiff depends, or delimiting the obligation as existing in point of law. A declaration and an injunction are but the means of obtaining the definition of an obligation, or the enforcement in certain circumstances of an obligation, if upon the alleged facts an obligation towards the plaintiff arises as matter of law. Neither declaration nor injunction nor relief is, in my judgment, within the jurisdiction of H the court unless it be founded upon alleged facts showing (if true) a cause of action. If such facts are alleged, but are not proved, the court may of course make a declaration or express an opinion disclosing the ground on which the action fails, and may thereupon dismiss it. The concluding words of R.S.C., Ord. 25, r. 5, are capable of being read as empowering the court to make declarations where relief could not be claimed. The language of the Court of Chancery Procedure Act, I 1852, s. 50 [repealed], was:

> "No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

The final words of Ord. 25, r. 5, are: "Whether any consequential relief is or could be claimed, or not." But it is impossible, I think, to read the words of the rule as giving the court power to make a declaration where there is no cause

of action. If that were its effect, this part of the rule would be ultra vires. If there is no cause of action, there is, in my opinion, no jurisdiction. A rule cannot create jurisdiction. The rule is only one of procedure: per LORD DAVEY in *Barraclough* v. *Brown* (1) ([1897] A.C. at p. 624). Further, the rule follows after Ord. 25, r. 4, which provides the means of getting rid of the proceeding in any case in which there was no reasonable cause of action. The action mentioned in r. 5 must, I think, be an action in which there is a cause of action, and which could not be got rid of under r. 4. The last words, though difficult, bear a meaning if they are understood to include cases in which consequential relief could not presently be given, as, for instance, where the declaration sought is as to future or reversionary rights, and are also intelligible if addressed to such a case as that which arose in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2), where the Peninsular and Oriental Co. alleged that they would, as customers of the defendants, be entitled to certain accommodation in the docks, and the defendants denied that right, and a declaration was obtained to quiet the matter, although an injunction was refused, because the plaintiffs had never sought to avail themselves of the right and lien denied. LORD DAVEY so understood the rule and in *Barraclough* v. *Brown* (1) used the following words ([1897] A.C. at p. 624):

> "It would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only and must be so construed."

The jurisdiction was in that case by statute in another tribunal, but the principle of the words is generally applicable. Such a case as *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2) is analogous to a case in which a plaintiff sues for an injunction on the ground that the defendant threatens and intends to do something which the plaintiff says is contrary to some obligation binding on the defendant. The act may not yet have been done. There may be no right to relief by way of damages, but there may be a right to relief prospective in its nature, that is to say, to an injunction forbidding the defendant so to act as to involve the plaintiff in damages. Further, the declaration authorised by Ord. 25, r. 5, is a "declaration of right" that is of the plaintiff's right "whether any consequential relief is or could be claimed, or not." It does not authorise a declaration of obligation. Where the cause of action is in the defendant and not in the plaintiff the declaration which the plaintiff seeks is not a declaration of any right of his, but is a declaration that his obligation is not that which the defendant alleges.

In the case before the court, Hannay & Co. allege facts which show an obligation towards them binding the Guaranty Trust Co. of New York, and they are suing upon it in New York. Hannay & Co. have a cause of action and are seeking to enforce it in an appropriate jurisdiction. The Guaranty Trust Co., on the other hand, have no cause of action against Hannay & Co. They have brought an action in this country asking for a declaration as to the English law, which is material in the American proceedings, and asking for an injunction to restrain the further prosecution of proceedings in America. With the question whether upon proper allegations of fact there would be a cause of action for an injunction I need not concern myself, for the Guaranty Trust Co. do not ask upon the present application to strike out that part of the endorsement on the writ which asks for an injunction. The Guaranty Trust Co. say, and it is the fact, that Hannay & Co. could have sued them in this country, and that the English law could better be applied here than ascertained by evidence for application in America. In this I agree. In the course of the case I suggested that Hannay & Co. should sue here upon proper terms such as that the evidence already taken in America should be available here, and that all costs in America, including the costs in this appeal, should be costs in

A the English action. Hannay & Co. declined this, and they are not compellable to adopt the suggestion.

We have to deal with the action before us. In my opinion, no cause of action is disclosed. The declaration which the Guaranty Trust Co. ask for, if made, would be merely an expression of opinion by the court to which this court could give no effect whatever. There is no claim by the Guaranty Trust Co. against
B Hannay & Co. with a view to the determination of which this court could declare, for there is no existent liability of Hannay & Co. towards the Guaranty Trust Co. As regards the declarations the action will not, in my opinion, lie. In asking for them the Guaranty Co. are in fact seeking to compel Hannay & Co. to litigate the cause of action which Hannay & Co. have against them in a forum to which Hannay & Co. are not bound and are not minded to resort.

C Numerous authorities have been referred to; some of them may be dismissed shortly. In *The Manar* (3) there was plainly a cause of action. The plaintiffs were mortgagees of a ship, the defendants were necessaries men. As between those parties arose a contest as to their rights against the ship. They were parties both interested in a property against which the plaintiffs claimed to enforce a right which they alleged. In *Williams* v. *North's Navigation Collieries, Ltd.* (4) the
D plaintiffs were workmen claiming to recover sums which they alleged to have been improperly deducted from their wages and claiming a declaration that the deduction was illegal under the Truck Act, 1831. In *Chapman* v. *Michaelson* (5) the plaintiff was a trustee under a scheme of arrangement, and the defendant an unregistered moneylender who had taken a mortgage from the debtor. The plaintiff said that that security was bad by reason of the statute, and that the fund
E coming to him was so much the larger in consequence. In *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6) the plaintiffs failed in obtaining a declaration of invalidity of letters patent because no legal right of the plaintiffs had been infringed. In *Offin* v. *Rochford R.D.C.* (7) the plaintiff failed in obtaining a declaration because, as the learned judge held, he had no cause of action. Whether he rightly so held or not I do not stay to inquire. If he had no cause of action,
F then the learned judge's words, in my opinion, are right. He said ([1906] 1 Ch. at p. 358).

> "I think in order to justify an action there must still, as before that rule, be some cause of action; and all that the rule means is, that if there is a cause of action the plaintiff may ask, and the court may award, merely a declaration
G asserting his right without awarding damages or an injunction or any other form of specific relief. But in order to justify an action there must be still, as before the rule, a cause of action."

I prefer this statement of the law to another by the same learned judge to the contrary effect, in *Burghes* v. *A.-G.* (8) ([1911] 2 Ch. at p. 155). The learned judge there failed to observe that *Jenkins* v. *Price* (9), to which he refers as an
H example, was a case upon the construction of a document. Of this class of case I will say something presently. In *Williams* v. *North's Navigation Collieries, Ltd.* (4), COLLINS, M.R., said ([1904] 2 K.B. at p. 49):

> "We felt that there would be a difficulty in making the declarations which the plaintiffs asked for, even if we should be of opinion that such a set-off was
I a violation of the statute, because, even on the view of the plaintiffs, who asked for it, the declaration would not be ancillary to the putting in suit of any legal right."

The reversal of the decision in the House of Lords does not affect the sentence which I have quoted.

The plaintiffs, Hannay & Co., principally relied upon the decision of the Court of Appeal in the *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2). It is, I think, no decision in their favour, but, on the contrary, is against them. The declaration there made was a declaration

that certain regulations of the defendants were not binding upon the plaintiffs. The plaintiffs were the Peninsular and Oriental Co. and another company, who had no interest and were upon that ground ignored. The Peninsular and Oriental Co. had never so required berths in the dock as that the regulations were a deprivation of their rights, and upon that ground the decision of the court below which had refused them an injunction was affirmed. LINDLEY, L.J.'s judgment dealing with this point concludes ([1892] 3 Ch. at p. 259) with the words "the order appealed from must therefore stand." His reasoning down to that point is addressed to leading to that conclusion. But then he goes on to express the reasons for which he considers that a declaration ought to be made, and he does so expressly upon the footing that there were rights of the Peninsular and Oriental Co. which could be ascertained and declared. Those rights arise in the following manner. The Peninsular and Oriental Co. never had in fact asked for unappropriated berths, but as customers of the docks they might do so. As the lord justice expresses it, they had rights in that respect, and it was in elucidation of those rights that the court went on to declare as to the regulations being binding or not binding upon the plaintiffs. KAY, L.J., says the same thing in still plainer terms. He says (ibid. at p. 273):

> "They may at any time require to use the docks for ships for which no berth is appropriated. I think that, without adding any other plaintiff, as the suit is now constituted, it is right that the court should declare to what extent these regulations are proper and can have any effect in law so far as the Peninsular and Oriental Co. are concerned."

That decision, therefore, in my opinion, is expressly to the effect that only if the plaintiff has rights in the matter in respect of which the declaration is sought can a declaration be made.

There is another decision in the Court of Appeal, *Dyson* v. *A.-G.* (10), which requires careful consideration. It is a case in which the plaintiff sued for a declaration that he was under no obligation to fill up Form 4 under the Finance (1909-10) Act, 1910. In other words, the plaintiff was alleging that he was not under any obligation, and asking for a declaration to that effect. But the action contained an allegation that the commissioners threatened to enforce penalties against him for failure to make the return. The plaintiff did not go on, I agree, to ask for an injunction based upon that threat, and it would have been a serious question whether an injunction could be obtained against the Crown. All that the court decided was that they would not strike out the pleading under Ord. 25, r. 4, as disclosing no reasonable cause of action, and that, on an interlocutory proceeding, they would not determine the question whether the action ought to be dismissed although, as the Master of the Rolls said, that might be the result at the trial. The judgment of the Master of the Rolls contains this significant sentence ([1911] 1 K.B. at p. 417):

> "I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be a plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The court may well say, 'Wait until you are attacked and then raise your defence,' and may dismiss the action with costs. This may be the result in the present case. That, however, is not a matter to be dealt with on an interlocutory application. It is pre-eminently a matter for the trial."

The action subsequently came on for trial.

The court adhered to the views expressed on the interlocutory application and made certain declarations. I note, however, three things. First, that both the Crown (see [1912] 1 Ch. at p. 161) and the plaintiff (see ibid. at p. 162) were asking for declarations; secondly, that the matter for decision was the construction of an Act of Parliament; and thirdly, that the plaintiff was threatened with penalties if

A he did not do certain acts which according to the defendant's construction of the Act he was bound to do. The question, therefore, was as to the construction of a document which bound the plaintiff, and upon which the defendant was threatening him with penalties if he did not act upon the footing that the construction was that which the defendant alleged. In both *Dyson* v. *A.-G.* (10) and *Burghes* v. *A.-G.* (8) the judges rely upon the threat of penalties as a material element: B see per COZENS-HARDY, M.R., [1912] 1 Ch. at p. 166; MOULTON, L.J., ibid. at p. 168; FARWELL, L.J., ibid. at pp. 172, 189. If ever there was a case in which the court would seek to find that it had jurisdiction this was one, and there was, I conceive, a cause of action in the plaintiff—namely, that of any one party to a document against the other parties to ascertain its true construction (this is the subject of Ord. 54A, r. 1)—and the claim to protection against proceedings for C penalties which, according to the plaintiff's construction, had not been incurred. I do not think the case is an authority for the proposition that a plaintiff who has no cause of action can obtain a declaration as to the law applicable to a case in which the defendant has a cause of action against him.

There are several cases (BANKES, L.J., has referred to some of them in the judgment to be presently delivered) in which declarations have been made as to D the construction of a document at the instance of some one of the parties to the document against the others. These cases, in my opinion, throw no light upon the question which arises in the present case. There is a cause of action as between parties who by personal contract or statutory obligation are bound towards each other, and it arises from their mutual obligations. There seems to be one case, and one only, in which a plaintiff obtained a declaration as to his obligation towards E the defendant. It is *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (11). I think that decision was wrong, for it was not a question of construction of a contract, but a question whether the plaintiffs were bound by a certain contract towards persons who were not parties to it. *Lofthouse Colliery, Ltd.* v. *Ogden* (12), rested as it was upon Ord. 25, r. 5, was also, I think, wrong. But it may be that that decision could have been supported under Ord. 54A, r. 1, F but for the principle of *Barraclough* v. *Brown* (1). It was a case in which the court was making a declaration in a matter in which the jurisdiction to give effect to the right declared rested not on the court, but on another tribunal. It was in this respect similar to *Barraclough* v. *Brown* (1), where the House of Lords held that the High Court could not make a declaration when the jurisdiction was by statute in a court of summary jurisdiction. In the present case the plaintiffs are G asking for a declaration as to their obligation towards the defendants. In my opinion, the court has no jurisdiction to make it. I think the appeal should be allowed, and the three declarations struck out from the endorsement on the writ.

PICKFORD, L.J.—In this case the plaintiffs sue the defendants for a declaration that the plaintiffs are not liable to the defendants in respect of money paid on H certain bills of exchange and for an injunction to restrain the defendants from suing the plaintiffs in any foreign court to recover such money. The ground of the alleged liability is not important. The defendants have sued the plaintiffs in the United States of America in respect of the money paid on one of the bills, and obtained judgment in the court of first instance. That judgment has, however, been set aside, and a new trial ordered, and the matter is now pending in the I courts of the United States of America. The injunction sought is to restrain the defendants from proceeding with that action or instituting any proceedings in respect of the other bills.

The matter comes before us in a peculiar, and, I think, most unsatisfactory, way, owing no doubt to the laudable wish of both sides to have a decision, or, at any rate, an opinion, of the court as soon as possible. The plaintiffs after the issue of the writ made an application for an interim injunction as claimed in paras. 4 and 5 of the writ. On the hearing of the application counsel for the defendants said that he intended to raise the question that the court has no

jurisdiction to make the declaration claimed in paras. 1 to 3 of the writ on the grounds, as stated by BAILHACHE, J., before whom the case came, that such declarations could only be made (i) as ancillary to putting some rights in the person asking for the declaration in suit or (ii) at the instance of a party who desires to use the declaration to support some right which he seeks to enforce. It seems to me clear that, even if the contention were right, it would not necessarily dispose of the claim for an injunction, for a person can be restrained from instituting or continuing proceedings in a foreign court if a proper case of injustice or oppression be made out without any declaration of right. However, I suppose that the parties were of opinion that this objection raised the substantial question between them, and it was agreed that the case should be argued as though the defendants had taken out a summons under Ord. 25, r. 4, to strike out the claim as disclosing no cause of action. The proceedings were, therefore, transformed from an application by the plaintiffs for an injunction under paras. 4 and 5 of the writ to an application by the defendants to strike out the claim, and in reality this was confined to striking out paras. 1 to 3, as it was admitted in argument before us that paras. 4 and 5 could not be struck out at this stage. I doubt if that proceeding was regular, as the endorsement on the writ is not a statement of claim, and, therefore, not a pleading, and none has been delivered. Nevertheless, it was heard by BAILHACHE, J., on that basis, and, after full argument, he dismissed the application under Ord. 25, r. 4, with costs. His order was:

> "On the application of the defendants that the claim of the above-named plaintiffs for a declaration and other relief claimed and endorsed on the writ herein be struck out, and that the action be stayed or dismissed, and judgment entered accordingly, pursuant to Ord. 25, r. 4, with costs, it is ordered that such application be dismissed, and that the costs thereof be costs in the cause."

Against that decision this appeal was brought, and, strictly speaking, the only question before us is whether the claim, so far as it asks for a declaration, should be struck out under Ord. 25, r. 4. I think the answer as to that is plain and clear—that is, that it should not, for that summary procedure is only to be applied in plain cases, and this is not one. This was the decision on a similar point in *Dyson* v. *A.-G.* (10). The case, however, was not argued before us on that ground only, but on the larger ground whether the objection made by the defendants to the power of the court to make declarations was sound, and the parties desired the opinion of the court on the larger question whether such a declaration can be made. It may be doubted whether such an opinion will be of any value, because a court before which this case came might well say that it was not necessary for the decision of the exact point before us, and, therefore, may be disregarded. The question really turns upon two matters: (i) Does Ord. 25, r. 5, mean that the court has power to make such a declaration as is here asked? (ii) If it has that meaning, is it ultra vires, as purporting to enlarge the jurisdiction of the court which cannot be done by a rule made by the rule committee? If such a meaning can be given to the rule, I think it should be given; to narrow it as asked by the defendants would be to put an end to what has been a most valuable procedure especially in commercial matters. I may instance one case, *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (11), in which questions involving most important matters, on which immediate action was required, were decided, which, apart from this rule, could only have been decided after great delay, inconvenience, and expense. Still, if the power be not validly conferred, it cannot be exercised.

The history of the matter is shortly that before 1852 the Court of Chancery would not give declaratory judgments unless at the same time it gave consequential relief. In that year the Court of Chancery Procedure Act was passed. [HIS LORDSHIP read s. 50 of that Act.] This was interpreted to mean that such a judgment could not be given unless consequential relief could also be given although in fact it was not. This may have been too narrow a construction, as suggested by JAMES, L.J., in *Cox* v. *Barker* (13), but it prevailed until 1883, when

A the present R.S.C., Ord. 25, r. 5, was passed. The first objection is that the rule only gives the right to a declaration as ancillary to putting some right in suit, or, as it is also expressed, a person can only ask for a declaration when he has a cause of action. This, of course, must mean a cause of action apart from the provisions of the rule. I think that, if this be the meaning, the rule has no effect whatever, for a declaration under those circumstances could be made before. I find that B FARWELL, L.J., said in *Chapman* v. *Michaelson* (5) ([1909] 1 Ch. at p. 243), quoting LINDLEY, M.R., in *Ellis* v. *Duke of Bedford* (14) ([1899] 1 Ch. at p. 514):

> "Moreover, now, under the Judicature Act, actions can be brought merely to declare rights, and this is an innovation of a very important kind."

He referred to Ord. 25, r. 5. If the defendants are right on this first point, it C is no innovation at all.

But I think the contention cannot be maintained either on principle or authority. If there be a cause of action apart from the rule, there must be also a consequential right to relief. The mere fact of being entitled to a right does not give a cause of action, which only arises when there is interference actual or threatened with the right, and in that case there is a right to relief in the first case by damages or D injunction, or both, possibly by specific performance, and in the latter by injunction. In such cases, therefore, consequential relief could be given whether it was or was not given, and the rule says the declaration may be made where consequential relief could not be given. It seems to me, therefore, that it cannot be confined to cases where there is a cause of action apart from the rule. It has been suggested that "could not" may be read "could not presently" or "at present," E but I do not think that such an interpretation is of any assistance, for, if there is a cause of action, there is a present right to relief, and if there is not a present right to relief, then there is not a cause of action. But, in my opinion, the point is covered by authority in this court in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2). That was an action to declare certain regulations made by the defendants invalid, and for an injunction F to restrain them from enforcing them. It is not necessary to notice the case of the first plaintiffs as they were held not entitled to maintain the action on grounds which do not touch the case. The Peninsular and Oriental Steam Navigation Co. were customers of the docks, and there were both appropriated and unappropriated berths; the Peninsular and Oriental Co., from the nature of their business, only used appropriated berths, but like any other shipowner it was possible that they G might some day want an unappropriated berth, and they in the first instance asked for an injunction in respect of both kinds of berths. In the course of the argument in the Court of Appeal the claim for an injunction was dropped. A. L. SMITH, J., dismissed the action with costs, which he could not have done if any cause of action had been made out, and the plaintiffs appealed. The Court of Appeal affirmed the decision dismissing the action, but made a declaration at the instance H of the Peninsular and Oriental Co. that the regulations as to unappropriated berths were invalid. I have examined the actual order made in the case, and find that after making two declarations: (i) That the regulations are not binding on the Peninsular and Oriental Co., and (ii) that the Peninsular and Oriental Co. are not entitled to have appropriated berths except on terms agreed between them and the defendants, it proceeds that the appeal be dismissed without costs to either side.

I This may or may not be a correct order to have made; it may be that it would have been more correct to have dismissed the action, except so far as regards the making of the declaration, but it seems to me to show that the court intended to affirm the decision that no cause of action in the ordinary sense was made out, and still it made the declarations. On looking at the judgments delivered, I think it is made clear that such was the intention of the court. The case as to appropriated berths does not touch the point, and the only possible cause of action in respect of the unappropriated berths was a right to an injunction for a threatened interference by imposing improper conditions by the regulations. LINDLEY, L.J.,

examines that contention, and comes to the conclusion that they had no such right, because there was no reasonable prospect of them wanting such a berth, and no certainty that, if they did, the dock company would insist on the regulations, and he concludes ([1892] 3 Ch. at p. 259):

> "The Peninsular and Oriental Steam Navigation Co. has, in fact, failed to establish its alleged rights, and the order [dismissing the action] must therefore stand."

That seems to me a clear decision that there was no cause of action, apart from that given by the rule, but the learned lord justice went on to say that he thought the Peninsular and Oriental Steam Navigation Co. were entitled to a declaration that the regulations were invalid and could not be imposed on them if they should happen to want an unappropriated berth. BOWEN, L.J., discusses the suggested right at considerable length, and comes to the same conclusion that no injunction could be granted, and KAY, L.J., after discussing the position of the parties, states the question before him in this way (ibid., at p. 273):

> "It is suggested that to make such a decree in this case, if the plaintiffs have no cause of action, would be an excess of jurisdiction; and it has been doubted whether this order gives the court any new jurisdiction. I refer to the case of *Brooking* v. *Maudslay, Son and Field* (15). . . ."

Later he says ([1892] 3 Ch. at p. 273):

> "The strongest mode of stating the objection is that the present plaintiffs, even if the defendants are committing a wrongful act, are not damaged by it, and therefore have no cause of action against the defendants; and that Ord. 25, r. 5, to which I have referred, does not enable the court to make a declaratory decree in such a case, or if it does, it would be ultra vires."

He then points out that the Peninsular and Oriental Steam Navigation Co. are proper plaintiffs because they have the right to ask for an unappropriated berth, although they have never done so, and concurs both in dismissing the action and in making the declaration. This seems to me a clear decision that there may be a right to a declaration, although the person asking for it has no cause of action apart from the rule, and I think *Dyson* v. *A.-G.* (10) and *Burghes* v. *A.-G.* (8) are to the same effect. I do not think it could be contended that the plaintiffs in those cases had any cause of action; the only possible cause would be an injunction because of a threatening and intending to enforce the provisions of the forms, and I do not see how such a cause of action could exist against the Attorney-General as representing the Crown.

The chief authorities relied on in argument for the opposite contentions were a dictum of COLLINS, L.J., in *Williams* v. *North's Navigation Collieries, Ltd.* (4) ([1904] 2 K.B. at p. 49), and a decision of WARRINGTON, J., in *Offin* v. *Rochford R.D.C.* (7), and of JOYCE, J., and the Court of Appeal in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6). In the last case this question was not decided. All that JOYCE, J., and the Court of Appeal decided was that the order should not in that case be made. In the case before WARRINGTON, J., he certainly held that there could be no declaration without a cause of action, but the cases on the point do not seem from the report to have been cited to him, and in *Burghes* v. *A.-G.* (8), after they had been cited, the same learned judge said ([1911] 2 Ch. at p. 155):

> "It is contended that there is no cause of action against the Crown or its officers, that they have broken no contract and have done no legal wrong, nor do they threaten to do so. But Ord. 25, r. 5, is intended to deal with the very case, i.e., one in which no relief can be claimed either by way of damages for the past or an injunction for the future, and, in fact, in several cases declarations have been made under this order where there was no cause of action in the proper sense."

By "the proper sense" the learned judge no doubt means apart from the provisions of the rule, and he refers to *Jenkins* v. *Price* (9), before SWINFEN EADY, J., where a declaration was made in a case in which it was admitted there was no cause of action. The dictum of COLLINS, L.J., is, in my opinion, opposed to the latter decision, and cannot be supported.

The next contention is that, even if there is no necessity for a cause of action, the declaration can only be made at the instance of the person claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. No such limitation, so far as I know, has been suggested in the analogous procedure under Ord. 54A of declaring rights arising out of documents. But I think this point again is covered by authority in *Dyson* v. *A.-G.* (10) and *Burghes* v. *A.-G.* (8). The plaintiffs in those cases were not claiming to exercise any right; they claimed a declaration that a document which might be used to make a demand upon them was invalid, and they got it. I think, therefore, that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not; and at the instance of any party who is interested in the subject-matter of the declaration. It does not extend to enable any stranger to the transaction to go and ask the court to express its opinion in order to help him in other transactions. Whether it extends to a declaration that the plaintiff is not liable in an action intended, or proceeding, is a matter I shall discuss in dealing with this particular case.

The next question is whether, if this be the meaning of the rule, the rule is ultra vires. It is said to be so because it adds to the jurisdiction of the court which cannot be done by rules of practice and procedure. The word "jurisdiction" and the expression "the court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first, and, in my opinion, the only really correct, sense of the expression that "the court has no jurisdiction" is that the court has no power to deal with and decide the disputes as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used—i.e., that although the court has power to decide the questions it will not according to its settled practice do so, except in a certain way and under certain circumstances. The distinction is, I think, well shown by two cases: *Barraclough* v. *Brown* (1) and *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (16). In the first case there was a true want of jurisdiction. The power to decide the disputes as to the particular subject-matter had been taken away by statute from the High Court as a court of first instance and given to another tribunal. In the second case the court could decide the dispute and give the relief, but, by a settled practice embodied in a rule, it would not do so except under certain circumstances—i.e., the subject-matter exceeded £10. Yet LORD ESHER, M.R., in *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (16) used the same expression, "the court has no jurisdiction," although clearly what was laid down by a rule could be altered by a rule, and the expression is used in this sense in many cases. It is, I think, necessary to keep this distinction in mind in considering whether this rule is *ultra vires*. If it adds to the jurisdiction in the first sense of giving power to deal with matters which could not in any case or under any circumstances be entertained it is ultra vires, and it is to this state of things that the remarks of LORD DAVEY in *Barraclough* v. *Brown* (1) ([1897] A.C. at p. 624) were addressed. But if its only effect is to provide that the court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person it is, in my opinion, only dealing with practice and procedure and is intra vires. The latter, in my opinion, is the position in this case. Admittedly, if a declaration as to liability on these bills of exchange were asked for by someone who wanted it for the purpose of getting consequential relief, it could be made, and all that the rule does is to remove the restriction imposed upon the making of it by the

practice of the court. It is worthy of notice, though not conclusive, that the Court of Chancery Procedure Act, 1852, which, by s. 50, gave the right to make a declaration when no consequential relief was given is called: "An Act to amend the Practice and Course of Proceeding in the High Court of Chancery."

There only remains to be considered the circumstances of this particular case. It has been ascertained in the course of the case that the rights of the parties depend upon a question of English law, and, in my opinion, the whole object of this action is either directly by means of an injunction, or indirectly by means of a claim for a declaration, to compel the defendants to litigate the question in England, and not in the United States of America. If this cannot be done, it will very probably be the case that if this declaration were made it would be used to guide the court in the United States to the determination of the point of law, but the real intention is to make it not worth the defendant's while to go on with the action there. It may very well be that it is more convenient to decide the question here, and I regret that the suggestion of BUCKLEY, L.J., was not accepted, but the defendants are entitled to bring their action in the United States, and can only be prevented from doing so on the principles laid down in *Logan* v. *Bank of Scotland* (17). This procedure is open to the plaintiffs, and, if they fail to establish their right in that way, I do not think they should be allowed to obtain it indirectly by this declaration. But the question is whether that goes to the power to make the declaration. I think that a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made, but that in practically every case the person asking for it will be left to get up his defence in the action when it is brought: see per the Master of the Rolls in *Dyson* v. *A.-G.* (10) ([1911] 1 K.B. at p. 417) and per JOYCE, J., in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6) ([1906] 1 Ch. at pp. 329, 330), but taking the large view that I do of the effect of Ord. 25, r. 5, I am not prepared to say that it is beyond the power of the court in a very exceptional case to make such a declaration, and that the fact of its being asked for a purpose which the court does not approve does not take away the power to make it, but only gives reason to refuse it. I think, therefore, that there is jurisdiction to make this declaration, but as I understand the circumstances now it ought not to be made. In my opinion, the appeal should be dismissed on the ground that this is not a proper case for the summary procedure under Ord. 25, r. 4, and, on the other questions on which our opinion has been asked, I think the court has power to make the declaration, but on the facts at present before me I think it ought not to be made. I think the action should be allowed to proceed to trial, when all the facts can be ascertained and a proper decision arrived at which cannot, in my opinion, be done in the present proceeding. I understand that the question whether, as a matter of discretion, the order should be made was not really argued in the court below. I think, therefore, that the appeal should be dismissed, the order of the learned judge making the costs of the application costs in the cause should stand, and the costs of this appeal should also be costs in the action.

BANKES, L.J.—As presented to this court, the argument for the appellants raised two questions: First, whether upon the true construction of Ord. 25, r. 5, the plaintiffs' claim for a declaration came within the rule; second, whether, if it did, the rule was not ultra vires.

For the consideration of both points, it is, I think, necessary to go back and trace the development of the practice with regard to declaratory judgments, and to consider also the meaning of the term "jurisdiction" when applied to the powers of a court of justice. The term appears to be used in a double sense—sometimes as referring to a case where the matter in dispute is such that it is impossible for any court, or sometimes for a particular court, to entertain it, as, for instance, where a court is asked to enforce an agreement which is made void by statute, or, as in *Barraclough* v. *Brown* (1), where exclusive jurisdiction had been given by statute to a court other than that in which the application was made; and some-

A times as referring to a case where the particular court refused to entertain some matter in dispute on the ground that it was not matter proper or convenient for it to adjudicate upon. I think this distinction is well brought out in the opinion of LORD HERSCHELL in *British South Africa Co.* v. *Companhia de Moçambique* (18). It was in this latter sense, I think, that the Vice-Chancellor was speaking in *Rooke* v. *Lord Kensington* (19) (2 K. & J. at pp. 760, 761), where he says that there B was no jurisdiction in the Court of Chancery before the Court of Chancery Procedure Act, 1852, to make a simple declaration of right where no consequential relief was claimed. I cannot doubt that if the Court of Chancery of those days thought it expedient to make mere declaratory judgments they would have claimed and exercised the right to do so. It was, among other things, to amend the practice and procedure of the Court of Chancery in this respect that s. 50 of the C Act of 1852 was passed. The preamble of the statute makes this point clear. The section itself is in these terms:

> "No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

D The effect of this section was that it extended the process theretofore exercised by the Court of Chancery in relation to declarations of right to cases where no consequential relief was claimed; and it did this as a matter of the procedure or practice of the court.

In interpreting this section the Court of Chancery held that the plaintiff could E not file a bill for a mere declaration unless there was some consequential relief which the court had the power to grant although the plaintiff had not in fact claimed it. JAMES, L.J., in *Cox* v. *Barker* (13) (3 Ch.D. at p. 370) indicates that in his opinion this was a somewhat narrow view to take; but this was the view held until the making in 1883 of R.S.C., Ord. 25, r. 5, upon which the question in this case turns. That rule is in these terms:

F > "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

It is obvious from a mere reading of the language of the rule that it introduces a G considerable extension into the practice previously existing. It enables the court to make the declaration irrespective of whether consequential relief could be claimed or not. LORD LINDLEY, M.R., in *Ellis* v. *Duke of Bedford* (14) ([1899] 1 Ch. at pp. 514, 515), refers to this as an innovation of an important kind. FARWELL, L.J., in *Chapman* v. *Michaelson* (5) ([1909] 1 Ch. at p. 243), refers to it as a novel practice created by the Supreme Court of Judicature Act, which H cannot be limited by the old equitable practice; and WARRINGTON, J., in *Burghes* v. *A.-G.* (8) ([1911] 2 Ch. at p. 155), differing in this apparently from what he had previously said in *Offin* v. *Rochford R.D.C.* (7) ([1906] 1 Ch. at pp. 357, 358), says that the order is intended to deal with the very case—that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future, and that several cases had occurred where declarations had been I made under the order where there was no cause of action in the proper sense, and he cites *Jenkins* v. *Price* (9) as an example. A later and still more forcible instance of the same view is to be found in *Dyson* v. *A.-G.* (10), the question being as to the validity of a Form 4 notice. FLETCHER MOULTON, L.J., says ([1912] 1 Ch. at p. 168) that

> "an action thus framed [that is, asking for a declaration of right] is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions."

In *Jenkins* v. *Price* (9) SWINFEN EADY, J., granted the declaration of right asked for, but without costs, because the plaintiff had no cause of action, and EVE, J., followed the same course in *Evans* v. *Levy* (20). In spite of these authorities counsel for the defendants contends that the rule is ultra vires to the extent to which it purports to add to the jurisdiction conferred upon the Court of Chancery by the Court of Chancery Procedure Act, 1852. He rests his argument upon ss. 16 and 23 of the Supreme Court of Judicature Act, 1873, and s. 17 of the Supreme Court of Judicature Act, 1875. By virtue of these sections the jurisdiction which at the commencement of the Act of 1873 was vested in or capable of being exercised by (inter alia) the High Court of Chancery was transferred to the High Court to be exercised by that court (so far as regards procedure and practice) in the manner provided by the Act, or by such rules and orders of court as might be made under the Act, and where no special provision was contained therein it should be exercised as nearly as might be in the manner as the same might have been exercised by the Court of Chancery. By s. 17 of the Act of 1875 power is given to the Crown by Order in Council to make further rules for carrying the Act of 1873 into effect, and in particular to make rules for regulating the practice and procedure in the High Court and any matter relating to such practice and procedure.

At the time of the passing of the Supreme Court of Judicature Act, 1873, there were two statutes defining the jurisdiction of the Court of Chancery which it is material to consider—namely, the Court of Chancery Procedure Act, 1852, and the Chancery Regulation Act, 1862 [repealed]. I have already referred to the material section of the first of these Acts. The later Act directed the Court of Chancery to determine every question of law and fact incident to the relief sought, even though such questions were cognisable in a court of common law. As a result of this last statute the Courts of Chancery apparently felt themselves bound in some cases to make a declaratory order, even though the case was one in which they refused to make a declaration of right: see *Jenner* v. *Jenner* (21). This was the state of things in 1883, in which year both the above statutes were repealed by the Statute Law Revision and Civil Procedure Act, 1883, and the way was clear for the Rule Committee to lay down what the practice and procedure of the court should be. They made Ord. 25, r. 5. The order extends the previous practice, just as the statute of 1852 had done, but, in my opinion, the extension in each case was an extension of the practice and procedure of the court, and, subject to the limitation to which I refer later, the extension contained in Ord. 25, r. 5, was one which the Rule Committee was competent to make. I am, therefore, of opinion that both on principle and on authority the contention that the rule is ultra vires fails.

The question as to the construction of the language of the rule is a difficult one. The rule is framed in two branches. It first provides that no action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby. It then goes on to say that the court may make binding declarations of right whether consequential relief is or could be claimed or not. The first question to decide is whether the rule is dealing with declaratory judgments or orders as one thing and declarations or right as another and distinct thing, or whether the declaratory judgments and orders referred to are judgments and orders in the form of declarations of right. I think the framers of the rule must have had the previously existing practice in mind, and have provided both for the case of declaratory judgments and orders which are declarations of right and those which are not. If the other interpretation is put upon the rule, I should be prepared to hold that what the plaintiffs are asking for in their action is not a declaration of right at all. It is quite true that the extension made by the rule has entirely altered the character of the right which it is permissible for a plaintiff to ask to have a declaration upon; but, in my opinion, the expression "declaration of right" in the rule must be read in the sense which it had always previously borne—that is to say, a declaration of some right which the plaintiff maintains that he has

A against the person or persons whom he has made parties to his suit. Here the respondents are claiming nothing of the kind. What they are asking is that the court shall define their obligations to the defendant. I do not think that the alteration in the character of the right which a plaintiff is entitled to assert under the rule can have the effect contended for, of altering the expression "declaration of right" into either a declaration of rights of the parties, or into a declaration as B to the obligations of either party. These considerations are not, however, in my opinion, sufficient to dispose of this appeal, because I think that the rule contemplates the making of declaratory judgments and orders which may not be declarations of right.

In my opinion, the clue to the real meaning of the rule is to be found in the opening words. The rule deals with actions and proceedings. For the present C purpose it is only necessary to consider an action. An action is a civil proceeding commenced by a writ (Supreme Court of Judicature Act, 1873, s. 100 [see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 225]), and in every action there must be a plaintiff who is a person seeking relief (ibid.), or, to use the language of R.S.C., Ord. 16, r. 1, a person in whom a right to relief is alleged to exist. It is the person, therefore, who is seeking relief, or in whom a right to D relief is alleged to exist, whose application to the court is not to be defeated because he merely applies for a declaratory judgment, or order, and whose application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action. It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word "relief"? When once it is established, as I think it is established, that E relief is not confined to relief in respect of a cause of action, it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it; that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant, or contrary to the accepted principles upon which the court exercises its jurisdiction. Subject to this limitation, I see nothing to fetter the F discretion of the court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors, I think the rule should receive as liberal a construction as possible.

A great number of decisions have been cited to us. If the test which I have suggested is applied to them, I think it will be found that the plaintiff was in G each case claiming some relief, and a relief which, though in many cases not resting on a cause of action, was nevertheless within the limitation I have indicated above. In some of the cases the plaintiff was asserting a cause of action, but in many of them he was not. The character of the relief sought varied considerably. For instance, in *Dyson* v. *A.-G.* (10) the relief claimed was a relief from the obligation to comply with a Form 4 notice under the Finance (1909-10) Act, 1910, H on the ground that the notice was ultra vires and invalid. The same kind of relief was asked for in *Burghes* v. *A.-G.* (8). An analogous kind of relief was applied for in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2). In *Lofthouse Colliery, Ltd.* v. *Ogden* (12) the plaintiff claimed relief upon the ground that he was receiving less wages than he was entitled to, and he asked the court to decide the point upon which his right to I the wages he claimed depended. In *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (11) the relief claimed was to be relieved from performing the obligations under a contract upon the ground that the plaintiffs were not bound by it to the defendants who were insisting upon its performance. Order 54A. r. 1, deals in terms with a case where anticipatory relief depending upon the construction of a document is claimed. This rule gives the applicant a right to proceed by originating summons, but this is for convenience merely. I cannot doubt that if the applicant preferred to proceed by action the court would have jurisdiction to deal with his claim under Ord. 25, r. 5. In *Chapman* v. *Michaelson*

(5) EVE, J., brings out very clearly in his judgment the view I take as to the operation of this rule where in reference to the plaintiff's claim for a declaratory judgment as to certain facts, he said ([1908] 2 Ch. at p. 619) that the plaintiff took upon himself to establish certain facts which, if established, would entitle him to statutory relief. The only cases which appear to me to be contrary to the view which I have expressed as to the meaning of the rule are *Williams* v. *North's Navigation Collieries, Ltd.* (4), where the then Master of the Rolls suggested ([1904] 2 K.B. at p. 49) that the declaration referred to in the rule must be ancillary to the putting in suit of a legal right: this, however, was only a dictum; *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6), where, however, it will be seen both parties admitted that the matter was one in which the learned judge could exercise a discretion; and *Offin* v. *Rochford R.D.C.* (7), a decision of WARRINGTON, J., who later, as I have already pointed out, took a different view as to the meaning of the rule.

I pass now to consider whether the present plaintiffs' claim comes within the rule, as I have endeavoured to interpret it. Are they, by their present action, claiming any relief or any relief which the court can recognise? For the purpose of deciding this question, it is necessary to look at the substance as well as the form of the claim. The view I take of the plaintiffs' case is that what they really want is to stay the proceedings in America, and that the claim for the declaration is merely ancillary to the claim for an injunction. The first step after the issue of the writ was the summons for an injunction; and this was supported by the affidavit of Mr. Russell, who submitted that the bringing and prosecution of the action in America was vexatious and embarrassing and likely to result in grave injustice to the plaintiffs. I did not understand counsel for the plaintiffs to dispute that the plaintiffs' real desire in bringing the action was to get the dispute between themselves and the defendants tried in England instead of in America. The desire is one which it is easy to understand, but is it one which the court can gratify? That depends entirely, in my opinion, upon facts which are not before us, and upon which no argument was addressed to this court, or apparently to the court below, though it was indicated in the affidavit to which I have referred. If the plaintiffs' claim for a declaration is to be taken by itself, and their rights under the rule are to be decided without reference to the claim for an injunction, then, in my opinion, their action is not maintainable. The claim for a declaration is not in itself a claim for relief; and no circumstances are shown from which an inference can be drawn that, underlying the claim, though not apparent on the face of it, there is a claim to relief which the court can entertain. The circumstances might have been quite different had a case been made for the plaintiffs that the American proceedings were vexatious and that the present action had been brought to obtain relief from those proceedings, and to bring the defendants before the court in order to compel them to litigate the dispute in this country. The court clearly has jurisdiction to grant an injunction restraining a person from commencing or continuing proceedings abroad if it thinks those proceedings are vexatious: see *Bushby* v. *Munday* (22); *Hyman* v. *Helm* (23); *Wood* v. *Connolly Bros., Ltd.* (24). A strong case, however, must be made out; and, as was said by BRETT, M.R., in *Hyman* v. *Helm* (23) (24 Ch.D. at p. 537), the fact that an action is brought at an inconvenient place is not the sort of vexation upon which the court can act.

The conclusion to which I have come upon the whole matter is that, if the plaintiffs could establish any ground for relief from any further proceeding in the American courts, then this court would have jurisdiction to give them that relief, not only by the granting of an injunction, but by the making of a declaratory judgment or order upon the matter in dispute between the parties, but short of making out such a case, I am of opinion that the court has no jurisdiction to entertain the plaintiffs' claim. In the absence of any such case the plaintiffs' application to the court is not an action seeking relief at all. It is merely a request to the court to supply them with evidence in a convenient form for use in

the American action, and to supply it against the will of the defendants, and possibly at their expense. In my opinion, such a proceeding is not within Ord. 25, r. 5, at all. The matter comes before us in an unfortunate form. The substance of the appeal is to obtain a decision of this court upon the view expressed by the learned judge as to the meaning of the order, but the form of the appeal is for an order striking out the action so far as it relates to the claim for a declaration. I have already stated the grounds upon which I disagree with the view taken by the learned judge, but I cannot say at the present stage, and upon the information at present before the court, that the court has no jurisdiction. I think, therefore, that the appeal must fail. In saying this I desire to make it quite plain that, though I am not in a position to decide the point, I think it extremely unlikely that a case can be made out giving the court jurisdiction to entertain this claim or justifying the exercise of the jurisdiction if the court possesses it. I agree with the order suggested by PICKFORD, L.J.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool; *Crosley & Burn.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

FELSTEAD *v.* REGEM

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Moulton, Lord Parker of Waddington, and Lord Reading), February 26, April 7, 1914]

[Reported [1914] A.C. 534; 83 L.J.K.B. 1132; 111 L.T. 218; 78 J.P. 313; 30 T.L.R. 469; 58 Sol. Jo. 534; 24 Cox, C.C. 243; 10 Cr. App. Rep. 129]

Criminal Law—Appeal—Appeal by person found to be guilty, but insane—Competency—Trial of Lunatics Act, 1883 (46 & 47 *Vict.*, *c.* 38), *s.* 2 (1)—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

An accused person who, by a special verdict under s. 2 (1) of the Trial of Lunatics Act, 1883, has been found to have done the act charged against him, but to have been insane at the time, is not a "person convicted on indictment" within s. 3 of the Criminal Appeal Act, 1907, and so has no right of appeal to the Court of Criminal Appeal against that part of the verdict which found that he was insane at the time of doing the act.

R. v. *Ireland* (1), [1910] 1 K.B. 654, and *R.* v. *Machardy* (2), [1911] 2 K.B. 1144, overruled.

Notes. Applied: *R.* v. *Taylor*, [1915] 2 K.B. 709. Followed: *R.* v. *Duke* (1961), The Times, Oct. 10. Referred to: *Re Houghton, Houghton* v. *Houghton*, [1915] 2 Ch. 173; *Re Pitts, Cox* v. *Kilsby*, [1931] All E.R.Rep. 645; *Beresford* v. *Royal Insurance Co.*, [1937] 2 All E.R. 243.

As to insanity in relation to the criminal law, see 10 HALSBURY'S LAWS (3rd Edn.) 287–289; and for cases see 14 DIGEST (Repl.) 365, 366.

Cases referred to:

(1) *R.* v. *Ireland*, [1910] 1 K.B. 654; 79 L.J.K.B. 338; 102 L.T. 608; 74 J.P. 206; 26 T.L.R. 267; 54 Sol. Jo. 343; 22 Cox, C.C. 322; 4 Cr. App. Rep. 74, C.C.A.; 14 Digest (Repl.) 365, *3543*.

(2) *R.* v. *Machardy*, [1911] 2 K.B. 1144; 80 L.J.K.B. 1215; 105 L.T. 556; 76 J.P. 6; 28 T.L.R. 2; 55 Sol. Jo. 757; 22 Cox, C.C. 614; 6 Cr. App. Rep. 272, C.C.A.; 14 Digest (Repl.) 365, *3544*.

(3) *R.* v. *Oxford* (1840), 9 C. & P. 525; 4 State Tr.N.S. 497; 1 Town. St. Tr. 102; 14 Digest (Repl.) 60, *235*.

Also referred to in argument:

R. v. *Hill* (1911), 105 L.T. 751; 76 J.P. 49; 28 T.L.R. 15; 22 Cox, C.C. 625; 7 Cr. App. Rep. 26, C.C.A.; 14 Digest (Repl.) 365, *3345*.

R. v. *Stokes* (1848), 3 Car. & Kir. 185; 14 Digest (Repl.) 64, *273*.

R. v. *Davies* (1858), 1 F. & F. 69; 14 Digest (Repl.) 61, *250*.

R. v. *Tolson* (1889), 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 37 W.R. 716; 5 T.L.R. 465; 16 Cox, C.C. 629, C.C.R.; 15 Digest (Repl.) 890, *8578*.

M'Naghten's Case (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr.N.S. 847; 1 Town. St. Tr. 311; 1 Car. & Kir. 130, n.; sub nom. *Insane Criminals*, 8 Scott, N.R. 595, H.L.; 14 Digest (Repl.) 60, *246*.

Appeal from a decision of the Court of Criminal Appeal (Sir Rufus Isaacs, C.J., Bray and Lush, JJ.), reported 9 Cr. App. Rep. 227.

The appellant was charged with wounding his wife with intent to do her grievous bodily harm. At the trial, which took place at the Derby Assizes before Rowlatt, J., the jury, under the Trial of Lunatics Act, 1883, found him guilty of the act but insane at the time, and an order was made for his detention during His Majesty's pleasure. The appellant appealed to the Court of Criminal Appeal against that part of the verdict which found he was insane at the time of doing the act. The court held they were bound to follow their decision in *R.* v. *Machardy* (2), and they, therefore, entertained the appeal and dismissed it. The appellant then obtained the necessary certificate from the Attorney-General and appealed to the House of Lords.

Charles A. McCurdy for the appellant.

The Attorney-General (*Sir John Simon*, *K.C.*), *Branson* and *Tinsley Lindley* for the respondent.

Their Lordships took time for consideration.

April 7, 1914. **LORD READING, C.J.,** read the following opinion.—The appellant was indicted for wounding with intent to do grievous bodily harm. The jury returned a special verdict, in accordance with s. 2 (1) of the Trial of Lunatics Act, 1883 [amended by Mental Health Act, 1959, s. 149 (2), Sched. 7; and see s. 71 (1)–(4): 39 Halsbury's Statutes (2nd Edn.) 1025, 1079, 1125], that the prisoner was guilty of the act charged in the indictment as an offence, but was not responsible for his actions at the time, and thereupon the learned judge made an order for the safe custody of the appellant, under s. 2 (2) of that statute. The appellant gave notice of appeal to the Court of Criminal Appeal against that part of the verdict which found that he was not responsible for his actions at the time of doing the act. The Court of Criminal Appeal held that they were bound to follow their decision in *R.* v. *Machardy* (2), that they had no jurisdiction to hear and determine the appeal, and consequently dismissed it upon that ground. The appellant then applied to the Attorney-General for his certificate under s. 1 (6) of the Criminal Appeal Act, 1907, and he granted the application, and issued his certificate authorising the appellant to appeal to your Lordships' House.

The sole question for the decision of this House is whether an accused person who, by the special verdict, is found guilty of the act, but insane at the time, can appeal to the Court of Criminal Appeal against that part of the verdict which finds that he was insane at the time of doing the act. If there is any right of appeal it can only be that conferred by the Criminal Appeal Act, 1907. This Act was passed to establish a Court of Criminal Appeal and to amend the law relating to appeals

A in criminal cases, and there is no right of appeal to the Court of Criminal Appeal, and no jurisdiction in that court to hear an appeal unless the appellant can bring himself within that statute. By s. 3 of the Criminal Appeal Act, 1907:

> "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal."

B

Unless a person is a "person convicted on indictment" there is no right of appeal against the verdict or any part of it; therefore, the question is whether by reason of the special verdict under the Trial of Lunatics Act, 1883, or any part of such verdict, the accused is "a person convicted on indictment."

In order fully to understand the effect of such a special verdict it is well to C examine the history of the law before the passing of the Trial of Lunatics Act, 1883. In the earliest times proofs of insanity when he committed the act charged did not entitle the accused to an acquittal, but to a special verdict carrying with it a right to a pardon. The same course was taken when the accused had killed a man by misadventure or in self-defence: see 1 Rot. Parl. 444; 3 Edw. 2 (1310) and FITZHERBERT'S GRAND ABRIDGEMENT, sub tit. "Corone," s. 351. At a later period D the jury in cases of insanity could either find a general verdict of Not Guilty or a special verdict that the accused committed the act, but that at the time he was non compos mentis, and thereupon the court gave judgment of acquittal: see HALE'S PLEAS OF THE CROWN, Edn. of 1800, vol. 1, p. 28, and SIR MICHAEL FOSTER'S CROWN LAW (3rd Edn.), s. 1, p. 279. It is to be observed that in such cases the result of either a general or a special verdict was the acquittal of the E accused, and in the words of the preamble of the subsequent statute of 1800, "it may be dangerous to permit persons so acquitted to go at large." In the public interest it became necessary to provide for the safe custody of the insane person notwithstanding the verdict of acquittal. Consequently the statute of 1800 (39 & 40 Geo. 3, c. 94) entitled "An Act for the safe custody of insane persons charged with offences" was passed. It was there enacted

F

> "that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether G such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of committing such offence the court before whom such trial shall be had shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until His Majesty's pleasure shall be known."

H The intention of the legislature as manifested by this statute was to provide for the safe custody of persons who were found by the jury to be insane (a) at the time of committing the offence, or (b) upon arraignment, or (c) upon trial, or (d) upon being brought before any court to be discharged for want of prosecution. In the last-mentioned case, it will be observed upon examination of s. 2 that if a I person brought before the court to be discharged for want of prosecution should appear to be insane, the court was empowered to empanel a jury to try his sanity, and if the jury found him insane, the court could order his detention for safe custody during His Majesty's pleasure. Under this statute the finding of the jury that the accused was insane at the time of committing the offence was not a conviction of any offence, but was an acquittal on account of insanity empowering the court to order the safe custody of the accused during His Majesty's pleasure. The alteration in the law made with reference to a person insane at the time of committing the offence charged against him was that although he was acquitted

of the crime he was detained as a lunatic. As LORD DENMAN, C.J., said in *R.* v. *Oxford* (3) (9 C. & P. at p. 550):

> "The statute must mean the jury are to find that that act has been done by the prisoner which fixes him as a criminal unless he is a lunatic,"

implying that, if he is a lunatic, he is not a criminal, and is not convicted of any offence.

The last stage was the Trial of Lunatics Act, 1883, which is the statute now applicable. It made no substantial difference in the administration of the law, except that it enacted that where upon evidence the jury are satisfied that the accused did the act charged, but was insane so as not to be responsible according to law for his actions at the time he did the act, they must return a special verdict to that effect. That is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence. In other words, this verdict means that upon the facts proved the jury would have found him guilty of the offence had it not been established to their satisfaction that he was at the time not responsible for his actions, and, therefore, could not have acted with a "felonious" or "malicious" mind, which is an essential element of the crime charged against him. The indictment of the appellant was for "feloniously" and "maliciously" wounding Lilian Ann Felstead, with intent to do her grievous bodily harm. It is obvious that if he was insane at the time of committing the act he could not have had a mens rea, and his state of mind could not then have been that which is involved in the use of the term "feloniously" or "maliciously," for crimen non contrahitur, nisi voluntas nocendi intercedat. It was argued that, as the Trial of Lunatics Act, 1883, provided under s. 2 that where such a special verdict is found the accused should be kept in custody as a criminal lunatic, the legislature must have intended the special verdict to operate as a conviction of a crime. In my judgment this contention is not well founded. By the use of the term "criminal lunatic" the legislature meant by a compendious reference to bring into operation the powers given under the Criminal Lunatics Asylums Act, 1860 [repealed by Mental Health Act, 1959], which provided for detention in certain asylums, and under certain conditions, both of persons found insane and acquitted under the aforementioned Act of 1800 and of convicted persons who became insane during confinement in prison. It was also contended that, as by s. 20 of the Criminal Appeal Act, 1907, writs of error and other modes of bringing a verdict and judgment under review had been abolished, the legislature must have intended to give a right of appeal to the Court of Criminal Appeal whenever such a special verdict was found. It must, however, be borne in mind that your Lordships are deciding the proper interpretation to be placed upon the words of the statute, and cannot extend the right of appeal to those who, in your Lordships' opinion, are not persons "convicted on indictment."

I have for these reasons come to the conclusion that the appellant is not a "person convicted on indictment." By the verdict of the jury he has been acquitted of the crime, and the order for his detention for safe custody is consequent upon the finding of insanity, and is not for a fixed period but during His Majesty's pleasure. The effect of this conclusion is to affirm the decision of the Court of Criminal Appeal that they had no jurisdiction to hear and determine the appeal of the appellant. That court arrived at this decision because of the judgment in *R.* v. *Machardy* (2) which affirmed *R.* v. *Ireland* (1). In the latter case the Court of Criminal Appeal held that when a special verdict under the Trial of Lunatics Act, 1883, was found in reference to the accused he was "a person convicted on indictment," and, therefore, had a right of appeal under the Criminal Appeal Act, 1907. The court was largely influenced to their conclusion by reason of the use of the word "guilty" in the special verdict. It is unfortunate that this word is there used, as it suggests the responsibility for a criminal act. If the requirement under the statute had been merely to find that the accused did the act, instead of that he was guilty of the act, there could have been no room for

doubt that such a verdict was not a conviction, but was an acquittal. *R.* v. *Machardy* (2) was a decision of the majority of the court (consisting of five judges), constituted to consider *R.* v. *Ireland* (1), and whether an appeal lay against such part of the special verdict as found the accused insane. The majority of the judges approved the decision of *R.* v. *Ireland* (1), but held that an appeal could be brought only against the first part of the verdict, and that, as the second part was in aid and relief of the accused, he could not appeal against it. Thus the court divided the verdict into two parts, and held that no appeal lay against that part relating to insanity. The special verdict is, in my opinion, one and indivisible by reason of the statutory provision and takes the place of the general verdict of "Not Guilty," and is a verdict of acquittal of the accused. It is worthy of observation that, if the appellant succeeded in his present contention and established on the hearing of the appeal that the verdict as to insanity should be set aside, he would be entitled forthwith to be set at liberty, for the remaining part of the verdict could not justify the passing of any sentence upon him, as it does not find him guilty of having committed an offence, but only of having done the act charged. I am of opinion, for the reasons given, that this appeal should be dismissed.

LORD ATKINSON.—I concur in the judgment which has just been delivered by my noble and learned friend, and I have been requested by **LORD DUNEDIN** and **LORD PARKER OF WADDINGTON** to express on their behalf their concurrence also.

VISCOUNT HALDANE, L.C.—I also concur in the judgment of my noble and learned friend LORD READING, and **LORD MOULTON** has asked me to intimate to your Lordships that he concurs in the opinion that has been delivered.

Solicitors: *P. Wellington Taylor*; *Director of Public Prosecutions.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

NOCTON *v.* LORD ASHBURTON

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Shaw and Lord Parmoor), April 23, 24, 27, May 1, 8, June 19, 1914]

[Reported [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 30 T.L.R. 602]

Misrepresentation—Innocent misrepresentation—Advice given in performance of duty—Error made in good faith—Liability of adviser.

Solicitor—Duty to client—Fiduciary relationship—Full disclosure of personal interest and all relevant matters when advising client—Liability on breach of duty.

An action for deceit cannot be maintained without proof of actual fraud, i.e., proof of mens rea—that a false representation was made knowingly, or without belief in its truth, or recklessly without caring whether it was true or false: *Derry* v. *Peek* (1) (1889), 14 App. Cas. 337; but where a duty is laid on one person to give information or advice to another, on which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer although the information or advice has been given, not fraudulently, but in good faith, and the recipient of the information or advice will be entitled

to compensation for any loss which he has suffered, by reason of the misrepresentation.

A solicitor was associated with a client in transactions relating to the development of land in the course of which both the solicitor and the client advanced money on mortgage, and to raise further sums the solicitor requested the client to make a certain property available for mortgage by releasing it from the security of his own mortgage. The effect of the release would be to improve the position of the security held by the solicitor for his loan from a second to a first mortgage, but he did not inform the client of that fact nor fully explain to him other matters relating to the release. In an action by the client against the solicitor for a declaration that the solicitor had improperly advised him and for an order for indemnity against loss of interest and the replacement of the sum advanced, charges of fraud being found not to have been made out,

Held: the solicitor had been in a fiduciary position towards his client, and that position imposed on him the duty to make a full, and not a misleading, disclosure of facts known to him when advising his client; the fact that the client had the means to correct the false impression conveyed to him by the solicitor, but did not inquire into what he had been told, did not avail the solicitor; and, therefore, the solicitor was liable to compensate the client for any loss caused by his breach of duty.

Notes. Referred to: *Bell* v. *Lever Bros., Ltd.*, [1931] All E.R.Rep. 1; *Terrene, Ltd.* v. *Nelson*, [1937] 3 All E.R. 739; *Halifax Building Society* v. *Salisbury*, [1939] 4 All E.R. 427; *Bradford Third Equitable Building Society* v. *Borders*, [1941] 2 All E.R. 205; *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E.R. 426; *Armstrong* v. *Strain*, [1952] 1 All E.R. 139; *Otter* v. *Church, Adams, Tatham & Co.*, [1953] 1 All E.R. 168.

As to innocent misrepresentation and the action for deceit, see 26 HALSBURY'S LAWS (3rd Edn.) 847 et seq., 862 et seq.; and for cases see 35 DIGEST 25 et seq. As to the duty of a solicitor towards his client, see 31 HALSBURY'S LAWS (2nd Edn.) 116 et seq.; and for cases see 42 DIGEST 76 et seq.

Cases referred to:

(1) *Peek* v. *Derry* (1887), 37 Ch.D. 541; 57 L.J.Ch. 347; 59 L.T. 78; 36 W.R. 899, C.A.; reversed sub nom. *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185*.

(2) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest 25, *163*.

(3) *Edelsten* v. *Edelsten* (1863), 1 De G.J. & Sm. 185; 7 L.T. 768; 9 Jur.N.S. 479; 11 W.R. 328; 46 E.R. 72, L.C.; 43 Digest 217, *614*.

(4) *Bourne* v. *Swan and Edgar, Ltd., Re Bourne's Trade Marks*, [1903] 1 Ch. 211; 72 L.J.Ch. 168; 51 W.R. 213; 19 T.L.R. 59; 47 Sol. Jo. 92; 20 R.P.C. 105; 43 Digest 177, *311*.

(5) *Angus* v. *Clifford*, [1891] 2 Ch. 449; 60 L.J.Ch. 443; 65 L.T. 274; 39 W.R. 498; 7 T.L.R. 447, C.A.; 35 Digest 54, *488*.

(6) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 9, *24*.

(7) *Low* v. *Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 40 W.R. 50; 7 T.L.R. 582, C.A.; 35 Digest 33, *254*.

(8) *Burrowes* v. *Lock* (1805), 10 Ves. 470; 32 E.R. 927; 35 Digest 34, *261*.

(9) *Slim* v. *Croucher* (1860), 1 De G. F. & J. 518; 29 L.J.Ch. 273; 2 L.T. 166; 6 Jur.N.S. 437; 8 W.R. 347; 45 E.R. 462, L.C. & L.JJ.; 35 Digest 34, *262*.

(10) *Earl of Chesterfield* v. *Janssen* (1751), 1 Atk. 301; 2 Ves. Sen. 125; 26 E.R. 191, L.C.; 35 Digest 39, *328*.

(11) *Evans* v. *Bicknell* (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 35 Digest 33, *249*.

(12) *Torrance* v. *Bolton* (1872), 8 Ch.App. 118; 42 L.J.Ch. 177; 27 L.T. 738; 37 J.P. 164; 21 W.R. 134, L.JJ.; 35 Digest 66, *624*.

(13) *Denn d. Bulkley* v. *Wilford* (1826), 8 Dow. & Ry.K.B. 549; 4 L.J.O.S.K.B. 295; 35 Digest 138, *366*.

A (14) *British Mutual Investment Co.* v. *Cobbold* (1875), L.R. 19 Eq. 627; 23 W.R. 487; sub nom. *British Mutual Investment Co., Ltd.* v. ——, 44 L.J.Ch. 332; 32 L.T. 251; 42 Digest 106, *1001.*

(15) *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; 39 L.J.Ch. 369; 18 W.R. 387, L.C. & L.J.; 42 Digest 228, *2603.*

(16) *Cockburn* v. *Edwards* (1881), 18 Ch.D. 449; 51 L.J.Ch. 46; 45 L.T. 500; B 30 W.R. 446, C.A.; 42 Digest 87, *787.*

(17) *Archbold* v. *Charitable Bequests for Ireland Comrs.* (1849), 2 H.L.Cas. 440; 13 L.T.O.S. 249; 9 E.R. 1159, H.L.; 35 Digest 68, *650.*

(18) *Thom* v. *Bigland* (1853), 8 Exch. 725; 1 C.L.R. 38; 22 L.J.Ex. 243; 21 L.T.O.S. 62; 1 W.R. 290; 155 E.R. 1544; 35 Digest 58, *532.*

(19) *Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890; 29 L.J.Ex. 382; 2 L.T. C 406; 6 Jur.N.S. 1035; 8 W.R. 545; 157 E.R. 1437; 35 Digest 68, *654.*

(20) *Hickson* v. *Lombard* (1866), L.R. 1 H.L. 324; 35 Digest 69, *659.*

(21) *Bank of Montreal* v. *Stuart*, [1911] A.C. 120; 80 L.J.P.C. 75; 103 L.T. 641; 27 T.L.R. 117, P.C.; 42 Digest 113, *1096.*

(22) *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 35 Digest 21, *119.*

D **Appeal** from an order of the Court of Appeal (COZENS-HARDY, M.R., FARWELL and HAMILTON, L.JJ.), reversing in part a decision of NEVILLE, J., in an action in which the respondent was plaintiff and the appellant defendant.

The appellant had acted as solicitor for the respondent in certain land and building transactions relating to property in which the appellant was also interested as a principal, and the question was whether the appellant had acted fraudu- E lently in advising the respondent to release a part of the property from a mortgage which he had upon it.

NEVILLE, J., held that, although the appellant had advised the respondent badly, and had fallen short of his duty as a solicitor to his client, the evidence did not establish fraud, and he dismissed the action. The Court of Appeal held that fraud was made out, and that a case based upon fraud could not be turned into a case F based on negligence, and gave judgment for the respondent. The appellant appealed.

The facts are set out in the opinions of LORD DUNEDIN.

P. O. Lawrence, *K.C.*, *Peterson*, *K.C.*, and *J. W. Manning* for the appellant.

Sir R. B. Finlay, *K.C.*, *Jenkins*, *K.C.*, and *A. à Beckett Terrell* for the respondent.

G Their Lordships took time for consideration.

June 19, 1914. The following opinions were read.

VISCOUNT HALDANE, L.C.—Owing to the mode in which this case has been treated both by the learned judge who tried it and by the Court of Appeal, the question to be decided has been the subject of some uncertainty and much argu- H ment. But when the real character of the litigation has been made plain, the difficulties which have attended the giving of relief appear to have been concerned with form and not with substance.

The action was brought by the respondent, Lord Ashburton, against the appellant, who had acted as his solicitor, for a declaration that the solicitor had improperly advised and induced him to advance £65,000 upon a mortgage made in I 1904 by other clients of the solicitor, a transaction out of which the solicitor was said to have got an advantage for himself, and for an order for indemnity against loss of interest and for replacement of the sum advanced. This was the prominent head of the relief sought. But by the statement of claim a further case was made which was really covered by the main relief asked for, and only arose if, as happened, the claim for replacement of the amount of the mortgage was barred by acquiescence or by the Statute of Limitations. It was alleged that subsequently, in December, 1905, a date within six years from the issue of the writ, the solicitor had improperly and in bad faith advised and induced Lord Ashburton to release

from the latter's mortgage a valuable part of the security, knowing that the security would thereby be rendered insufficient, and that this was done by the solicitor in order that he might benefit in respect of a charge for £15,000 in which he was interested, by rendering it a first charge. He was alleged to have represented untruly that the remaining security would be sufficient, and it was further alleged that it was insufficient, and that loss both of security for the principal sum of £65,000 and of interest had occurred in consequence of the release. The defence was knowledge of the facts and of the position of the appellant on the part of Lord Ashburton, as well as a denial of the material allegations in the statement of claim, and a plea of the Statute of Limitations.

I do not propose to enter into an examination of the evidence. The action was tried before NEVILLE, J., who had the appellant and the respondent before him in the witness-box. He treated the case as one of fraud simply, as, indeed, according to the statement of claim, in one sense it was. Fraud, he said, must be clearly and unmistakably proved, and it was not enough to prove the mere fact that a solicitor, in advising his client, was actuated by the belief that some advantage would accrue to himself. He found that, although the respondent "fell far short of the duty which he was under as a solicitor" to the appellant, he did not intend to defraud him, but that he would probably have given different advice had he not been personally interested in the result. The learned judge was no doubt influenced by the fact that Lord Ashburton had previously embarked, to the knowledge and with the co-operation of the appellant, in other speculative transactions of large amounts, and that the release of the particular security in question might have enabled the mortgagors to raise more money and develop the value of Lord Ashburton's remaining security. At all events, he held that, while the appellant had failed in his duty and given bad advice, the case as launched was one in which charges of actual fraud had been made as its foundation, and that, these charges having, as he thought, failed, the action ought to be dismissed. The Court of Appeal took a different view. They held that the solicitor had, on the evidence, been guilty of actual fraud, so that an action of deceit would lie. If the action had been one of negligence they thought it would have been undefended, but the Master of the Rolls, in agreement with NEVILLE, J., said that "it would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based on negligence." As, however, they came to the conclusion that the solicitor had been guilty of actual deceit, this point was not important. The Court of Appeal, therefore, gave judgment for Lord Ashburton, and directed an inquiry as to damages to be held before the official referee.

I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal. I have read the evidence of the appellant, and, although it is obviously untrustworthy evidence, it leaves on my mind the same impression which it left on that of the learned judge who heard it—that the solicitor did not consciously intend to defraud his client, but, largely owing to a confused state of mind, believed that he was properly joining with him and guiding him in a good speculation. I cannot, therefore, treat the case, so far as based on intention to deceive, as made out. But where I differ from the learned judges in the courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to treat the action as one of mere negligence at law unconnected with misconduct. This alternative they thought was precluded by the way in which the case had been conducted. I am not sure that, on the pleadings and on the facts proved, they were right even in this. The question might well have been treated as in their discretion and as properly one of costs only, having regard to the unsatisfactory evidence of the appellant. But I do not take the view that they were shut up within the dilemma which they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been an impression that

A the necessity which recent authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy. For the reasons which I am about to offer your Lordships, I do not think that this is so.

Much of the argument at the Bar turned on the interpretation of what was laid down by this House in *Derry* v. *Peek* (1). It is of importance to be sure of what really was decided in that case. It has been the subject of much comment, both B on what it expressly decided and what has been considered to be implied in the judgments. The facts were these. A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by the Act the company had the right to use steam power. The plaintiff took shares on the faith of this statement. The Board C of Trade afterwards refused their consent to the use of steam power, and the company was wound-up. The plaintiff then brought an action of deceit against the directors, based on the untrue statement. The case was tried in the Chancery Division, before STIRLING, J. He came to the conclusion that the defendants thought that what they had stated was true, inasmuch as they took the consent of the Board of Trade to be a matter of course, and he dismissed the action on the D ground that there was no intention to deceive. The Court of Appeal held that the directors ought to have taken care that they had reasonable grounds for their statement, and that, as they had no reasonable grounds for making it, they were liable, notwithstanding that they had not intended to deceive. This House reversed that judgment, and held that, the action being one of deceit, it was necessary to prove actual fraud. Fraud must be proved by showing that the false repre- E sentation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, but the inference could be displaced by showing that it was made under an honest impression that it was true. The discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis F that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must have indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry* v. *Peek* (1) were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances, G the case is to be concluded by asking whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords show a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked H out in the fashion which is characteristic of a system where much of the law has always been judge-made and unwritten.

Even the action on the case for deceit was itself evolved by the judges, as is shown by the dissenting judgment of GROSE, J., in *Pasley* v. *Freeman* (2) so comparatively recently as 1789. Up to that date it was at least doubtful whether the action lay in the absence of a special duty. The doctrines of obligation to exercise I care by persons in particular situations, who are doing acts which may injure the property or persons of others; of implied contract, as shown in the evolution of the action of assumpsit and its development from a case; of the liability of the agent, who came at last to be treated as warranting the authority which he asserted; of the right to an injunction and an account in equity in cases of passing off goods, as explained and contrasted with claims based on deceit in LORD WESTBURY'S judgment in *Edelsten* v. *Edelsten* (3), and in such later authorities as the judgment of FARWELL, J., in *Bourne* v. *Swan and Edgar, Ltd.* (4). These doctrines and the like illustrate the freedom which has been exercised by the judges in making new

applications of recognised principles. Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.

The decision of the House of Lords in *Derry* v. *Peek* (1) was applied by the Court of Appeal in another case relating to a prospectus, a case which, like *Derry* v. *Peek* (1), has given rise to comment. In *Angus* v. *Clifford* (5) the directors had affirmed in their prospectus that the reports of certain mining engineers "were prepared for the directors" when they were really prepared for the promoters. The judge who tried the case thought that the directors had not taken proper care as to what they stated, and held them liable, but he did not find that they had made the untrue statements fraudulently as distinguished from carelessly. The Court of Appeal applied the law as laid down in *Derry* v. *Peek* (1). As the judge who tried the case had not found fraud they considered that they could not properly do so, and treated the words used as having been simply passed over by the directors without seeing their importance. This, they thought, amounted to gross and culpable carelessness in the use of language, but not to dishonesty, and they took the view that *Derry* v. *Peek* (1) had decided that there was no legal duty cast upon persons in such a position to take reasonable care in forming their belief. BOWEN, L.J., observed that, while there was nothing new in deciding, as had been done by the House of Lords, that proof of an actual fraudulent mind was necessary to found an action for deceit at common law, the really important step taken was the decision, which he seems to have taken to be of very general application, that there was no duty to be careful in such cases. An honest blunder in the use of language is not dishonest, and unless there is such a duty is not actionable. It is plain that between the grossly careless use of language and the reckless use which will still give a right to succeed in an action for deceit the line of demarcation may seem to plain persons to be very fine. I do not wonder that the decisions in *Derry* v. *Peek* (1) and *Angus* v. *Clifford* (5) have on this point given rise to some heart-burning. But the principle laid down that a mens rea is essential, in the absence of a duty to be careful, was no new one, nor is it now open to question. The difficulty as regards the principle lies in its application to individual cases. It is to the view taken of the facts by the judge of first instance, who has tried the question of fact and decided on which side of the line of demarcation the case lies, that comment should be generally directed, for, though not impossible, it is difficult for a Court of Appeal to review his finding after seeing the witnesses, especially in cases of this class. What requires closer consideration is the generality of the language used in some of the opinions of this House in *Derry* v. *Peek* (1), to the effect that in such a case there is no legal as distinguished from moral duty to be careful. Soon after the decision the legislature, in the Directors' Liability Act, 1890, imposed a statutory obligation on those who issue prospectuses. But in other cases the decision remains binding as to what it really established, and its principle stands.

To what cases, then, does that principle extend? In his opinion LORD HERSCHELL (14 App. Cas. at p. 360) carefully excluded from it

> "those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course."

In such cases, he thought, following what LORD SELBORNE had said in *Brownlie* v.

A *Campbell* (6) (5 App. Cas. at p. 935), that honest belief in the truth of the answer was no defence. This exception was considered by the Court of Appeal, consisting of Lindley, Bowen, and Kay, L.JJ.—the court which had decided *Angus* v. *Clifford* (5)—in *Low* v. *Bouverie* (7). There the defendant, who was trustee of a fund, had replied to the inquiry of a person who contemplated making a loan to a beneficiary on the security of the fund, that the interest of the latter was subject
B to certain incumbrances which he mentioned, but he did not say that there were no others. In fact there were others which he had forgotten. That the defendant was not liable for deceit was clear, but it was contended that as a trustee he was liable for breach of duty to give correct information. But the Court of Appeal held, as I think rightly, that the duty of a trustee did not extend to furnishing answers to inquiries such as were made in the case. Lindley, L.J., said that in
C the absence of such a duty the trustee could not be made liable. Before *Derry* v. *Peek* (1) he observed that it had been generally supposed to have been settled in equity that a person who carelessly, although honestly, made a false representation as to matters within his special knowledge to another about to deal in a matter of business on the faith of the representation, was liable. *Burrowes* v. *Lock* (8) and *Slim* v. *Croucher* (9) were regarded as having laid this down. But *Burrowes* v.
D *Lock* (8) could be supported on the quite different ground of estoppel, that is to say, on the ground that the trustee in that case was precluded from denying that the share in question was unincumbered, as he had asserted this in unambiguous words on the faith of which the plaintiff in the suit had changed his position. It could not be supported on the wider ground. *Slim* v. *Croucher* (9), in which the assertion was that a valid lease would be granted in the future, could not be supported on the
E ground of estoppel, and, as he thought, probably could not be on that of warranty. It must, therefore, in his opinion, be taken to be no longer law. In the case before him, *Low* v. *Bouverie* (7), there was no such precision of statement about the absence of incumbrances as could give rise to estoppel. Lindley and Bowen, L.JJ., concurred in holding that, if there had been a duty to be careful, the case would have been untouched by *Derry* v. *Peek* (1). But they held that as such a
F breach of duty did not exist, and as fraud, warranty, and estoppel were all negatived, there was no liability.

In *Slim* v. *Croucher* (9) the circumstances were unusual, and it may be that the decision can be supported on the ground that the defendant warranted by implication that he had power to grant a valid lease. It is not, however, necessary to express an opinion on the point. But in the appeal before us I do not think that
G any question of warranty or estoppel arises, and if moral fraud has not been established the only question which remains is whether there has been such a breach of duty as gives rise to liability. Now such a duty might arise either at law or in equity; and I do not understand Lord Herschell, who mentioned the case of a legal as distinguished from merely a moral duty, to have intended in any way to exclude duty of which only a court of equity took cognisance. If among
H the great common lawyers who decided *Derry* v. *Peek* (1) there had been present some versed in the practice of the Court of Chancery it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, courts of equity gave a remedy.

It is known that in cases of actual fraud the Courts of Chancery and of common
I law exercised a concurrent jurisdiction from the earliest times. For some of these cases the greater freedom which, in early days, the Court of Chancery exercised in admitting the testimony of parties to the proceedings made it a more suitable tribunal. Moreover, its remedies were more elastic. Operating in personam as a court of conscience it could order the defendant, not, indeed, in those days, to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury. But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in

that court as cases of fraud, yet did not necessarily import the element of dolus malus. The court took it upon itself to prevent a man from acting against the dictates of conscience as defined by the court, and to grant injunctions in anticipation of injury, as well as relief where injury had been done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by LORD HARDWICKE'S judgment in *Earl of Chesterfield* v. *Janssen* (10). I can hardly imagine that those who took part in the decision of *Derry* v. *Peek* (1) imagined that they could be supposed to have cast doubt on the principle of any cases arising under the exclusive jurisdiction of the Court of Chancery. No such case was before the House, which was dealing only with a case of actual fraud as to which the jurisdiction in equity was concurrent. The judgment in *Evans* v. *Bicknell* (11) of LORD ELDON, who not only possessed wide experience of Chancery procedure but had been Chief Justice of the Common Pleas, is instructive as to the character of the equity jurisdiction, especially as far as it is concurrent, and another great judge, SIR WILLIAM GRANT, confirmed his view in *Burrowes* v. *Lock* (8). The latter case can probably be now supported only on the ground of estoppel, but the exposition of the principle of the concurrent jurisdiction remains intact. A similar observation applies to *Slim* v. *Croucher* (9), to which I have already referred. It was not expressly found that there was a duty in breach of which the misrepresentation alleged was made, and there was neither fraud nor estoppel. But the case remains valuable, whatever view may be taken of its result, on account of the exposition of the equity jurisdiction given by LORD CAMPBELL, L.C., and KNIGHT BRUCE and TURNER, L.JJ., judges of great experience. So far as the equity jurisdiction in cases of what is called fraud is concurrent only and exercised in actions for mere deceit apart from breach of special duty, an actual intention to cheat has now to be proved. But there are cases of other classes to which, as I have already said, the Court of Chancery undoubtedly did apply the term fraud, although I think unfortunately. Fraud in such cases is, as JAMES, L.J., said in *Torrance* v. *Bolton* (12) (8 Ch. App. at p. 124)

> "nomen generalissimum, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the court to deal with them as it deals with any instrument, or any other transactions in which the court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed, the books are full of cases in which the court has dealt with contracts of that kind—contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done."

In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction. What was laid down by Lord Eldon in this House in *Denn d. Bulkley* v. *Wilford* (13) explains the nature of the duty.

I have dealt thus fully with this distinction because I think that confusion has arisen by overlooking it. It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a court of law or a court of equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that LORD BRAMWELL and LORD HERSCHELL should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. \

A man may misconceive the extent of the obligation which a court of equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the B solicitor who makes a bargain with his client which cannot stand, have all for several centuries run the risk of the word "fraudulent" being applied to them. What it really means in this connection is not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court which from the beginning regarded itself as a court of conscience.

Derry v. *Peek* (1) simply illustrates the principle that honesty in the stricter C sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage. A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the D defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense.

The courts had also power to rescind contracts of many kinds obtained by an innocent misrepresentation, so long at least as the contract had not been superseded by being carried into effect. The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free E the defendant might have been from any intention to deceive, he was not allowed to retain what he had obtained from the plaintiff by a material mis-statement on which the latter was entitled to rely as being true. This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.

But side by side with the enforcement of the duty of universal obligation to be F honest and the principle which gave the right to recission, the courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled. Prior to *Derry* v. *Peek* (1), the G distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the courts would not allow him to say that he was ignorant. Such H a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I I do not find in *Derry* v. *Peek* (1) an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care, therefore, gave rise to no cause of action. In other words, it was decided that the directors stood in no fiduciary relation, and, therefore, were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. I have only to add that the special relationship must, whenever it is alleged, be clearly shown to exist.

The solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him. In the early history of the action of assumpsit this liability was indeed treated as one for tort. There was a time when in cases of liability for breach of a legal duty of this kind, the Court of Chancery appears to have exercised a concurrent jurisdiction. That was not remarkable, having regard to the defective character of legal remedies in those days. But later on, after the action of assumpsit had become fully developed, I think it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor. The judgment of HALL, V.C., in *British Mutual Investment Co.* v. *Cobbold* (14) is in accordance with this view. This, however, does not end the matter. When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a court of equity has always assumed jurisdiction to scrutinise his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him. This jurisdiction, which really belonged to the exclusive jurisdiction of the Court of Chancery, had for the client the additional advantage that, as is illustrated by the judgment of LORD HATHERLEY, L.C., in *Burdick* v. *Garrick* (15) the Statute of Limitations would not apply when the person in a confidential relationship had got the property into his hands.

Since the Judicature Act any branch of the court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of JESSEL, M.R., in *Cockburn* v. *Edwards* (16) may, I think, really be regarded as an illustration of the latter jurisdiction. In the case with which we are dealing the statement of claim was framed mainly on the lines of breach of fiduciary duty. This was probably done deliberately in order to endeavour to get over the difficulty occasioned by the Statute of Limitations as regards any mere case of negligence in the original mortgage transaction of 1904. As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would not the less, if proved, have afforded ground for an action for mere negligence.

I think that NEVILLE, J., was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a court of equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence. The judges of the Court of Appeal appear to have taken some such view, with this difference, that they found actual fraud. I think, as I have already said, that it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness. A study of the evidence of the appellant has brought me to the conclusion that NEVILLE, J., was probably right in the conclusion which he reached. I think that the appellant was negligent and rash and regardless of the obligations of his position; I think his evidence utterly untrustworthy; but I cannot agree in holding that NEVILLE, J., has been shown to be wrong in refusing to draw the inference that he intended to cheat. The conclusion at which I have arrived is that this action ought properly to have been

A treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty or for breach of contract to exercise due care and skill. The main head of claim, that relating to the mortgage of 1904, is barred in equity by the acquiescence of the plaintiff, and at law by the Statute of Limitations. The second head of claim, which is quite sufficiently stated in the pleadings, is not so barred. I am of B opinion that Lord Ashburton was entitled to succeed on this second claim. The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did. The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only, and is not one which it is necessary to decide. C I am not sure that such an order would have been more merciful to Mr. Nocton than the order for an inquiry as to damages which was actually made. At all events, Mr. Nocton's advisers did not at any time object and ask for the other alternative, and it is too late to ask for it now. There was before us a cross-appeal by the respondent from the decision against him that could not now complain of the transaction in 1904 relative to his mortgage for £65,000. I think that, on the D ground assigned by the Court of Appeal, that claim fails. For the reasons which I have given, and, having regard to the unsatisfactory way in which Mr. Nocton gave his evidence, I think that no injustice has been done by any part of the order under review, and I move that this appeal and the cross-appeal be each dismissed with costs. **LORD ATKINSON** requests me to say that he concurs in this judgment.

E **LORD DUNEDIN.**—This action as originally brought by the respondent, Lord Ashburton, against his quondam solicitor, the appellant, asked for relief in respect of a sum of £65,000 which he had on his advice advanced on mortgage over certain property in Church Street, Kensington. This property, which consisted of land available for building, has been acquired by the appellant from the then owners as a joint speculation on behalf of himself and the Hon. C. Baring, the brother of F the respondent, for a sum of £60,000. The purchase money had been obtained by means of a temporary advance from Parr's Bank. The co-adventurers had then made a sub-sale to the firm of Messrs. Douglas and Holloway, builders, at the price of £80,000. The sub-sale, however, was only valid if certain conditions were fulfilled, the ones material to mention being (i) that the purchaser should be able to obtain a loan of £65,000 on the property; (ii) that they should obtain a loan of G £15,000 from the vendors on mortgage postponed to the £65,000; and (iii) that they should obtain another loan, again postponed, of £47,000. The scheme was that on these sums being advanced the land should be covered by blocks of residential buildings, which should then be let at a ground rent, and the sale of the ground rents would realise sums sufficient to pay off the series of mortgages. It is evident that on the success of the whole scheme depended the chance of the appel- H lant securing his half share of £20,000 profit made by the sale to Douglas and Holloway. The appellant accordingly approached his client, Lord Ashburton, to lend the £65,000 on mortgage on the Church Street property, which he did. Out of the money so received the temporary advance to Parr's Bank was paid off. It should here be explained that as Lord Ashburton had not at the moment £65,000 available, the form which the transaction took was this. He borrowed £75,000 from I the Economic Assurance Co., and as security therefor gave the mortgage aforesaid of £65,000, and also a mortgage over other property of his own, which was valued on behalf of the Economic at £52,400. The ground on which relief was sought was that the appellant had fraudulently induced the respondent to lend the £65,000 by misrepresentations as to the true value of the security. NEVILLE, J., by whom the action was tried, found that the respondent had failed to prove fraud. The Court of Appeal on this main question found that it was unnecessary to consider whether this was right or not. They found that in any case a subsequent communication had been made to Lord Ashburton by the partners of Nocton, with

whom he had come to have differences, which communication either disclosed the whole true state of the facts, or at least put Lord Ashburton on his inquiry, that Lord Ashburton refused to take any steps, and that since that communication the years prescribed by the Statute of Limitations expired before action was brought, and consequently the action was barred. A cross-appeal was taken by Lord Ashburton against this judgment, but was abandoned at your Lordships' Bar. The main question in the action as raised is, therefore, out of the case.

There was, however, a second point in respect of which relief was sought, which necessitates a continuance of the story. The various sums of money above mentioned were all raised, and Douglas and Holloway proceeded to build by means of a sub-contract with a Mr. Johnson, a practical builder. There were to be six blocks of buildings, numbered A to F. Block A was practically completed, and was let at a ground rent of £1,300 per annum; block B was very nearly completed; the others had not been begun when Douglas and Holloway, and Johnson, ran short of money. In the state of the title above mentioned it was obviously impossible to raise any more money by postponed mortgages. It, therefore, occurred to Nocton that the best way to get more money would be, if possible, to get the mortgagees of the £65,000 to release block A from their security. Block A being covered with buildings, and let at a ground rent of £1,300 per annum, would then be an efficient source of credit. As already stated, the legal holder of the £65,000 was the Economic Assurance Co. But the person really most affected by the transaction would be Lord Ashburton, because he had become personally liable to the Economic for £75,000, and had given £52,000 worth of other property in mortgage. Nocton approached the Economic before he approached Lord Ashburton. He did so by a letter of Nov. 16, 1905, in which he set out the state of matters, and proposed that the society should release block A. The letter contained the following sentence:

> "We have no doubt that Lord Ashburton will agree to the proposals, but before communicating with him upon the subject we desire to know whether your society will agree to them."

The society replied that any agreement on their part must be subject to their receiving a favourable report from their own surveyor, Mr. Vigers, and stipulated that Nocton's clients should pay Vigers' fee. To this Nocton assented, and the society instructed Vigers to report. The result was that on Dec. 4 Nocton received a letter from the secretary of the society in the following terms:

> "I have now received a satisfactory report from Mr. Vigers, and I have to inform you that we consent to the release of block A from our security."

On Dec. 9, 1905, Nocton sent the following letter to Lord Ashburton:

> "Dear Lord Ashburton,—for the purpose of financing the building upon the Church Street, Kensington, site which will be known as 'York House' it is necessary that the first lot of flats which are known as 'block A' should be released from the mortgage. The Economic Life Assurance Society have agreed to release it from their mortgage, and I am now writing to ask you to release it from your mortgage. The necessary deed is being prepared in anticipation of your consent, and will be ready for signature very shortly. The Economic Society sent their surveyor Mr. Robert Vigers to look at the property with a view to testing the security before they consented to release it. This, I think you will agree with me, is very satisfactory.—Yours very faithfully, W. Nocton."

On Jan. 1, 1906, Nocton sent the release to Lord Ashburton, who signed it. It is not denied that the only information given to Lord Ashburton at this time was that contained in the said letter of Dec. 9, 1905.

I pause for a moment before examining what the relief actually claimed was, to consider the facts as they stand at this point. I have no hesitation in saying that the letter of Dec. 9 was grossly misleading. It assumes that the question of

release for the Economic is identical with the question for Lord Ashburton, and it refers to the report of Mr. Vigers in such terms as clearly to convey the idea that Vigers, if employed for Lord Ashburton, would have said that the remanent security after the release of block A was sufficient. Now, Nocton knew perfectly well that the question for the Economic was a prefectly different one from that for Lord Ashburton, because the Economic, so far as their debt was concerned, had the additional security of £52,000 worth of Lord Ashburton's other property. It will not do to say that if Lord Ashburton had remembered each of the individual facts of which he was cognisant at the time of the original transaction more than eighteen months before he could have pieced out for himself the true state of matters. No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction. But besides that Nocton was in a fiduciary position. He was Lord Ashburton's solicitor, advising him as to the very transaction which he was himself proposing, and his position was, so to speak, aggravated by the fact that he himself was interested in the transaction going through, and that in a double sense; first, because the direct effect of the release of block A from the £65,000 mortgage was to raise the position of the £15,000 mortgage held by Nocton and Baring to that of a first mortgage quoad that block; and, secondly, because, as already said, the ultimate success of the whole scheme was essential to the realisation of the £20,000 profit by Nocton and Baring. In such a state of facts, I think it not doubtful that the plaintiff ought to have a remedy, nor in any system in which law and equity were not separated would there, I think, any difficulty arise. I will venture to go further and say that, in my opinion, one of the objects of the legislation of 1873 was to prevent such difficulties arising in the law of England.

Viewing the matter as I must do, as under the rules of the law of England, the question which at once arises is: Was the remedy of the plaintiff at law or in equity, or had he a remedy in both? As I understand the matter, if the action had been brought at law under the old system it could have been based either (i) on fraud, or (ii) on negligence, and the relief in either case would have been damages. But if based on fraud, then, in accordance with the decision in *Derry* v. *Peek* (1) the fraud proved must be actual fraud, a mens rea, an intention to deceive. It is an action of deceit. It is the case that the plaintiff here did aver fraud—he said that the things done and omitted to be done by the defendant in the part which he took in advising the release were fraudulently done and omitted to be done. Neville, J., held that the mens rea had not been proved, and, fraud being in the forefront of the pleadings, he held himself not entitled to treat the action as one for negligence. Further, fraud in the sense of mens rea not being proved, he held that the doctrine of *Derry* v. *Peek* (1) was as fully applicable to relief in equity as it was to relief at law. The Court of Appeal held that the behaviour of the appellant in this matter of the release was fraudulent, and granted relief in the shape of damages accordingly. They found on the facts that there was negligence, but assumed that, fraud being in the forefront of the pleadings, mere negligence could not be inquired into. In the words of the Master of the Rolls:

> "It would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based upon negligence."

Holding fraud proved, it became unnecessary for them to consider whether there was in default of law any equitable remedy to meet the situation.

Turning now to equity, here again, as I understand the situation, there was a concurrent jurisdiction in equity to keep persons in a fiduciary capacity up to their duty. The matter has been exhaustively dealt with by the Lord Chancellor, and I do not propose to examine the cases. I will only make a few remarks. In the first place, it will be found that the word "fraud" in the older cases in Chancery is often used where the thing so characterised is a wrongful breach of

duty, without a consideration of whether there is such a mens rea as would found an action for deceit. In the second place all the cases are based upon the existence of a fiduciary relationship, and subsequently the breach of duty arising. Now, whenever we come to the idea of breach of duty we see how nearly the domains of law and equity approach, or, perhaps, more strictly speaking, overlap. Take the word negligence—the culpa of the Roman jurists. There can be no negligence unless there is a duty. That duty may arise in many ways. There are certain duties which all owe to the world at large, alterum non lædere is one. So the man who leaves a loaded gun in a public place is liable for the accident ensuing, though it is not he that pulls the trigger. The common law gives a remedy. Then there are the duties which arise from contract, of which the solicitor's position gives an example—spondet peritiam artis—he contracts to be professionally qualified and to be careful. Here again the common law will give an action for negligence. And then there are the duties which arise from a relationship without the intervention of contract in the ordinary sense of the term, such as the duties of a trustee to his cestui que trust or a guardian to his ward. It is in these latter class of cases that equity has been peculiarly dominant, not, I take it, from any scientific distinction between the classes of duty existing and the breaches thereof, but simply because in certain cases where common justice demanded a remedy the common law had none forthcoming, and the common law (though there is no harder lesson for the stranger jurist to learn) began with the remedy and ended with the right.

If, then, we turn to the solicitor's position we may look at it in two aspects, which is not to look at two different things, but to look at the same thing from two different points of view. He has contracted to be diligent: he is negligent. Law will give a remedy. It may well be that if a bill had been filed with a bold statement to the effect above, there might have been a demurrer for want of equity. He has not contracted that all representations made by him, if not negligently made, shall be true; and consequently, fraud apart, he cannot, on the law of *Derry* v. *Peek* (1) be answerable at law for his representation. But from the other point of view he has put himself in a fiduciary position, and that fiduciary position imposes on him the duty of making a full and not a misleading disclosure of facts known to him when advising his client. He fails to do so. Equity will give a remedy to the client. This it does quite apart from the doctrine of *Derry* v. *Peek* (1), for in that case there was no fiduciary relationship, and the action had to be based on the representation alone.

Returning now to the pleadings in the present case, the case as originally launched, seeking for relief as to the £65,000, was undoubtedly based on fraud. That fact tinged the form of the pleadings. That part of the case is gone; but the Court of Appeal thought that it dominated the pleadings as to the relief in respect of the release of block A. It was held in *Archbold* v. *Charitable Bequests for Ireland Comrs.* (17), *Thom* v. *Bigland* (18), and *Swinfen* v. *Lord Chelmsford* (19), that if on striking out the allegations of fraud a cause of action still remains, the action may proceed. I should myself have been prepared so to read the statement of claim as to show an averment of negligence even when the averments of fraud are struck out. In that case, as NEVILLE, J., says: "I think that Mr. Nocton fell far short of his duty which he owed to the plaintiff as solicitor." And as the Court of Appeal held that the action, if based on negligence, was practically undefended, it would have been unnecessary to consider, as the Court of Appeal did, whether the fraud which NEVILLE, J., had held not proved was proved. But apart from that, for the reasons given by the Lord Chancellor, I think there was here a remedy in equity for breach of duty. I agree that the form which that remedy would have taken would not have been damages, but looking to the course which the case has taken, I do not think it incumbent on us to alter the remedy to another which would practically come to much the same. I, accordingly, agree with the motion made by my noble and learned friend.

LORD SHAW.—I agree with the conclusion reached by the Lord Chancellor and to the judgment proposed. It would have been satisfactory to my mind to have had the judgment of the Court of Appeal upon the merits of the question now being determined by this House. Owing to the view taken by that court, however, upon the question of fraud it became unnecessary for their Lordships to deal with the case on any other footing. Fraud was negatived by NEVILLE, J., and the Court of Appeal has affirmed it. I humbly agree with NEVILLE, J., and with your Lordships that fraud was not established against the appellant.

I am of opinion that the facts as they appear from the evidence stand thus. The appellant and the respondent were both experienced and sanguine speculators in land. Lord Ashburton was as astute as the other. I still retain some doubt whether, if his co-speculator and solicitor, the appellant, had put all the then available facts correctly before him, he, the respondent, would not have taken the risk of going on with the speculation on the terms proposed. But I admit that this is in the realm of conjecture, and I am willing to assent to the view of your Lordships that the likelihood is the other way. As, however, to the conduct of Mr. Nocton, his cardinal error is intelligible. He allowed the idea of his relations to Lord Ashburton as co-speculator to obscure the view which he ought steadily to have kept before him of Lord Ashburton as his client. The appellant was interested to the extent of a moiety of a mortgage of £15,000 over the properties. For my own part, I do not believe that it ever occurred to him, in proposing the release of block A, one of the mortgaged properties, that the effect of that transaction would be to give the £15,000 a position of priority which it would not otherwise have obtained. I think further that upon the point of valuation Mr. Nocton was himself quite assured in his own mind that the valuation obtained from Messrs. Hamnett was sufficient and might be treated as equivalent to a separate valuation made up to date and for mortgagee's purpose. There are many other elements in the case which suggest to me that he did not intend on any occasion to defraud his client, but that most of his conduct now called in question arose from the fact that he was, with regard to these properties and at the time of these transactions, in a confused, somewhat hustled, and very anxious state of mind.

I now turn to the pleadings. They do appear to me to contain averment sufficiently clear of the following facts—that block A was the most valuable part of the respondent's security when the same was released; that the remainder was insufficient as a security for the existing mortgage of £65,000; that the respondent was approached by the appellant in order to have block A released from his security; and I also read the averment as if none of the motive or inducement or suggestion of the transaction ever came from the respondent to the appellant, but on the contrary proceeded from the appellant to the respondent. The pleadings still further aver that the appellant advised the respondent that he would still have sufficient security and that a valuation or valuations showed this, whereas in point in fact this was not so. It is finally alleged that the respondent, in executing the release, had no independent advice, that he acted solely upon that proffered to him by the appellant, and that the appellant was himself interested in the property and in the obtaining of the release in the sense already mentioned. Stating the averments thus, they appear to me to lay the basis of, and to give due notice of, a claim for liability upon a ground quite independent of fraud, namely, of misrepresentations and mis-statements made by a person entrusted with a duty to another, and in failure of that duty. I have stated what is found in the pleadings, purposely deleting from them the allegations of fraud which they contain. I think that with those allegations of fraud deleted there was quite sufficient left in the pleadings for the determination of the case as is now being done by this House.

I incline to the view that prior to the passing of the Supreme Court of Judicature Act, 1873, this is a course which would have been taken in a court of equity. In *Hickson* v. *Lombard* (20), L.R. 1 H.L. at p. 331, LORD CHELMSFORD, L.C., refers with approval to

"the principle explained by LORD COTTENHAM in *Archbold* v. *Charitable Bequests for Ireland Comrs.* (17), that where a bill alleges matters of fraud and all the subsequent considerations depend on those matters, which are not proved, the court must necessarily dismiss the bill, 'but if fraud be imputed and other matters alleged which will give the court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as under the circumstances the plaintiff may be entitled to.' "

There is indeed in the present case a good deal to remind one of the observation of POLLOCK, C.B., in *Swinjen* v. *Lord Chelmsford* (19) (5 H. & N. at p. 920):

"If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved, and we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences whether done wilfully or not."

I need not pursue the later cases giving effect to the same view, but approaching the whole case as I do from an independent standpoint, I should have learned with surprise that, especially since the passing of the Supreme Court of Judicature Act, 1873, this salutary rule of practice had been departed from, and I am relieved to think that the difficulty on the pleadings to which I have referred which influenced the judgment of NEVILLE, J., does not seem serious to your Lordships.

Addressing myself to the merits of the case, I approach it in this respect differing to some extent from the line along which some of your Lordships have advanced—by suggesting that the first consideration in these cases ought always to be: What was the relation in which the parties stood to each other at the time of the transaction in respect of which the claim for damages, compensation, or restitution is made? In the answer to that question, in my judgment, may be found a solution of not a few of the difficulties which arise in such actions. LINDLEY, L.J., in *Low* v. *Bouverie* (7), compendiously indicated the lines on which liability might be founded as fraud, breach of duty, warranty and estoppel. With regard to fraud, I do not believe that it occurred in this case; the action is not founded on warranty; and in the view which I take of it the safer and less complicated method of viewing this case is not as one of estoppel but as one of alleged breach of duty. I, accordingly, repeat the question as to what were the relations of the parties here. Mr. Nocton was a solicitor; Lord Ashburton was his client. Mr. Nocton became responsible for statements that there had been a valuation and that there was sufficient margin in the remainder of the property to secure the existing debt, and that the release was accordingly a safe and sound transaction. He was also, as a matter of fact, personally interested, and he profited as a co-speculator by the transaction of release; and I am of opinion that the duty of Mr. Nocton was, in view of this fact, to decline to act professionally or as the adviser of his client and to insist that a separate solicitor should be obtained: *Bank of Montreal* v. *Stuart* (21). But in the whole circumstances mentioned every step taken by the solicitor which subsequent disclosures show to have been out of accord with fact became for him a step of danger, a danger of liability if through the erroneous step the client is misled and the loss accrues.

Once the relation of parties has been so placed, it becomes manifest that liability upon the part of an adviser upon whom rests the duty of doing things or making statements by which the other is guided or upon which that other justly relies, can and does arise irrespective of whether the information and advice given have been tendered innocently or with a fraudulent intent. I am well aware of the fact that *Derry* v. *Peek* (1) is in some quarters thought to have introduced a far-reaching change into the law. But if the question be approached from the

point of view which I have stated—namely, of first ascertaining the relations which the parties bore to each other, then much assistance may be derived on the point—which is a vital point—as to what are the conditions and restrictions under and within which the supposed new rule of *Derry* v. *Peek* (1) can be held to operate. Does, in short, *Derry* v. *Peek* (1) cover the ground? I do not go further for this caution than *Derry* v. *Peek* (1) itself. In the previous history of the law, as, for instance, in *Burrowes* v. *Lock* (8), and in certain expressions in *Brownlie* v. *Campbell* (6), the principle had been over and over again enunciated, but in *Derry* v. *Peek* (1) LORD HERSCHELL gathers them together in these expressions (14 App. Cas. at p. 360):

> "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance which he has given. *Burrowes* v. *Lock* (8) may be cited as an example, where a trustee had been asked by an intended lender upon the security of a trust fund whether notice of any prior incumbrances upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action."

The fact that the principle here set out was not held to cover the case of a company director holding out representations to the investing public—this fact, no doubt, led to the acceptance of *Derry* v. *Peek* (1) in certain quarters under protest. When LORD HERSCHELL said (14 App. Cas. at p. 376):

> "I think those who put before the public a prospectus to induce them to embark their money into a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea,"

he may have seemed to be giving an apt illustration of the general rule of liability to make good an assurance given. But it appeared it was not so; the decision was the other way, and this position was only changed by Parliament in the Directors Liability Act, 1890. And it should not be forgotten that *Derry* v. *Peek* (1) was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that this being so what was decided was that fraud must ex necessitate contain the element of actual moral delinquency. Certain expressions by learned lords may seem to have made incursions into the region of negligence, but *Derry* v. *Peek* (1) as a decision was directed to the single and specific point just set out. But, although the principle was not applied to the position of directors, the principle itself was not abandoned, but was, as has been mentioned, distinctly enunciated.

With regard to dicta subsequent to *Derry* v. *Peek* (1) and bearing upon that case, I venture to repeat the observation of LORD BOWEN in *Lowe* v. *Bouverie* (7). He said that *Derry* v. *Peek* (1)

> "decides . . . that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful, not to give information except after careful inquiry. In *Derry* v. *Peek* (1) the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that if the duty is assumed to exist there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty such as the law recognises to be careful."

There is a passage, my Lords, in an argument used by SIR ROUNDELL PALMER in *Peek* v. *Gurney* (22) (L.Rep. 13 Eq. at p. 97) which may well afford guidance as to the antecedent state of the law of equity.

> "Equity will interfere only in the following cases: First, wherever a contract is to be rescinded; secondly, where fraud in the proper sense of the word is to be redressed; thirdly, where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In the last case the representation in equity is equivalent to a contract and very nearly coincides with the warranty at law, and in order that a person may avail himself of relief founded on it he must show that there was such approximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other."

These principles still remain.

I purposely avoid the term "estoppel," but the principle to be found running through this branch of the law is, in my opinion, this. Once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given, not fraudulently, but in good faith. It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I, accordingly, think that the situation is plainly open for the application of the principle of liability to which I have referred—namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled.

LORD PARMOOR stated the facts and continued: The question of fraud cannot be determined apart from the oral evidence, and I am not prepared to differ from NEVILLE, J., who negatived the charge after hearing at length the evidence of both the appellant and the respondent, stating that, in his opinion, the evidence had fallen far short of proof of such a charge. The question remains to be considered whether, in the absence of mens rea, the appellant is liable to the respondent. It is practically admitted that the appellant, in advising the respondent, did not use the skill and care required of a solicitor, and that in the transaction which resulted in the release of block A from the mortgage he committed a breach of duty rendering him liable in negligence, quite apart from fraudulent intention. NEVILLE, J., stated his opinion that the appellant fell far short of the duty which he owed to the respondent as a solicitor, and the Master of the Rolls says that, if the respondent had claimed damages on the ground of negligence, the action would have been practically undefended as to the part of the case not barred by statutory limitation. NEVILLE, J., held, however, after careful consideration of the statement of claim, that fraud had been definitely alleged in connection with the whole story, and that he would not be acting with justice if he were to divide the case, and treat part of the action as severable from the rest, and consider whether, on the grounds other than the alleged ground of fraud, he should be right in giving relief against the appellant. The same view was expressed in the Court of Appeal, but it was less material, since the Court of Appeal found fraud against the appellant. It is necessary to note that the pleadings could not be amended so as to charge negligence, if amendment was necessary, since at the date of the suggested amendment such a charge would be statute barred. The question, therefore, arises in a simple form whether the pleadings raise sufficiently a charge of negligence. Turning first to the claim, it deals with the whole transaction, and not separately with the release of block A, and asks for a declaration

A that the respondent was improperly advised and instructed by the appellant while acting as his confidential solicitor to advance to Douglas and Holloway the sum of £65,000 upon the security mentioned. No doubt, it does directly allege fraud in connection with the release of block A, but if all the allegations directly imputing fraud are excluded, sufficient remains on which to furnish a charge of negligence or breach of duty of the appellant in his employment as a solicitor. It does not B appear to me that there would be any injustice to the appellant in dealing with the action as one of negligence or breach of duty. The same evidence would have been required whether the action had been founded on negligence or fraud, and the defence would have been conducted in either case on the same lines. In my opinion, the judgment of the Court of Appeal should be affirmed, without costs, but the appellant is absolved from the charge of fraud.

C *Appeal and cross-appeal dismissed.*

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley*, for *Frederick Hall*, Folkestone; *H. S. Knight-Gregson.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

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DIRECTOR OF PUBLIC PROSECUTIONS *v.* CHRISTIE

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Moulton, Lord Parker of Waddington and Lord Reading) February 26, 27, April 7, 1914]

F [Reported [1914] A.C. 545; 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 30 T.L.R. 471; 58 Sol. Jo. 515; 24 Cox, C.C. 249; 10 Cr. App. Rep. 141]

Criminal Law—Evidence—Statement made in presence of accused—Description of alleged offence—Denial of guilt by accused—Identification—Res gestae—Statement made after, but not immediately after, alleged offence.

G At the trial of the respondent on a charge of indecently assaulting a boy aged five years, the mother of the boy stated in evidence that at about 10 a.m. he left her, and that she next saw him about 10.30 a.m. After describing his then condition, she stated that she took him across the fields, and there saw a man with whom she had a conversation, and the respondent was then fetched. She was asked whether the boy said anything in the presence and H hearing of the respondent; she answered in the affirmative, and objection was raised to the admission in evidence of the conversation. Her evidence was then interrupted and the boy was called. He related the story of the assault, and when asked by counsel if he could see the man in court who committed it, he pointed to the respondent. Counsel for the defence did not cross-examine. The evidence of the mother was then resumed, and she was again I asked whether the boy said anything in the respondent's presence. Counsel for the defence again objected, and argued upon the authority of the Court of Criminal Appeal in *R.* v. *Norton* (1) that the evidence was not admissible, inasmuch as the respondent had denied the statement made in his presence. The deputy chairman was aware from the depositions of the nature of the statement and of the respondent's answer to it. The evidence was admitted. The mother then stated that, as she and the boy were going towards the respondent, the boy said: "That is the man, mum." Crooks, a police constable, was standing close to the respondent, and asked: "What man?" The

boy went up close to the respondent and said: "That is the old man, mum." and proceeded to give a description of the acts done by Christie, who replied: "I am innocent." Police Constable Crooks, when called, said that the boy, in answer to the question: "Which is the man?", went up to the respondent, touched him on the sleeve, and said: "That is the man." The police constable asked: "What did he do to you?" and the boy then gave an account of the various acts done by the respondent, who answered: "I am innocent, I have been asleep in the fields since eight o'clock last night." The only cross-examination was to elicit a repetition of the statement: "I am innocent."

Held: (i) the evidence of the boy's mother and of the police officer that the boy said: "That is the man" when he touched the prisoner's sleeve was admissible as being so closely connected with the act of identification as to be part of it; (ii) the evidence of those witnesses regarding the boy's statement when asked what the prisoner had done to him was also admissible although the prisoner denied that it was true, for there was no rule of law that evidence could not be given of an accused person being charged with an offence and of his behaviour when hearing the charge where that behaviour amounted to a denial of his guilt (*R.* v. *Norton* (1), [1910] 2 K.B. 496, criticised and doubted), but the evidential value of the behaviour of the accused where he denied the charge was very small, either for or against him, whereas the effect on the minds of the jury of his being charged to his face with the crime might seriously prejudice the trial, and the judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he suggested to the prosecution that the evidence should not be admitted; (iii) the evidence was not admissible as being part of the res gestae because it was not of something which the boy stated while the offence was being committed or immediately thereafter.

Notes. Applied: *Chantler* v. *Bromley* (1921), 14 B.W.C.C. 14. Considered: *Davies* v. *D.P.P.*, [1954] 1 All E.R. 507. Referred to: *R.* v. *Curnock* (1914), 111 L.T. 816; *Perkins* v. *Jeffery*, post, p. 172; *R.* v. *Smith*, post, p. 262; *R.* v. *Bovy* (1916), 12 Cr. App. Rep. 15; *R.* v. *Feigenbaum*, [1918-19] All E.R.Rep. 489; *R.* v. *Adams* (1922), 17 Cr. App. Rep. 77; *R.* v. *Cole* (1941), 165 L.T. 125; *R.* v. *Keeling*, [1942] 1 All E.R. 507; *R.* v. *Hughes* (1949), 33 Cr. App. Rep. 59; *Harris* v. *D.P.P.*, [1952] 1 All E.R. 1044; *Teper* v. *R.*, [1952] 2 All E.R. 447.

As to evidence of statements made in the presence of the defendant and as part of the res gestae, see 10 HALSBURY'S LAWS (3rd Edn.) 440–442, 475, 476; and for cases see 14 DIGEST (Repl.) 401 et seq.

Cases referred to:

(1) *R.* v. *Norton*, [1910] 2 K.B. 496; 79 L.J.K.B. 756; 102 L.T. 926; 74 J.P. 375; 26 T.L.R. 550; 54 Sol. Jo. 602; 5 Cr. App. Rep. 65, C.C.A.; 14 Digest (Repl.) 447, *4332*.

(2) *R.* v. *Lillyman*, [1896] 2 Q.B. 167; 65 L.J.M.C. 195; 74 L.T. 730; 60 J.P. 536; 44 W.R. 654; 12 T.L.R. 473; 40 Sol. Jo. 584; 18 Cox, C.C. 346, C.C.R.; 14 Digest (Repl.) 453, *4390*.

(3) *R.* v. *Atwood and Robbins* (1788), 1 Leach, 464; 14 Digest (Repl.) 534, *5182*.

(4) *Re Meunier*, [1894] 2 Q.B. 415; 63 L.J.M.C. 198; 71 L.T. 403; 42 W.R. 637; 18 Cox, C.C. 15; 10 R. 400, D.C.; 14 Digest (Repl.) 535, *5193*.

(5) *R.* v. *Stubbs* (1855), Dears. C.C. 555; 25 L.J.M.C. 16; 26 L.T.O.S. 109; 19 J.P. 760; 1 Jur.N.S. 1115; 4 W.R. 85; 7 Cox, C.C. 18, C.C.R.; 14 Digest (Repl.) 535, *5191*.

(6) *R.* v. *Boyes* (1861), 1 B. & S. 311; 30 L.J.Q.B. 301; 5 L.T. 147; 25 J.P. 789; 7 Jur.N.S. 1158; 9 Cox, C.C. 32; 121 E.R. 730; 14 Digest (Repl.) 528, *5126*.

(7) *Thompson* v. *Trevanion* (1693), Holt, K.B. 286; Skin. 402; 90 E.R. 1057, N.P.; 14 Digest (Repl.) 450, *4367*.

(8) *R.* v. *Bedingfield* (1879), 14 Cox, C.C. 341; 14 Digest (Repl.) 451, *4370*.
(9) *R.* v. *Foster* (1834), 6 C. & P. 325; 14 Digest (Repl.) 451, *4368*.
(10) *R.* v. *Lunny* (1854), 6 Cox, C.C. 477; 14 Digest (Repl.) 451, **2835*.
(11) *R.* v. *Wilson, Lewis and Harvard* (1911), 6 Cr. App. Rep. 125, C.C.A.; 14 Digest (Repl.) 539, *5234*.
(12) *R.* v. *Blatherwick* (1911), 6 Cr. App. Rep. 281, C.C.A.; 14 Digest (Repl.) 533, *5179*.
(13) *R.* v. *Welsh* (1862), 3 F. & F. 275; 14 Digest (Repl.) 448, *4353*.
(14) *R.* v. *Smith* (1897), 61 J.P. 120; 18 Cox, C.C. 470; 14 Digest (Repl.) 448, *4354*.
(15) *R.* v. *Thompson*, [1910] 1 K.B. 640; 79 L.J.K.B. 321; 102 L.T. 257; 74 J.P. 176; 26 T.L.R. 252; 22 Cox, C.C. 299; 4 Cr. App. Rep. 45, C.C.A.; 14 Digest (Repl.) 448, *4357*.
(16) *R.* v. *Wainwright* (1875), 13 Cox, C.C. 171; 14 Digest (Repl.) 317, *3047*.
(17) *R.* v. *Pook* (1871), 13 Cox, C.C. 172, n.; 14 Digest (Repl.) 450, *4365*.

Also referred to in argument:

R. v. *Rowland* (1898), 62 J.P. 459; 14 Digest (Repl.) 453, *4391*.
R. v. *Wood* (1877), 14 Cox, C.C. 46; 14 Digest (Repl.) 453, *4389*.
R. v. *Hedges* (1909), 3 Cr. App. Rep. 262, C.C.A.; 15 Digest (Repl.) 1014, *9993*.
R. v. *Osborne* (1842), Car. & M. 622; 14 Digest (Repl.) 453, *4384*.
R. v. *Goddard* (1882), 15 Cox, C.C. 7; 14 Digest (Repl.) 451, *4371*.
R. v. *Nicholas* (1846), 2 Car. & Kir. 246; 2 Cox, C.C. 136; 14 Digest (Repl.) 453, *4392*.

Appeal by the Director of Public Prosecutions from a decision of the Court of Criminal Appeal (SIR RUFUS ISAACS, C.J., DARLING, J., and ATKIN, J.) quashing a conviction of the respondent at the Middlesex Quarter Sessions on a charge of indecently assaulting a boy aged five years.

The Attorney-General (*Sir John Simon, K.C.*), *Branson*, *Comyns Carr*, and *Purchase* for the Director.

Dickens, K.C., and *Bryan* for the respondent.

Their Lordships took time for consideration.

April 1, 1914. **VISCOUNT HALDANE, L.C.**—I concur in the opinions which are about to be expressed by LORD ATKINSON, LORD MOULTON, and LORD READING. The only point upon which I desire to guard myself is as to the admissibility of the statement in question as evidence of identification, for the boy gave evidence at the trial, and if his evidence was required for the identification of the prisoner, that evidence ought, in my opinion, to have been his direct evidence in the witness-box, and not evidence of what he had said elsewhere. On that point I share the doubt which I understand LORD MOULTON will express.

The following opinions were then read.

LORD ATKINSON.—This is an appeal from an order of the Court of Criminal Appeal, dated Oct. 27, 1913, whereby the conviction of the present respondent under s. 62 of the Offences against the Person Act, 1861, [see now Sexual Offences Act, 1956, s. 15 (1) (2)] for indecently assaulting a boy named Frederick Butcher, of about five years of age, was quashed, and a verdict and judgment of acquittal directed to be entered upon the indictment upon which he had been convicted. The accused was then discharged from custody. The Attorney-General stated that there was no intention of re-arresting him, whatever the result of this appeal might be.

The questions of law arising on the appeal are: (i) Whether a certain statement made by this boy Butcher in the presence and hearing of the accused and of a police constable was properly admitted in evidence; and (ii) whether, the child having been permitted under the powers of s. 30 of the Children Act, 1908, [now Children and Young Persons Act, 1933, s. 38] by the deputy chairman of the

Middlesex Quarter Sessions, before whom the case was tried, to give evidence without being sworn, this judge had misdirected the jury by telling them that the statement so made by the boy in the presence of the accused was, within the meaning of that section, material evidence implicating the accused, in corroboration of the boy's testimony given at the trial.

The little boy when examined as a witness proved what had been done to him, and identified the prisoner as the person who had done it, but was not asked any questions, and did not give any evidence, in reference to any previous identification of the accused by him, nor refer to any statement previously made by him in the presence of the accused. He was not cross-examined upon his evidence of identification given at the trial. The boy's mother, Mrs. Charlotte Butcher, and Constable William Crooks were examined. The latter proved that he was stationed at Edmonton, and that, having received certain information, he went to a field off Winchester Road, saw a number of people, including the prisoner, Mrs. Butcher, and her son standing there; that she made a complaint to him (the constable) that a man had assaulted her son, that he then asked the boy which was the man, whereupon the boy went up to the accused, touched him upon the sleeve of his coat, and said: "That is the man"; that he (the constable) then asked the boy: "What did he do to you?" In reply to which question the boy made a statement giving full particulars of the offence charged. The Attorney-General contended that the entire statement of the boy was admissible on each of four separate grounds: (i) As part of the act, of identification, or as explanatory of it. (ii) As a statement made in the presence of the prisoner in circumstances calling for some denial or explanation from him, the truth of which he admitted by his conduct and demeanour. (iii) As proof of the consistency of the boy's conduct before he was examined with the testimony given by him at the trial. (iv) As part of the res gestæ. Your Lordships intimated during the course of the argument that you would not consider this third point. It is, therefore, unnecessary to allude to it further. Of course, it will suffice for the Attorney-General's purpose if the statement be admissible on any of these grounds. It is, I think, clear that the principle laid down in *R.* v. *Lillyman* (2), and in those cases which followed, has no application to the present case. In these cases it was decided that in rape and other sexual crimes committed against women, the statement of the prosecutrix made in the absence of the accused in the form of a complaint, immediately or soon after the commission of the offence, is admissible in evidence, even though the full details of the crime be stated. In *R.* v. *Lillyman* (2) consent was immaterial on the charge in the first count of the indictment, upon which alone the prisoner was convicted, though it was material on some of the other counts. It is admitted that such a statement is no evidence against the accused of the facts stated. There is some conflict between the authorities as to the particular grounds upon which such statements are admitted, but I think the general result of the cases is that the complaint is only admissible to negative consent. It is to be remembered that statements admitted under heads (i) and (iv) are not, as against the accused, affirmative evidence of the facts stated, but only of the knowledge of, or the belief in, those facts by the person who makes the statement, or of his intention in respect of them. They must, of course, in order to be admissible, be relevant to the issue, the guilt of the accused of the offence charged against him.

As to the first point, it cannot, I think, be open to doubt that, if the boy had said nothing more, as he touched the sleeve of the coat of the accused, than: "That is the man," the statement was so closely connected with the act which it accompanied, expressing, indeed, as it did, in words little if anything more than would have been implied by the gesture simpliciter, that it should have been admitted as part of the very act of identification itself. It is on the admissibility of the further statement made in answer to the question of the constable that the controversy arises. On the whole, I am of opinion that this statement only amplifies what is implied by the words "That is the man," plus the act of touching him. A charge had been made against the accused of the offence committed on

A the boy. The words "that is the man" must mean "that is the man who has done to me the thing of which he is accused." To give the details of the charge is merely to expand and express in words what is implied in the act of identification. I think, therefore, that the entire statement was admissible on these grounds, even although the boy was not asked at the trial anything about the former identification.

As to the second ground, the rule of law undoubtedly is that a statement made B in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the C case to determine whether his words, action, conduct, or demeanour at the time when a statement is made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknow- D ledgment may be inferred by them. Of course, if at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, he can instruct the jury to disregard the statement entirely. It is said that, despite this direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, E could not or would not rid their mind of it. It is, therefore, in the application of the rule that the difficulty arises. The question then is this: Is it to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it his own in whole or in part, F or is it to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance, leaving it to the presiding judge, in case no such evidence as the above mentioned should be ultimately produced, to tell the jury to disregard the statement altogether? In my view the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice. The course suggested by G Pickford, J., in *R.* v. *Norton* (1) ([1910] 2 K.B. at p. 500), where workable, would be quite unobjectionable in itself as a rule of practice, and equally effective for the protection of the accused. The course pursued when accomplices are examined as witnesses is very analogous to that suggested. It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid: *R.* v. *Atwood and Robbins* (3); *Re Meunier* (4); H but it is a general rule of practice that judges should advise juries not to convict on the evidence of an accomplice unless it be corroborated, and this is a matter entirely for the discretion of the judge before whom a case is tried: *R.* v. *Stubbs* (5); *R.* v. *Boyes* (6). Again, if two persons are jointly indicted and tried together, the statements made by each are generally only evidence against him who makes them. Under certain circumstances they may be evidence against both, but if I they be only evidence against him who makes them, injustice to the other accused is guarded against by the presiding judge telling the jury that this is so. There is no sufficient reason, I think, to suppose that injustice to the accused could not be effectually guarded against by the judge instructing the jury that they should discard from their minds a statement not found to have been accepted by the accused as his own.

The boy's statement was so separated by time and circumstance from the actual commission of the crime that it was not, I think, admissible as part of the res gestæ. In *Thompson* v. *Trevanion* (7), tried before Holt, C.J., sitting at nisi

prius, it was held that what a woman said immediately on a hurt being received by her and before she had time to contrive anything for her own advantage, might be given in evidence. The rule is here stated to rest on the absence of time or opportunity for concoction. In *R.* v. *Bedingfield* (8) a woman rushed out of a room with her throat cut almost through, made a statement to some women she met, and expired in a very short time. Her husband was found in this room with his throat cut also. The question at issue was murder or suicide. COCKBURN, C.J., said the woman's statement was not admissible,

> "for it was not part of anything done or something said while something was being done, but something said after something done. It is not as it, while being in the room and while the act was being done, she had said something which was heard."

In other cases, such as *R.* v. *Foster* (9) and *R.* v. *Lunny* (10), the rule was applied with less strictness. I have found no authority, however, which would justify the admission of any part of the boy's statement as part of the res gestæ.

Even, however, if the boy's statement was admissible in evidence if properly dealt with, I think the verdict should be quashed. The deputy chairman never explained properly to the jury that it is what the accused accepts as his own of the statement made in his presence that is evidence against him, not the statement itself. Again, he treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of s. 30 of the Children Act, 1908. This is, of course, wholly erroneous. If the boy himself had been examined, either in chief or on cross-examination, and had detailed what took place at the identification, this portion of his evidence could not be treated as corroboration of the other portion proving the charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more "material corroborative evidence in support of his evidence at the trial implicating the accused" than his would be. The appeal, so far as it is directed to reverse the decision appealed from, should, I think, be dismissed, although the Crown have succeeded on the point as to the admissibility in evidence of the statement. I have been requested by my noble and learned friend **LORD PARKER** to express his concurrence in this judgment.

LORD MOULTON.—The evidence admitted in this case, the admissibility of which is the question raised by the appeal, consists of the statements of more than one witness as to one and the same event—namely, that which passed on the occasion when the little boy on whom the assault is alleged to have been committed came into the presence of the prisoner almost immediately after that assault is alleged to have taken place. For the purpose of considering the point it will suffice to take the evidence of one of these witnesses, inasmuch as the same point is involved in each case. I will, therefore, select the evidence given by the boy's mother. She says that she took the boy back to the field where the prisoner was standing and that he said in the prisoner's presence, pointing him out: "That is the man." The constable then asked, "Which man?" and the boy went up and touched the prisoner and said: "That is the old man who did so and so" (giving particulars of the assault). The prisoner said: "I am innocent."

The admission of this evidence has been defended on three grounds: (i) That it was evidence of identification of the prisoner by the boy; (ii) that it was a statement made in the presence of the prisoner coupled with evidence of his behaviour on hearing the statement; and (iii) that it was relevant to the issue of "consistent complaint," and, therefore, admissible in the case of an offence such as an indecent assault committed on a small child. I do not propose to deal with the third ground because it is not necessary to do so for the purpose of deciding this appeal, and it raises very difficult questions which would be better decided in some case where the admission of the evidence turns directly on the point. I

A shall, therefore, confine myself to the first and second of the above grounds. They do not depend in any way on the youth of the person making the statement, and the issue is, therefore, free from the complications which might arise from the fact that he was a child of tender years.

Speaking for myself, I have great difficulty in seeing how this evidence is admissible on the ground that it is part of the evidence of identification. To B prove identification of the prisoner by a person, who is, I shall assume, an adult, it is necessary to call that person as a witness. Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called C as a witness and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would, in my opinion, be to use secondary evidence where primary evidence was obtainable, and this is contrary to the spirit of the English rules of evidence.

There remains the second ground—namely, that it is evidence of a statement made in the presence of the accused, and of his behaviour on that occasion. In a D civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. E The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intima- F tion from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for anyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure. It is alleged on the part of the respondent that an instance G of this is the case of the accused being charged with the crime and denying it or not admitting it. It is common ground that, if on such an occasion he admits it, evidence can be given of the admission and of what passed on the occasion when it was made. It seems quite illogical that it should be admissible to prove that the accused was charged with the crime if his answer thereto was an admission, while it is not admissible to prove it when his answer has been a denial of the crime, and H I cannot agree that the admissibility or non-admissibility is decided as a matter of law by any such artificial rule. Going back to first principles as enunciated above, the deciding question is whether the evidence of the whole occurrence is relevant or not. If the prisoner admits the charge, the evidence is obviously relevant. If he denies it, it may or may not be relevant. For instance, if he is charged with a violent assault and denies that he committed it, that fact might I be distinctly relevant if at the trial his defence was that he did, but that it was in self-defence. The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that someone makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be

given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt. This is said to have been laid down as a rule of law in *R.* v. *Norton* (1), and to have been followed by the courts since that decision. If this be so, I think that the decision was wrong, but I am by no means convinced that it was intended in that case to lay down any such rule of law.

But while I am of opinion that there is no such rule of law, I am of opinion that the evidential value of the behaviour of the accused where he denies the charge is very small either for or against him, whereas the effect on the minds of the jury of his being publicly or repeatedly charged to his face with the crime might seriously prejudice the fairness of his trial. In my opinion, therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value. Subject to these words of caution, I am of opinion that this appeal should be allowed on this point, because we have to decide upon the admissibility as a matter of law, and so regarded I have no doubt that the evidence in question was rightly admitted. I think, however, that the direction as to corroboration was wrong, and that, therefore, the conviction should not stand.

LORD READING, C.J.—The Attorney-General submitted that this evidence was admissible, first, because it was part of the act of identification by the boy; secondly, because it was a statement made in the hearing and presence of Christie which had a bearing upon his conduct and demeanour at the time of hearing it; thirdly, because it proved that the boy's conduct after the offence was committed and before he gave evidence was consistent with the statements made by him at the trial; and, fourthly, because it was part of the res gestæ. During the argument your Lordships intimated that it was not convenient on this appeal to consider the third ground, and there was no further discussion upon it.

As to the first ground. No objection was raised by counsel for the respondent to the admission of the first part of the statement, namely, "That is the man." It implied that Christie was the man designated by the boy as the person who had committed the offence, and meant little, if anything, more than the act of touching the sleeve of Christie or pointing to him. The importance is as to the admission of the additional words, describing the various acts done by Christie. These were not necessary to complete the identification or to explain it. There was no dispute that in the presence of his mother and the police constable the boy designated Christie as the man who had committed the offence. According to the constable's evidence, the additional statement was made in answer to his question to the boy: "What did he do to you?" At the trial, and before the statement was admitted, the boy identified Christie in court, and was not cross-examined. The additional statement was not required by the prosecution for the purpose of proving the act of identification by the boy. The statement cannot, in my judgment, be admitted as evidence of the state of the boy's mind when in the act of identifying Christie, as that would amount to allowing another person to give in evidence the boy's state of mind, when he was not asked, and had not said anything about it in his statement to the court. If the prosecution required the evidence as part of the act of identification it should have been given by the boy before the prosecution closed their case. In my judgment, it would be a dangerous extension of the law regulating the admissibility of evidence if your Lordships were to allow proof of statements made, narrating or describing the events constituting the offence, on the ground that they form part of or explain the act of identification, more particularly when such evidence is not necessary to prove the act, and is not given by the person who made the statement. I have found no case in which any such statement has been admitted.

As to the second ground. A statement made in the presence and hearing of the

A parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue. And equally such a statement made in the presence of the accused may be given in evidence against him at his trial. The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regu-
B lating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the crimnal law as almost to have acquired the full force of law. A familiar instance of such a practice is to be found in the direction of judges to juries strongly warning them not to act upon
C the evidence of an accomplice unless it is corroborated: see *R.* v. *Stubbs* (5); *R.* v. *Boyes* (6); *Re Meunier* (4); *R.* v. *Wilson, Lewis and Harvard* (11); *R.* v. *Blatherwick* (12). Such a practice has also long existed in reference to the admissibility in evidence of a statement as that now under consideration: see *R.* v. *Welsh* (13), and *R.* v. *Smith* (14), per Hawkins, J., which the Court of Criminal Appeal refused to follow as a rule of law in *R.* v. *Thompson* (15). Such practice has found its place
D in the administration of the criminal law because judges are aware from their experience that in order to ensure a fair trial for the accused and to prevent the operation of indirect, but not the less serious, prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence.

Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although
E admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it. That there is danger that the accused may be indirectly prejudiced by the admission of such a statement as in this case is manifest, for, however carefully the judge may
F direct the jury, it is often difficult for them to exclude it altogether from their minds as evidence of the facts contained in the statement.

In general, such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or
G did or said something from which the jury could infer such an acknowledgment, for if he acknowledged its truth, he accepted it as his own statement of the facts. If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, the practice of the judges has been to exclude it altogether. In *R.* v. *Norton* (1) Pickford, J.,
H in delivering the judgment of the Court of Criminal Appeal, said ([1910] 2 K.B. at p. 500):

> "If there be no such evidence [of acknowledgment by the accused] then the contents of the statement should be excluded; if there be such evidence, then they should be admitted."

I If it was intended to lay down rules of law to be applied whenever such a statement is tendered for admission, I think the judgment goes too far; they are valuable rules for the guidance of those presiding at trials of criminal cases when considering how the discretion of the court, with regard to the admission of such evidence, should be exercised, but it must not be assumed that the judgment in *R.* v. *Norton* (1) exhausts all the circumstances which may have to be taken into consideration by the court when exercising its judicial discretion. It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in

the particular case, notwithstanding that it did not amount either to an acknowledgment of any part of the truth of the statement. I think it impossible to lay down any general rule to be applied to all such cases, save the principle of strict law to which I have referred. Upon the whole, therefore, I come to the conclusion that the rules formulated in *R.* v. *Norton* (1), and followed in this and other cases, must be restricted in their application as above indicated, and cannot be regarded as strict rules of law regulating the admissibility of such evidence. I think, therefore, that this statement was in law admissible as evidence against Christie.

As to the fourth point. The statement under review formed no part of the incidents constituting the offence. It was not made while the offence was being committed or immediately thereafter. It took place after Christie had left the boy, and the mother had found him and taken him across the fields and had spoken to another man. In my view, it was not so immediately connected with the act of assault as to form part of the res gestæ. In the words of COCKBURN, C.J., in *R.* v. *Bedingfield* (8):

> "It was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard."

This ruling was given at the trial of an indictment for the murder of a woman when it was sought by the prosecution to give in evidence as part of the res gestæ a statement made by the deceased. It appeared that she, with her throat cut, came suddenly out of the house, and pointing backwards to the house, made a statement to two women whom she employed. She had left the prisoner in the house, and his throat was also cut. She succumbed to the injuries within a few minutes after making the statement. COCKBURN, C.J., refused to admit the statement, giving his decision in the words above quoted. Later he said: "It was something stated by her after it was all over, whatever it was, and after the act was completed." See also COCKBURN, C.J., in *R.* v. *Wainwright* (16), and BOVILL, C.J., in *R.* v. *Pook* (17). In *Thompson* v. *Trevanion* (7) HOLT, C.J., held in a civil action that a statement by a woman immediately upon receiving the hurt in question in the action, and, as the report says, "before that she had time to devise or contrive anything for her own advantage, might be given in evidence." The decision rests upon the ground that the statement was made immediately upon receiving the injury. *R.* v. *Foster* (9) is another instance of a statement made immediately after the event. There evidence was admitted of a statement as to the cause of the accident made by the deceased at the instant of receiving the injury. In *R.* v. *Lunny* (10), at a trial for murder, a girl heard a cry and then found the deceased, weak and injured, who made a statement immediately on her coming up to him. MONAHAN, C.J., admitted it as part of the res gestæ. In this case the rule as to admissibility seems not to have been so rigidly enforced, but neither that case nor any of the authorities would support the admission of the statement in the case now before us.

Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction, for other reasons, could not stand, and was properly quashed. The Court of Criminal Appeal acted upon the authority of *R.* v. *Norton* (1) and did not think it necessary to consider any further point in the appeal. By virtue of s. 30 of the Children Act, 1908, Christie could not be convicted unless the boy's testimony was "corroborated by some other material evidence in support thereof implicating the accused." There was no sufficient direction, and there was misdirection to the jury of the requisites of corroboration under this statute. Such direction as was given by the deputy chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable, as corroboration of the boy's evidence implicating the accused. This is manifestly wrong. It was for the deputy chairman to satisfy himself that there was evidence of corroboration fit to be submitted to the jury within the meaning

of the statute, and then to direct them not to convict unless they accepted the evidence of corroboration. He did not give this direction, and, therefore, notwithstanding the view I have expressed about *R.* v. *Norton* (1) and of the admissibility of the boy's statement in this case, I am of opinion that the conviction was rightly quashed, and that the appeal should be dismissed. I have been requested by **LORD DUNEDIN** to say that he concurs in this judgment.

Solicitors: *Director of Public Prosecutions; Avery Son & Fairbairn.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

STICKNEY *v.* KEEBLE AND ANOTHER

HOUSE OF LORDS (Earl Loreburn, Lord Atkinson, Lord Mersey, Lord Parker of Waddington and Lord Parmoor), November 3, 4, 12 and December 11, 1914.]

[Reported [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664]

Sale of Land—Contract—Time of performance—Time of the essence—Right to equitable relief of party in breach of term as to time—Discretion of court—Time made of the essence by notice after delay—Effect of Supreme Court of Judicature Act, 1873 (36 & 37 *Vict.*, c. 66), *s.* 25 (7).

The date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief against a breach of that term of the contract where a party seeks to make an unfair use of the letter of his contract in this respect. The granting of this relief is discretionary; it will always be refused when to grant it would be essentially unfair. It will be granted where a court of equity, looking, not at the letter but at the substance, of a contract to purchase land, sees that neither by the express stipulation of the contracting parties, the nature of the property, or the circumstances of the case is an intention disclosed that the time limited for completion, or for any step towards completion, is to be strictly adhered to, provided that that can be done without substantial injustice. The vendor's conduct may disentitle him to relief; in order to ascertain whether he is so disentitled his conduct both before and after the date fixed for completion must be considered. The purchaser's conduct is also relevant, for a delay by a vendor without remonstrance from the purchaser is far from having the same effect as a similar delay in spite of such remonstrance. Time may become of the essence of the contract where a vendor has been guilty of unnecessary delay and the purchaser serves him with a notice limiting a reasonable time at the expiration of which he will treat the contract as at an end.

By s. 25(7) of the Supreme Court of Judicature Act, 1873 (18 HALSBURY'S STATUTES (2nd Edn.) 467): "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

Held: in considering whether it will apply this subsection and give relief in an action on a contract the court should take into account all the circumstances proved up to the date of judgment and not merely consider whether at the date of the institution of the action time would in equity have been considered of the essence; the section has no application if it be established that

prior to the Act of 1873 equity would not under the then existing circumstances have granted specific performance to the defendant or restrained the action.

Notes. Section 25 (7) of the Supreme Court of Judicature Act, 1873, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, and has been replaced by s. 41 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 427) which is in slightly different terms.

Applied: *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915), 32 T.L.R. 156. Considered: *Re Sandwell Park Colliery Co., Field* v. *The Co.*, [1928] All E.R.Rep. 651; *Lock* v. *Bell*, [1930] All E.R.Rep. 635; *Harold Wood Brick Co.* v. *Ferris*, [1935] All E.R.Rep. 603; *Charles Rickards, Ltd.* v. *Oppenheim*, [1950] 1 All E.R. 420. Referred: *Re Bayley and Shoesmith's Contract* (1918), 87 L.J.Ch. 626; *Bernard* v. *Williams*, [1928] All E.R.Rep. 698; *Pincott* v. *Moorstons, Ltd.* (1936), 80 Sol. Jo. 207; *Wallington* v. *Townsend*, [1939] 2 All E.R. 225; *James Macara, Ltd.* v. *Barclay*, [1944] 2 All E.R. 589; *Finkielkraut* v. *Monohan*, [1949] 2 All E.R. 234; *Williams* v. *Greatrex*, [1956] 3 All E.R. 705; *Aberfoyle Plantations, Ltd.* v. *Cheng*, [1959] 3 All E.R. 910.

As to stipulations regarding time in contracts generally, see 8 HALSBURY'S LAWS (3rd Edn.) 164–166, and as to contracts for the sale of land, see ibid., vol. 34, pp. 256, 257. For cases see 12 DIGEST (Repl.) 346 et seq., and 40 DIGEST (Repl.) 117–121.

Cases referred to:

(1) *Roberts* v. *Berry* (1853), 3 De G.M. & G. 284; 22 L.J.Ch. 398; 20 L.T.O.S. 215; 43 E.R. 112, L.JJ.; 40 Digest (Repl.) 87, *659*.

(2) *Tilley* v. *Thomas* (1867), 3 Ch. App. 61; 17 L.T. 422; 32 J.P. 180; 16 W.R. 166, L.JJ.; 40 Digest (Repl.) 118, *924*.

(3) *Lennon* v. *Napper* (1802), 2 Sch. & Lef. 682; 40 Digest (Repl.) 143, **626*.

(4) *Noble* v. *Edwardes*, *Edwardes* v. *Noble* (1877), 5 Ch.D. 378; 37 L.T. 7, C.A.; 40 Digest (Repl.) 283, *2354*.

(5) *Wilde* v. *Fort* (1812), 4 Taunt. 334; 128 E.R. 359; 40 Digest 90, *675*.

(6) *Howe* v. *Smith* (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 32 W.R. 802, C.A.; 40 Digest (Repl.) 241, *2027*.

(7) *Lloyd* v. *Collett* (1793), 4 Bro.C.C. 469; 4 Ves. 689, n.; 29 E.R. 992, L.C.; 40 Digest (Repl.) 253, *2123*.

(8) *MacBryde* v. *Weekes* (1856), 22 Beav. 533; 28 L.T.O.S. 135; 2 Jur.N.S. 918; 52 E.R. 1214; 12 Digest (Repl.) 351, *2720*.

Appeal from a decision of the Court of Appeal, reversing a judgment of JOYCE, J., in an action by a purchaser of land to recover his deposit.

The question for decision was whether or not the appellant, who had agreed to purchase a farm from the respondents under an agreement for sale in which the time fixed for completion was Oct. 11, 1911, was justified, in the circumstances, in giving notice on Jan. 30, 1912, to the respondents that, unless the sale was completed on or before Feb. 13, 1912, the appellant would treat the agreement for the sale as abandoned, and would insist on the return of his deposit.

By an agreement in writing dated June 8, 1911, the appellant Alfred Henry Stickney contracted to purchase from the respondents certain freehold lands forming part of the Wawne Estate, near Hull, containing 612 acres for £20,200, of which sum £2,020 should be paid immediately as a deposit and the balance on Oct. 11, 1911. The appellant was a farmer who was giving up his farm and desired to purchase one for occupation in its stead and possession by a certain date was therefore of importance to him, and this was known to the vendors. The estate had been purchased by the respondents Keeble and Jellett for £84,000 as a speculation, and they hoped to pay Major Windham, who sold as tenant for life under the Settled Land Acts, the purchase money by selling the land in plots to different purchasers.

By the agreement the purchase was to be completed by Oct. 11, 1911, and vacant possession given the appellant on April 6, 1912.

A The purchase was not completed on Oct. 11, 1911, and after a considerable amount of correspondence, in which the purchaser complained of the delay and pressed for completion, he gave, on Jan. 30, 1912, a final notice to the respondents that unless the purchase was completed on or before Feb. 13, 1912, he would treat the contract as at an end, and demand the return of his deposit.

The purchase was not completed on the day named, and on Feb. 15 the appel-
B lant issued a writ claiming that he was entitled to treat the contract as at an end, and demanding the return of his deposit with interest and damages.

On Feb. 17 the respondents sold the land to another purchaser.

JOYCE, J., was of opinion that the defendants had been guilty of unreasonable delay, and that in the circumstances the time allowed by the notice of Jan. 30 was not unreasonably short. Accordingly he gave judgment for the plaintiff for the
C return of the deposit.

The Court of Appeal (LORD COZENS-HARDY, M.R., BUCKLEY and HAMILTON, L.JJ.), differing from JOYCE, J., on the facts, reversed his decision on the second point and entered judgment for the defendants.

The plaintiff appealed.

D *P. O. Lawrence*, *K.C.*, and *Percy Wheeler* for the appellant.
Hughes, *K.C.*, *Younger*, *K.C.*, and *W. R. Sheldon* for the respondents.

Their Lordships took time for consideration.

Dec. 11, 1914. The following opinions were read.

E

EARL LOREBURN.—This case turns on the view which the House may take of the facts, though it is also necessary to say something about the law. It is an action by a purchaser of some 612 acres of land against his vendors to recover the deposit, upon the ground that after a long delay he gave notice to complete in a fortnight, and the vendors failed to complete. JOYCE, J., held that he was entitled
F to recover the deposit. This decision was reversed by the Court of Appeal, who thought that the notice did not, in the circumstances, allow sufficient time. I agree with the judgment of JOYCE, J., but in view of the decided opinion expressed by the Court of Appeal feel it my duty to examine the facts.

Mr. Stickney, the purchaser, was a farmer who intended to quit his farm in April, 1912. Accordingly, on June 8, 1911, he contracted to buy from Messrs.
G Keeble and Jellett, the present respondents, these 612 acres. The purchase money was £20,200. The contract named Oct. 11, 1911, as the day for completion. A deposit of 10 per cent. was paid. It was known to the vendors that the purchaser required the land for farming, and April 6, 1912, was the day for giving vacant possession. It is common ground that the purchaser would require to enter before that date for ploughing and other purposes. It was not reasonable that Mr. Stick-
H ney should lay out large sums with a view to taking vacant possession in April, 1912, until he could feel certain that his purchase would be completed in good time. Both sides knew that undue delay would be very injurious to him. It is right to state at the outset that the purchaser, Mr. Stickney, was throughout able and willing to carry out his contract. He could and would have completed on Oct. 11. His solicitor says so, and no witness contradicts him. There is a sugges-
I tion about the source from which he was to borrow money, and which I regard as groundless. No one suggests that he was guilty of any delay or default. All that is said is that in the end his notice to complete did not allow sufficient time.

I now turn to Messrs. Keeble and Jellett, the vendors. These gentlemen were not the legal owners of the land which they contracted to sell. In April, 1911, they had contracted to buy from the tenant for life, Major Windham, a large property called the Wawne estate, with a view to re-sale. Part of it was the 612 acres sold to Mr. Stickney. In all there were twenty-three such re-sales. Messrs. Keeble and Jellett had no conveyance to themselves, and had not approved the title,

or even received an abstract, in June, 1911. The Wawne estate was mortgaged, different mortgages affecting different parts of it, and there were some charges affecting parts of it. Also, there were no effective trustees for the purposes of the Settled Land Acts. All this, no doubt, may be usual enough, and no real difficulty at any time arose in regard to the title. The importance of it is that when Messrs. Keeble and Jellett sold to Mr. Stickney they had a good deal to do before they could get a title themselves. As they had twenty-three sub-sales, which they intended to carry through by direct conveyances from Major Windham, and to complete all on the same day so as to apply the money they received in paying the money which they would owe, it was obvious that a good deal of work had to be got through on their side, and a good deal of coming and going, before everything was well over.

The view I take of the facts in this case may be put in a sentence. Mr. Stickney was anxious to pay his money and take his land, but his vendors delayed him again and again, because they wanted time to carry through their own engagements with Major Windham and with their twenty-three sub-purchasers so as to complete the whole thing, or as much as possible of it, on the same day. That is my view of the facts, and my view of the law is that Mr. Stickney was not bound to accept that as a justification for delay. Delay so caused must be imputed to Messrs. Keeble and Jellett, not to Mr. Stickney, who was not concerned with the other sub-purchasers.

Let me state briefly why I take this view of the facts. The contractual day for completion, Oct. 11, 1911, passed without notice on either side. Between that date and Nov. 14 Mr. Stickney, through his solicitors, complained that there was delay.

Messrs. Keeble and Jellett, through their solicitors, were getting trustees appointed and conveyances prepared. Whether they and the other sub-purchasers and Major Windham's solicitors were leisurely or not I do not know. But on Nov. 14 Mr. Stickney gave his first notice that he would cancel the purchase unless it was completed in three weeks. This, however, was waived. On Dec. 12 it was admitted that so far as Mr. Stickney's purchase was concerned every question of title was settled between him and his vendors. On that day he gave a second notice that he would cancel unless his purchase was completed on or before Jan. 12, 1912. An entire month was thus allowed, but Jan. 12 passed and Messrs. Keeble and Jellett had not settled with Major Windham and their other sub-purchasers. Mr. Stickney again waived his rights under the notice. He was becoming impatient, not without reason, when his own position is considered. On Jan. 16 his solicitors asked Messrs. Keeble and Jellett's solicitors if there were any questions as to title outstanding between them and Major Windham. The answer sent on Jan. 17 stated that only one question was outstanding, relating to the repair of a river bank, and that this could be dealt with after completion. In fact I think it did not affect the lands bought by Mr. Stickney. Another letter was written by Mr. Stickney's solicitors bitterly complaining of delay, without producing any result, and on Jan. 30 they gave the notice which the Court of Appeal held to be unreasonable, that they would cancel unless Messrs. Keeble and Jellett completed on or before Feb. 13. It was their third notice of the kind. This January notice left fourteen days for the vendors to prepare themselves. When I am asked to say that this time was insufficient I must see what had to be done within it. The draft conveyance had to be approved by the mortgagee's solicitors, Messrs. Bull and Bull. It had also to be engrossed and executed by eight persons living in Essex, Kent, Hull, London, Buckinghamshire, Wawne, Andover, and Peterborough. First, take the obtaining of Messrs. Bull and Bull's approval. That ought, so far as Mr. Stickney's draft was concerned, to have been done long before. This draft was received by Messrs. Keeble and Jellett's solicitors and forwarded by them to Major Windham's solicitors on Dec. 21, 1911, with a request to forward it to Messrs. Bull and Bull. This was not done till Jan. 30, and then

A it was forwarded with some of the other draft conveyances to the other sub-purchasers. Messrs. Bull and Bull did not approve it till Feb. 7. On Feb. 8 it was received by Mr. Stickney's solicitors approved. They had it engrossed instantly, and on Feb. 9 it was in the possession of Messrs. Keeble and Jellett's solicitors. Only four days were left before Feb. 13 to obtain the execution of the eight persons living in the places I have named. That was a short time. If it was B too short a time, that was not the fault of Mr. Stickney. It was because others failed to procure the necessary approval in time. Am I to say that what otherwise would have been a reasonable time to get the deed executed by eight persons becomes unreasonable because the vendors or other persons for whom they are responsible have been occupied on other matters for a month or six weeks, and so left more to be done within the time fixed by the notice? If that were accepted, C then the more lax a vendor is, the longer is the time which must be allowed him by the purchaser. With all respect I must decline that view. In my opinion, the fourteen days allowed for the notice were sufficient if Messrs. Bull and Bull's approval had been obtained to this draft in time. I am not prepared to say it was unreasonable under the circumstances, even if time had to be allowed for getting Messrs. Bull and Bull's approval, though it would have been a tight fit. People who are D behind time in the transaction of business must expect such pressure. It was admittedly not a reasonable time to complete all the twenty-three purchases, or even the eighteen or nineteen of them which were, in fact, concluded on Feb. 23. But Mr. Stickney was not bound to await the convenience of his vendors in carrying out their transactions with other people, unless he had either agreed to do so or led his vendors to believe that he would do so by his own statements E or by his own conduct. In the end the respondents' argument resolved itself into a contention that Mr. Stickney had, in fact, led the vendors to believe this, and that they had acted upon this belief. That also is the substance of the judgments delivered in the Court of Appeal, as I read them. I cannot assent to this contention.'

[HIS LORDSHIP examined the evidence and stated his reasons for coming to his F conclusion of fact, and continued:] In regard to the law I shall say very little, because it is fully dealt with in the opinion of LORD PARKER, which I have had the advantage of seeing in print. I will merely observe that the date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief where a party seeks to make an unfair use of the letter of his contract in this respect, having regard to the state of the law G relating to real property in England. The granting of this relief is discretionary. But it is safe to say that this relief will always be refused when to grant it would be essentially unfair. In the view I take of the facts, and this is why I have somewhat closely examined the facts, it would be essentially unfair that in this case the vendors who, either by themselves or by those for whose action they alone are chargeable against the purchaser, have caused great delay in completion, should H be enabled to forfeit the deposit of a purchaser against whom no one has attempted to make good any delay whatever. I have not expressed nor, indeed, formed any opinion on the question whether or not the time taken by the solicitors for the vendors, or the tenant for life, or the mortgagees, or the sub-purchasers other than Mr. Stickney, was too long in the circumstances for what they had to do, I because I do not know what difficulties they may have encountered in carrying through rather a large piece of business. What I am satisfied about is that Mr. Stickney's piece of business was in fact unjustifiably delayed by what occurred, and that he was in no sense bound to wait because others did not or could not make progress. I think this appeal should be allowed.

LORD ATKINSON.—I concur. It is unnecessary to re-state the facts. The respondents' contention is that, time not having been made of the essence of this contract by the express stipulation of the contracting parties, the nature of the

property, or the circumstances of the case, the notice given to them by the appellant on Jan. 31, 1912, is ineffectual to make it so, inasmuch as the time allowed by it to the respondents to do all that remained to be done by them was, under all the circumstances of the case, unreasonably short. The appellant, to the knowledge of the respondents, bought the land for the purpose of working it as a farm. He was to go in full possession and enjoyment of it on April 7, 1912, and I am by no means sure that time was not of the essence of the contract to this extent, at all events, that the purchase should be completed at such a time before that date as would leave an interval reasonably sufficient for the preparations necessary to enable him to so enter upon the land and use it. This point, however, was not fully dealt with in the evidence, and I pass it by.

There is no occult or elusive mystery hidden in the phrase, "in equity time is not of the essence of the contract." It merely expresses in a condensed form the doctrine that where a court of equity, looking, not at the letter but at the substance, of a contract to purchase land, sees that in none of the three ways above mentioned is an intention disclosed that the time limited for completion, or for any step towards completion, is to be strictly adhered to, it will relieve against breaches of the contract through mere lapses of time touching these matters, when that can be done without substantial injustice: *Roberts* v. *Berry* (1). The jurisdiction exercised by a court of equity in this matter is very much akin to that exercised by it in relieving against forfeitures, or in permitting the redemption of mortgages after the estate of the mortgagee has, according to the letter of his contract, become absolute at law. In *Tilley* v. *Thomas* (2) LORD CAIRNS and ROLT, L.J., deal with the doctrine thus. LORD CAIRNS says (3 Ch. App at p. 6):

> "The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a court of law. A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties. And if (as TURNER, L.J., said in *Robert* v. *Berry* (1)) 'there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract."

ROLT, L.J., says (ibid. at p. 69):

> "Now as a matter of construction merely I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than at law. But in equity there may be circumstances which will induce the court to give relief against the breach, and, sometimes, even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The defendant is entitled to say that the contract is at an end, and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law though not necessarily so in equity. The language of LORD REDESDALE in *Lennon* v. *Napper* (3) and cited by KNIGHT BRUCE, L.J., in *Robert* v. *Berry* (1) fully explains my view on this part of the case."

In that case the defendants purchased a house for a residence, possessor (i.e., possession with a good title) had to be delivered to him on a certain day, and it was held that these circumstances showed that it was the intention of the parties that

time should be of the essence of the contract and the bill of the vendor for specific performance was dismissed.

Again, at law if a vendor of land who on the contract being repudiated by the purchaser on the day named for completion, sued for damages for breach of contract, he would have been obliged to aver and prove that he was on that day ready and willing to convey, which involves that he had a good title on that day. If he could not do this, he could not sue, because he could not do that which is a condition precedent to the performance of the contract by the purchaser: see James, L.J., in *Noble* v. *Edwardes* (4), 5 Ch.D. at p. 393. Similarly, if the vendor of an estate should not have a clear title by the day specified, the purchaser may at law rescind the contract and recover back his deposit, without waiting to see whether the vendor may ultimately be able to establish a good title: *Wilde* v. *Fort* (5). Section 25 (7) of the Supreme Court of Judicature Act, 1873 [see now Law of Property Act, 1925, s. 41], has a bearing on this authority and was relied on.

In *Howe* v. *Smith* (6) the purchaser on entering into the contract paid £500 as a deposit and in part payment of the purchase money. The contract contained a condition very similar to condition No. 15 in the present case. The purchaser was guilty of so many delays as to amount to virtual repudiation of his contract. The vendor, on June 20, 1880, warned the purchaser that unless he completed within a month the vendor would sell the property. On July 25 the purchaser instituted a suit for specific performance of the contract. On July 31 the vendor, before he had delivered a defence justifying a rescission of the contract, resold the property to a third person at the original price. The Court of Appeal held that the purchaser was not entitled to a decree for specific performance, but allowed the statement of claim to be amended by adding a claim for a return of the deposit, ultimately, however, the court held that, notwithstanding that the deposit was to be taken in part payment of the contract when completed, it was also a guarantee for the due performance of the contract, and that as the purchaser was in default the resale gave him no rights, and he could not recover back his deposit. Fry, L.J., alone among the learned lords justices dealt with the question whether under s. 25 (7) of the Supreme Court of Judicature Act, 1873, the rule of law, as distinguished from the rule in equity, still prevails (27 Ch.D. at p. 103) and came to the conclusion that the effect of the subsection is that a purchaser seeking damages need no longer prove his readiness and willingness to complete on the day named, but may still recover if he can prove his readiness and willingness to complete within a reasonable time after that day. The same rule would, of course, apply to the case of a vendor suing for damages. If this decision be right, as I am inclined to think it is, the law laid down in *Tilley* v. *Thomas* (2) and in *Noble* v. *Edwardes* (4) is to this extent modified.

I feel myself quite unable to assent to the two propositions following, which, as I understood, were laid down by counsel for the respondents. (i) That no matter how distant the day may be which is fixed for completion by the parties to a contract for the sale and purchase of land—though, indeed, it be measured by years—a vendor who takes no steps to complete within that lengthened period is, in order to make time of the essence of the contract, entitled to notice giving him a reasonable time after its termination to do all he had left undone. (ii) That where no time for completion is fixed in the contract, and the law imports into it a provision that it is to be completed in a reasonable time, this reasonable time is not of the essence of the contract in equity, so that a defaulting vendor may do nothing to complete during its currency and be yet entitled to get a reasonable time after its termination to do all that the law intended he should do while it was running. If I misunderstood him, I apologise. I think the authorities I have cited show that these propositions are untenable.

Counsel for the respondents put his contention, as I understood him, thus. There was, he said, an understanding between the parties, not amounting to a contract because made without consideration, but definite and clear, that the purchaser should procure the purchase money and the contract for sale should be completed

in a certain way, namely, that the appellant would wait for completion until the vendors were ready to complete with their other purchasers for which preparations had been made, and that it was unreasonable and unfair on the part of the appellant to require that that mode of procedure should be abandoned, and the purchase completed in a wholly different way, for which few, if any, preparations had been made, in the short period of fourteen days. I am not quite sure that he did not contend further that if the mode of procedure first contemplated was not followed, the purchaser should in this case be held to have been unable to find the purchase money, and, therefore, unable to complete. JOYCE, J., was of opinion that, if the mode of procedure so alleged to have been understood and assented to by the plaintiff was to be followed, the time given for completion was unreasonably short. The Court of Appeal agreed with him. I myself see no reason to dissent from that view: but the Court of Appeal went further, and, as I understand their judgments, held that the appellant had assented to the contract being carried out in the way alleged to have been arranged, and that it was because he had done so that his notice requiring his own purchase to be completed within fourteen days, irrespective of the completion of all the other contracts of purchase, was unreasonable. It is in this last conclusion I am, with all respect, quite unable to concur. I do not think there is any satisfactory evidence whatever that the appellant ever came to any understanding such as is suggested, amounting either to this, that he would not require his agreement to be completed before the agreements of all the other sub-purchases, twenty to twenty-five in number, were completed, no matter how long that operation might take or to this, that the completion of the appellant's purchase was to be postponed till a reasonable time for the completion of all the other contracts had elapsed.

[HIS LORDSHIP referred to the evidence and concluded:]

On the whole, therefore, I am of opinion that the appellant has not been in any way in default. He has waited for four months to have his contract carried out. During that long period he has been, at once, patient and pressing. There was much delay, but that was not due to him or to anything he did or for which he is responsible. It is due, I think, in the main to this, that the respondents sold, as owners, property that did not belong to them, property that they had, no doubt, agreed to buy, but had not the money to pay for, money which they could only obtain from the sub-purchasers of the estate as their contracts of purchase were completed. It would, in my view, be quite unjust to allow the respondents to retain money deposited as a guarantee for the due performance of the very contract which they themselves, not the depositor, have failed to perform. As in *Howe* v. *Smith* (6) the purchaser who was in default could not get back his deposit because of his default, so here the vendors, who are in default, should not be permitted to retain the deposit since they were in default. I concur with JOYCE, J., in thinking that the fourteen days allowed by the notice of Jan. 30 was quite a reasonable time for the completion of the appellant's own contract, independently of the others, and am of opinion that the decision of that learned judge was right, and should be upheld, that the decision of the Court of Appeal was erroneous and should be reversed, and this appeal allowed with costs, here and below.

LORD MERSEY concurred, saying that he had read the opinions pronounced and about to be pronounced by the other noble and learned Lords who had heard the appeal, and that he entirely agreed with them.

LORD PARKER.—In a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title. In such cases, however, equity having a concurrent jurisdiction did not look upon

the stipulation as to times in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed shall be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract. It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time.

This is an action by a purchaser for return of his deposit and other relief, based upon the failure by the vendor to observe the stipulation as to the date of completion, and it will, I think, tend to simplicity if the matter be first considered irrespective of the changes introduced by the Judicature Acts. Prior to these Acts the vendor could have only obtained relief from the consequences of his failure by filing a bill for specific performance and for an injunction restraining the action. On such a bill he could have obtained no relief unless he were himself able and willing to make a title to the purchaser. It appears, however, that almost immediately after the institution of the action the vendor had put it out of his power to complete the sale by reselling the property to a third party, and under these circumstances there could be no question of specific performance, and, therefore, no injunction restraining the action. It seems to me that on this ground alone the bill must have failed. An injunction, if granted, would not have been incident to, and in aid of, the equitable remedy of specific performance, but a means of enabling the vendor to forfeit the purchaser's deposit—in other words, to exercise a right which, if it existed at all, was a legal right, and this would be contrary to the principles upon which the Court of Chancery has always acted. Counsel for the respondents in effect admitted this, but relied on s. 25 (7) of the Supreme Court of Judicature Act, 1873, which provides:

> "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

They argued that under this section it is only necessary to consider whether, at the date of the institution of the action, time would in equity have been considered of the essence and that the subsequent act of the vendor, whereby he put it out of his power specifically to perform the contract, was immaterial. I cannot give to the section in question the interpretation for which the respondents contend. It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on the breach thereof, the courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law, the Court of Chancery took cognisance of everything which had happened up to the date of the decree, and in applying s. 25 (7) of the Act, everything up to the date of judgment ought, in my opinion, to be similarly taken into account. The

section cannot in my opinion mean that the rules as to time laid down by courts of equity in certain cases, for certain purposes, and under certain circumstances only, shall be applied generally and without inquiry whether the particular case, purpose, or circumstances are such that equity would have applied the rules. If since the Supreme Court of Judicature Acts the court is asked to disregard a stipulation as to time in an action for common law relief and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity.

The above considerations appear to me to be sufficient to dispose of this appeal, but JOYCE, J., decided the case on somewhat different grounds. He came to the conclusion that, irrespective of the resale of the property, equity would not, after the expiration of the notice of Jan. 30., 1912, have decreed specific performance or retained the action at law because of the vendor's delay, and that, therefore, notwithstanding s. 25 (7) of the Supreme Court of Judicature Act, 1873, there was no defence to the action. I agree with every word of JOYCE, J.'s judgment, both in his findings of fact and his statement of the law applicable to the case. As to the law, however, I desire to add a few remarks. Even in cases when the time fixed for completion is not in equity of the essence of the contract, the vendor's conduct may disentitle him to equitable relief, and in order to ascertain whether he is so disentitled, his conduct both before and after the day fixed for completion must be considered. The purchaser's conduct is also relevant, for a delay by the vendor without remonstrance from the purchaser is far from having the same effect as a similar delay in spite of such remonstrance. Thus in *Lloyd* v. *Collett* (7) between Aug. 10, 1792, the date of the contract, and Mar. 24, 1793, the date fixed for completion, the vendor had taken no step to make out his title, though the purchaser had previously applied for the abstract. Shortly after Mar. 25, 1793, the purchaser applied for a return of his deposit with interest, and repeated such application many times before June 10, 1793, when he commenced an action to recover it. It was held that though time would not otherwise have been held of the essence of the contract, the vendor was entitled to specific performance, and, therefore, could not restrain the action at law. Again, although the vendor's conduct may not, under the circumstances, be alone sufficient to disentitle him to specific performance, yet if he has been guilty of unnecessary delay, and the purchaser has served him with a notice limiting a time at the expiration of which he will treat the contract as at an end, equity will not, after the expiration of such time, provided it is a reasonable time, enforce specific performance or restrain an action at law. The time limited by such a notice is sometimes referred to as having become, by virtue of the notice, of the essence of the contract. In considering whether the time so limited is a reasonable time the court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts: *MacBryde* v. *Weekes* (8). Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do. It would be unjust and inequitable to allow the vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by such a notice as that to which I have referred an unreasonable time.

In the present case I am of opinion that the time limited by the purchaser's notice of Jan. 30, 1912, was, under the circumstances, a reasonable time. The purchaser had continually pressed for completion. He had previously served

similar notices which he had waived. It was of the utmost importance to him to complete the purchase as early as possible in order that he might, under the power reserved in the tenancy agreements, enter and cultivate the arable lands comprised in the purchase. And, in spite of all this, though nothing but the approval, engrossment, and execution of the draft conveyance remained to be done, the vendor had for some six weeks delayed to take proper measures to obtain such approval. A great point was made as to the impossibility at the date of the notice of obtaining such approval and getting the approved draft engrossed and executed within the time limited by the notice. JOYCE, J., who has had great experience in conveyancing matters, held that all this could have been done within the time limited, and I respectfully agree with him. When the vendor resold the property to a third party there seems to have been no difficulty in completing the contract within six days, one of which was a Sunday.

I must now refer to the decision of the Court of Appeal, which turned on the facts rather than the law. [HIS LORDSHIP reviewed the evidence.] With the greatest respect I cannot accept the view of the facts taken by the Court of Appeal. Even were I able to do so, I doubt whether the order dismissing the action could have been upheld, specific performance being out of the question. I know of no precedent for restraining an action at law in aid of a forfeiture clause, and I cannot think that s. 25 (7) of the Supreme Court of Judicature Act, 1873, can have been intended to apply equitable principles for any such purpose. The judgment of JOYCE, J., should, in my opinion, be restored, with costs here and below.

LORD PARMOOR.—If a contract for the sale of land is such that specific performance may be decreed in spite of failure to complete at the date named in the contract, time is said not to be of the essence of the contract. It was admitted that the present contract came within this category. The appellant did not claim that the respondents on Oct. 11 had committed default which would have entitled him to claim on that date repayment of the deposit. The question is whether the respondents committed default in the performance of their contract at a later date by failure to comply with the notice of Jan. 30, 1912, and thereby became liable to repay the deposit. The answer to this question depends on whether the respondents had been guilty of delay when the notice was given, and whether the time fixed in the notice for completion was in itself reasonable. JOYCE, J., accepted a passage from SUGDEN ON VENDORS AND PURCHASERS (14th Edn.), p. 268, as correctly expressing the general law:

> "Where time is not made of the essence of a contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay a distinct written notice by the other that he shall consider the contract at an end if it be not completed within a reasonable time to be named would be treated in equity as binding on the party to whom it is given; but a reasonable time must be allowed."

The difficulty is not in the statement of the general law, but in its application by the courts to the facts of any particular case. In the present case it was not known to the appellant at the date of the contract that the respondents had no more than a contract to purchase, and that the documents required to complete the respondents' title as between themselves and the tenant for life, from whom they were purchasing, had not been prepared. If, therefore, the delay of which complaint is made was due, not to the various steps required to complete the purchase of the appellant, but in connection with the purchase by the respondents from their vendors, I should come to the conclusion that such delay was unnecessary and due to a cause outside the contract made with the appellant. I think the correspondence shows that the arrangements to be made between the respon-

dents and the tenant for life from whom they were purchasing did cause the delay, and that but for this factor the purchase could easily have been completed by Jan. 30, 1912. This position is hardly disputed, and the case made was that the appellant subsequently to his contract did become aware of these special circumstances, and that the subsequent steps to complete the purchase were carried out on the understanding that the additional time thereby made necessary would be allowed. On the other hand, it was known to the respondents that it was of great importance to the appellant to complete the purchase on or before Jan. 1, 1912, in order that the appellant might be in a position to enter upon the farm, and to plough, sow, cultivate, manure, and manage all the arable land, as he would be entitled to do as of right under the terms of the existing tenancy when the purchase was completed. The parties must have contemplated that the purchase would be completed not later than Jan. 1, 1912. In the absence of explanation, I think that any delay beyond this date was unreasonable, and that the appellant would be justified in giving the notice of Jan. 30, 1912. What is the explanation given by the respondents? It is that the appellant, after he became aware that his vendor had no complete title, acquiesced that the time for completion should be extended to meet the consequent delay, and to enable the completion of a number of other sub-purchases from the vendor to be carried out at the same time. Counsel for the respondents has said it was not necessary that there should be a contract to this effect or an estoppel, but that it was sufficient to prove an understanding, and that if such an understanding was proved there was no ground to charge delay against the respondents. Whether there was such an understanding must depend on the evidence, but I can find therein no such understanding and certainly neither contract nor estoppel. [His Lordship discussed the evidence and correspondence, and continued:] On the question whether a sufficient time was allowed after the notice of Jan. 30, 1912, for the signing of the documents and for technical details, I am prepared to accept the great authority of Joyce, J., and to agree with his finding that the notice in the circumstances was not unreasonable. In my opinion, the appellant succeeds, and the appeal should be allowed with costs in this House and the Court of Appeal.

Order accordingly.

Solicitors: *Stevenson & Coulduell*, for *Stickney & Barton*, Hull; *Walter Maskell & Nisbet*, for *Cranfield & Wheeler*, St. Ives, Hunts.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

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CHARING CROSS, WEST END, AND CITY ELECTRICITY SUPPLY CO., LTD. *v.* LONDON HYDRAULIC POWER CO.

[Court of Appeal (Lord Sumner, Kennedy, L.J., and Bray, J.), April 2, 3, 1914]

B [Reported [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 30 T.L.R. 441; 58 Sol. Jo. 577; 12 L.G.R. 807]

Nuisance—Rylands *v.* Fletcher *doctrine—Application—Pipes passed through soil by public authorities—Apparatus of one authority damaged by potentially dangerous property of other authority becoming actively mischievous.*

The rule in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, that, if a person C brings on land some dangerous thing which would not naturally come on it and may become mischievous if not kept under proper control, he will be liable for any mischief thereby occasioned, although he has not been guilty of negligence, is not limited to the case of adjacent freeholders, but extends to a case where persons are authorised to pass pipes or other apparatus through the soil and the property of the one is damaged by the potentially dangerous D property of the other becoming actively mischievous.

Where, therefore, the plaintiffs, an electric lighting company, acting under statutory powers, had placed under the surface of certain streets electric cables for the supply of electricity, and the defendants, acting under private Acts which contained a provision that they should not be exempt from liability for any nuisance caused by them, had placed under the same streets mains con- E taining water at a high pressure for the supply of hydraulic power, and the defendants' water mains burst owing to the subsidence of the soil and without any negligence on the part of the defendants, and damaged the plaintiffs' cables,

Held: as the defendants had brought into the road a dangerous thing which had escaped and damaged the plaintiffs' cables, they were liable for the damage, even though they had not been guilty of any negligence.

F *Midwood* v. *Manchester Corpn.* (2), [1905] 2 K.B. 597 and *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, applied.

Decision of Scrutton, J., [1913] 3 K.B. 442, affirmed.

Notes. Distinguished: *Goodbody* v. *Poplar Borough Council* (1914), 84 L.J.K.B. 1230. Considered: *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923. Followed: G *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145. Referred: *A.-G.* v. *Cory*, *Kennard* v. *Cory* (1919), 88 L.J.Ch. 410; *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] All E.R.Rep. 48; *Postmaster-General* v. *Liverpool Corpn.* (1922), 92 L.J.K.B. 382; *West Midlands Joint Electricity Authority* v. *Pitt*, *Minister of Transport* v. *Pitt* (1932), 96 J.P. 159; *Markland* v. *Manchester Corpn.*, [1934] 1 K.B. 566; *Read* v. *Lyons & Co.*, [1946] 2 All E.R. H 471; *Beckett* v. *Newalls Insulation Co.*, [1953] 1 All E.R. 250.

As to the dangerous user of property, see 28 Halsbury's Laws (3rd Edn.) 145-149; and for cases see 36 Digest (Repl.) 282 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; I affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *3634*.

(2) *Midwood* v. *Manchester Corpn.*, [1905] 2 K.B. 597; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348; 54 W.R. 37; 21 T.L.R. 667; 3 L.G.R. 1136, C.A.; 38 Digest (Repl.) 43, *219*.

(3) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 23 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 334, *240*.

(4) *May* v. *Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest (Repl.) 329, *216*.

(5) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L.T. 547; 10 T.L.R. 259, C.A.; 38 Digest (Repl.) 13, *52*.

(6) *Nichols* v. *Marsland* (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, *421*.

Also referred to in argument:

Ellis v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, *158*.

Appeal by defendants from a decision of SCRUTTON, J., reported [1913] 3 K.B. 442, in an action in which the plaintiffs claimed a sum of £717 4s. 1d. for damage caused to their electric mains and other property connected therewith by the escape of water from the defendants' mains.

In their statement of claim the plaintiffs said that they were an electric lighting company supplying electricity in various parts of London under the powers of various Acts of Parliament and Provisional Orders, and were entitled and authorised for the purposes of their business to construct, maintain, and use mains carrying electric cables beneath certain roadways and streets in the city of London, including Water Lane, Great Tower Street, Upper Thames Street, Cannon Street, and Swithin's Lane. The defendants were a company supplying water pressure for the purposes (inter alia) of working lifts in public buildings and private houses, and for the purposes of their business they had constructed, maintained, and used beneath the roadways above-mentioned and in close proximity to the plaintiffs' mains certain mains charged with water at high pressure. Mains of the defendants burst, one on Feb. 4, 1912, situate in Water Lane, one on Feb. 5, situate in Upper Thames Street, one on Feb. 13, situate in Cannon Street, and one on Aug. 27, 1912, situate in St. Swithin's Lane. On each of those occasions the water from the defendants' mains escaped therefrom, causing damage to the plaintiffs' mains, electric cables, and other property, and necessitating the execution of extensive repairs, amounting in all to £717 4s. 1d. The plaintiffs pleaded that the damage sustained by them was the natural consequences of the acts of the defendants in bringing water at high pressure into their mains (which was likely to cause injury in the event of its escaping) and allowing such water to escape therefrom at the places mentioned. Alternatively, they said that, as the mains were the property of and under the control and management of the defendants, and the bursting of such mains was an occurrence which in the ordinary course should not and would not happen if all proper precautions were taken, such burstings were in themselves evidence that the same arose from lack of care on the part of the defendants. In the further alternative, they said that the damage was due to a nuisance caused by the defendants in the carrying on of their business. The plaintiffs claimed £717 4s. 1d. in respect of the damage. By their defence the defendants said that they were a statutory body incorporated and carrying on business under the London Hydraulic Power Co.'s Acts, 1871 to 1903. They said that, if any of their mains burst so that water escaped and damage occurred, in no instance was it the result of any negligence, nuisance, or default on the part of the defendants, but the same occurred in consequence of subsidences or disturbances not caused or made by the defendants in or of the soil of the streets or roadways over which the defendants had no control. Alternatively the defendants said that the alleged burstings and escapes of water in Water Lane, St. Swithin's Lane, and Upper Thames Street (if they occurred) were caused or contributed to by the plaintiffs' own works, which disturbed and impaired the permanent support and safety of the defendants' hydraulic mains in those streets. SCRUTTON, J., held that the defendants were not entitled to rely on the defence that they had laid their mains under statutory authority; that the doctrine of *Rylands* v. *Fletcher* (1) applied as between co-users of the streets as well as to owners of adjoining property; and that, as the defendants had brought into the road a dangerous thing which had escaped and damaged the plaintiffs' cables, the defendants were liable for the

damage, even though they had not been guilty of any negligence. The defendants appealed.

Sankey, K.C., and *F. Gover* for the defendants.
McCall, K.C., and *C. B. Marriott* for the plaintiffs.

LORD SUMNER.—This is an appeal from a decision of SCRUTTON, J., in favour of the plaintiffs' claim in respect of damage to their underground electric cables occasioned by the escape of water from the defendants' underground mains. Both plaintiffs and defendants are companies carrying on undertakings for profit, for the purpose of which they have obtained statutory permission and powers under private Acts of Parliament. The damage complained of was sustained by the cables in four different places in which the mains of the defendants and the cables of the plaintiffs were underneath the surface of the street. They are all cases in which, in substance, the sequence of events leading to the injury was the same. As found by SCRUTTON, J., it is substantially that, the mains having remained in safety underground for a considerable time, in 1912 there were subsidences of the soil through which the mains passed, so that the mains were left unsupported in places, whereupon the weight and pressure of the pipes, and the water within, probably assisted by the vibration of the heavy traffic, caused the mains to burst on four occasions. The effective cause was the subsidence. This was due to the nature of the soil, and the traffic over it. For the purposes of their undertaking the defendants charged their mains with water at very high pressure, because, by the Acts of Parliament which they have obtained, they are incorporated for the purpose of supplying power by hydraulic pressure for cranes and similar uses and are not allowed to supply water for any purposes which would come into competition with the ordinary water supply. Accordingly, they have to keep their mains charged at very high pressure, and as soon as the breaks occurred the water escaped under a very high head. How soon it reached the neighbouring cables, I do not know, but no doubt there would be a complete wash out of the earth, injury to the cables, and a penetration of the insulation by the water under pressure comparatively soon, and with serious results. Negligence was alleged, and was negatived by the learned judge.

The first question is whether, under those circumstances, the plaintiffs sustained particular injury by what was a nuisance, or an invasion of their rights in the nature of a nuisance, by the defendants, and, without wishing to treat the arguments with any disrespect, I think I can answer that briefly, if curtly, by quoting COLLINS, M.R., in *Midwood* v. *Manchester Corpn.* (2) ([1905] 2 K.B. at p. 605): "If that was not a nuisance, I do not know what would be one." At that point I think it might be enough to dispose of this case by saying that as *Midwood* v. *Manchester Corpn.* (2) is an authority binding upon this court, being a decision of this court, unless it can be effectively distinguished nothing more need be said. The facts of that case were that the plaintiffs had premises and stock-in-trade adjoining a street in Manchester. The defendants, the Manchester Corporation, who were the undertakers of the electricity supply, had their mains in the streets. Negligence was not relied upon. Somehow or other the insulation of the conductors failed, a short circuit of the electricity took place, the heat so generated volatilised the bitumen in which the main was laid, and that gave off an inflammable gas which accumulated and presently found its way into the house adjoining the plaintiff's premises in the street in which the main was laid, where it ultimately exploded, causing the fire by which the plaintiff's property was damaged. The point is that there the defendants, the corporation, had this main in the street, and the gas generated from its apparatus spread into the premises adjoining the street. As I say, it might be sufficient to say that *Midwood's Case* (2) is indistinguishable, but lest there should be any misunderstanding I think that the present case is also indistinguishable from *Rylands* v. *Fletcher* (1), a decision of the House of Lords.

However, two grounds of distinction have been suggested, upon which both these cases may be laid aside. It is said that the doctrine of *Rylands* v. *Fletcher* (1) is applicable between the owners of adjacent closes, "adjacent" not being relied upon as meaning "adjacent" in the sense of there being no intermediate property, and that it depends upon the ownership of land and the rights attaching to the ownership of land—a doctrine under which any violation of that right can be prevented or punished. Then it is said that in the present case, instead of having two adjacent owners of property, you have two neighbouring owners, not strictly adjacent, of chattels, whose chattels are there under a permission which might have been obtained by the private licence of the owners of the soil, but in fact came under Parliamentary powers. It is also said that the two companies are in the position of co-users of a highway, or at any rate of co-users of different rooms in one house, and that, therefore, the doctrine of *Rylands* v. *Fletcher* (1) does not apply, but that other doctrines applicable to the highways, or to houses let out in tenements, do apply.

I am unable to agree with any of these distinctions, though they have been pressed upon us by learned counsel with great resource and command of the authorities. *Midwood's Case* (2) is not a case of a dispute arising between the owners of two adjacent closes. I do not know anything about the ownership of the soil in that street, but the case is treated as one between a corporation, whose business by its electric mains under the roadway is exactly similar to that of the defendant corporation here, and of injury done to persons who were the occupiers —I do not know whether they were the owners or not—of the adjacent premises. If the distinction which is rested upon the difference between the present case and that of the two adjacent landowners in *Rylands* v. *Fletcher* (1) be a good one, it is one which either was not taken in *Midwood's Case* (2), or was taken and treated as of no importance, because certainly it was one that might have been taken upon the facts there. Therefore I think on the authority of *Midwood's Case* (2) alone we are precluded from relying upon that distinction. But I do not limit myself to that, because I am quite satisfied that, as far as *Rylands* v. *Fletcher* (1) is concerned, that doctrine is not limited to the case of adjacent freeholders. I shall not in the least attempt to show how far it extends. I think it extends as far as this case, and that is enough for the present purpose. It is quite true that in *Rylands* v. *Fletcher* (1) there were adjacent freeholders, one of whom had made a reservoir on his land, and the other had excavated old mining workings on his land. That is why you find in the judgments both of the Exchequer Chamber and in the House of Lords precise statements, because they are limited to the facts of the case in which attention is drawn to the use of the close and the natural user of the land, the rule of law being that one who for his own purposes brings on his land and keeps there anything likely to do mischievous damage if it escapes must keep it at his peril. But it is quite clear from the illustrations and the reasoning in both courts that they had no intention of confining the principle to the case of adjacent freeholders. It is enough if I refer to the report of *Fletcher* v. *Rylands* (1) in the Exchequer Chamber, in which BLACKBURN, J., delivered the judgment of the court, and spread wide his net to so early a date as to find all manner of illustrations. He begins as early as Edward IV, where the Chief Justice lays down the doctrine in the case of trespass with cattle, to which the defence was that the plaintiff's land adjoining the place where the defendant had common, the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. He then goes on to the next case—*Cox* v. *Burbidge* (3)—a well-known case about a horse straying on the highway and kicking a child, and then *May* v. *Burdett* (4), and he illustrates the doctrine by these cases where the obligation rests upon the defendant owner of the animal, and the liability of the owner of the animal for any trespass it may commit. Again, to show that it is not in the least a casual matter I find that in the judgment of LORD CRANWORTH in *Rylands* v. *Fletcher* (1) the same considerations are

A referred to, and he speaks of the principle, not as confined to the cases of landlords, but in very broad terms in these words (L.R. 3 H.L. at p. 341):

> "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

B That is not a precise proposition of law, but it is inconsistent with there being any idea in his Lordship's mind that *Rylands* v. *Fletcher* (1) was confined to the invasion of a right of property in soil.

So far, then, it appears to me that this case is governed by *Rylands* v. *Fletcher* (1). But then it is said that that is not so because *Rylands* v. *Fletcher* (1) is a case C of adjacent owners, or be it occupiers, or be it even of licensees, of separate loci. I forbear to say "closes," or to specify what the premises might be. This case, it is urged upon us, depends on part of the law of highways; it is a case of joint and successive user by two parties of one highway which is common to them both. I think the same idea is involved in the other class of cases cited, that of joint occupiers of one house. Upon this part of his judgment, and upon this only, I D differ from SCRUTTON, J., because he clearly ([1913] 3 K.B. at pp. 449, 450) was disposed to sanction that this was a case of the joint user of highways. It so happens that these cables and mains were laid under the highway for the very reason that to have required that they should be laid under private premises would either have involved the purchase of the freehold, or have made accessibility to the cables and the mains, for the purpose of keeping them in order and repairing E them, almost impossible. Therefore, following the usual practice, they are laid under the highway, but the laying of them and the using of them is no part of the use of the highway. How thick a highway is I do not know. I suppose practically it has a certain thickness. However thick or thin the surface of a highway may be, I should think it was quite clear that where you found cables and mains laid you might be perfectly certain that there the highway ceased, and, if they are F laid at that depth, whatever it may be, deep or shallow, they are not in the highway, but underneath it. It seems to me, therefore, that this is a pure and simple case of licences for two independent persons to pass their apparatus through the soil—the ownership of which is not material here—with certain additional rights or permissions of breaking up the superincumbent surface of the highway, but the enjoyment of these licences is no co-joint user of the highway at all. If that is so, G I think that analogy of the various cases, both on nuisance and on co-occupation of a house, which was referred to, fails. It was said by the defendants: We got there first. The plaintiffs came with their cables afterwards; they must, therefore, take the place as they find it, and one of the ways in which that place may be dangerous is the presence of our mains, and, unless there is negligence, they cannot recover. Of course there are cases where a person is held not to be entitled H to complain of a nuisance which has arisen from the accustomed way of dealing with the property and where that person has gone to the nuisance instead of the nuisance coming to him. No doubt similar cases can be put in connection with licensees who go upon premises that are in a more or less hazardous condition, but I do not see that the analogy is made out. If it had been part of the normal condition of these mains that they squirted out water under very high pressure I from time to time, I could have understood that there was some substance in the argument, but taking the case as you find it on the argument, and assuming that the mains were sound and in good condition and contained the water instead of releasing it, as they have done for years and years without complaint, I think that the argument founded upon the sequence of dates is entirely illusory.

There is then another argument which is based upon the language of the defendants' Acts of Parliament themselves. I will make a short allusion to these two Acts for this purpose. The Act of 1871 incorporated the defendants and recited that they proposed to carry on an undertaking that was beneficial to the

public. Without some such recital being proved I suppose no private Act could be passed. They are not incorporated as waterworks supply companies are incorporated, with an obligation to supply water to the public; they are given powers of taking water on terms and of laying mains on terms, but they are not laid under a public Parliamentary obligation to keep their mains charged with water at this very high pressure, or, I think, at all, and that serves at once to distinguish the class of cases of which *Green* v. *Chelsea Waterworks Co.* (5) was an illustration, where the principle is that, if the legislature has required the owner of the undertaking to do that which has caused the damage, his liability for that damage must rest upon his negligence in his way of doing it, and not upon the doing of it itself. In the first Act of 1871, which incorporated the company with its capital, and gave it power to take water from the Thames on condition that it returned it to the Thames, and restrained it from using water except for the purposes of its undertaking and so on, there was no clause in pari materia with s. 17 of the later Act which extended the area of the undertaking and made further provisions of a permissive character for the operations of the company, but did not impose obligations upon them. Section 17 of this later Act is:

> "Nothing in this Act shall exempt the company from any indictment, suit, action or other proceeding at law or in equity in respect of any nuisance caused by them."

It is said that, in so far as that section applies, the plaintiffs have to prove that, if this was a nuisance, the nuisance was caused by the defendants. It is suggested that the nuisance was caused, not by the defendants, but by an act of God or some other person—unknown passers-by on the surface of the highway. I do not at all agree that in this clause "nuisance caused by them" is to be read in any restricted sense which would save the defendants, even although there had been other jointly operating causes as well as their own acts which led to the breakdown. But, I think, when one reads the facts as found by the learned judge it is quite plain from them that this nuisance was caused by the defendants. It is not having water in the pipes that is the legal wrong; it is not even subjecting the water in the pipes to the very high pressure that is necessary for the defendants' undertaking that is a legal wrong; it is letting the water escape that is the legal wrong, as was stated in *Nichols* v. *Marsland* (6). There is no doubt about it. Therefore, the question is: What caused the nuisance that consisted in streams of water, under a very high head, suddenly issuing from a fracture in the pipe? The fracture in the pipe, according to the learned judge's finding, is only conduced to by the traffic and the vibrations caused by the traffic. The immediate cause of the fracture of the pipe was its own weight with the water inside it when suspended between two points instead of being continuously supported by the subjacent soil which had subsided. But the thing which actually caused the water to squirt out was the working of the defendants' engines; if it had so happened that, at the time of the fracture, the engines had not been working, or if it had been possible simultaneously with the fracture to cut off the pressure, although it may be that some damage would still have been done, I am quite certain that the damage would have been done in a very different way, and to a very different extent, and I should think, although the facts are not before us, that much of the damage would have been of a very different kind. Therefore, I think that on any possible reading of the words "nuisance caused by them" this escape of water constituting a nuisance was caused by the defendants.

Therefore, we are of opinion that the case is covered by authority which binds us—by authority, which is well settled, and as to which I should not have thought it was possible to raise any doubt, in the House of Lords, and indistinguishable from these authorities, either upon the facts of the accident or of the nature of the locus in quo, and that the statutory answer to the claim is an unfounded one. I think the appeal should be dismissed with costs.

KENNEDY, L.J.—I am of the same opinion, and I entirely agree with the reasoning which has been expressed in the judgment just delivered. I will only add that, in my view, this case would be sufficiently decided by saying that it is indistinguishable on any material point from *Midwood's Case* (2), and the judgment in *Midwood's Case* (2) places the right of the plaintiffs to succeed, so far as this court is concerned, beyond all doubt. It was attempted—as a suggestion merely—to say that in *Midwood's Case* (2), in addition to a cl. 70 in the statutory order there which corresponds with s. 17 of the later of the two Acts in the present case, there was another clause, namely, cl. 67, but, on looking through the judgment, it is quite clear that the fact that there was also a cl. 67 in that case had no effect materially governing the decision. It was cl. 70 of the order which was relied upon, and the only reference, I think, in all three judgments to the existence of cl. 67 is in the judgment of MATHEW, L.J., in which he says ([1905] 2 K.B. at p. 610), not that cl. 70 is to be read by the light of cl. 67, but that:

> "cl. 70 of the order seems to me to be decisive. I think the provisions of cl. 67 of the order in this case must be read by the light of cl. 70."

Clause 70, as I have said, is substantially identical, as it seems to me, with s. 17 of the 1884 Act in the present case, and, as my Lord has said, that Act, by its terms, governs the case, although some portion of the defendants' mains were brought into being under earlier legislation, which, by the Act of 1884, is incorporated with the Act of 1884. Therefore, in my view, according to the true construction, s. 17 of the later Act applies to all the mains in question. It has been said in the course of argument, the substance of which has been dealt with by my Lord, that the plaintiffs in the present case came upon the ground, if I may use that expression, after the defendants' mains had been placed there, and were, therefore, so to speak, obliged to take the position for their works subject to risks which might arise from the earlier works. I think that argument for the defence is fallacious. The plaintiffs did, in fact, go there at later dates, but I think the earliest of the works that they put in was somewhere about 1901. They went there, if you look at it according to the true light to be got from the facts, with the knowledge that they were persons whose works would be protected from injury by the existing works. They went there, in fact, after the Act of 1884 had come into force, and, therefore, apart from any implication from the general law which would give them protection from nuisance, they went there with the knowledge that, whatever there was there, was there under the condition of paying compensation for damage if nuisance arose. Did nuisance arise? In my opinion, it clearly did in this case. As I have said, I am not going to repeat the reasoning, which has already been expressed, and makes *Midwood's Case* (2) a case which governs us, but which, and I quite concur, also says that the principle applicable in *Midwood's Case* (2) and in the present case is the principle in *Rylands* v. *Fletcher* (1), which cannot be distinguished on any of the grounds that have been suggested by the argument for the defendants. I agree this judgment should be as my Lord has stated.

BRAY, J.—I am of the same opinion. Treating this case, first of all, without regard to the statutory authority which the defendants have, it seems to me quite clear that it comes within the principles of *Rylands* v. *Fletcher* (1). It was said that it was not within those principles because *Rylands* v. *Fletcher* (1) is the case of owners of adjoining closes of land, but, in my opinion, that is not so. The head note of *Rylands* v. *Fletcher* (1) (L.R. 3 H.L. at p. 330) is this, and I may say that I have looked through these speeches of the Lord Chancellor and the other learned Lords, and it is abundantly justified by what is said there:

> "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself

dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned."

"For any mischief thereby occasioned," that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but, any mischief thereby occasioned, and in the earlier part of the headnote reference is made to the owner bringing the dangerous thing on his land. It seems to me it does not matter whether it is upon his land; if he has a right, as the defendants have here, to occupy the land for a certain purpose, as the defendants have, for these pipes, it is equally his for the purpose of testing this principle. Therefore, I think that *Rylands* v. *Fletcher* (1) applies, and, if it applies, the defendants undoubtedly have brought upon their land, or land which they are permitted to occupy, something which would not have naturally come upon it and which is, in itself, dangerous and probably mischievous if not kept under proper control.

If the case is within *Rylands* v. *Fletcher* (1), the next point is to see whether the statutory power that is given the defendants gives them any protection. Undoubtedly the cases show that, if statutory power is given without any limitation that does protect them except it be shown that they have acted negligently. Then comes s. 17, which has been read and which I will not read again. What is the effect of that section? In my opinion, the effect of it is, paraphrasing the language somewhat: You may put your pipes on this land, but you are not to be entitled by reason thereof to any protection against claims by other persons who have sustained injuries arising from any actionable nuisance which you may commit, and, therefore, if it be shown that the plaintiffs have sustained an injury by an actionable nuisance committed by the defendants, then they have no protection. The next point which is taken is that the defendants have not committed any nuisance. In my opinion, the findings of the learned judge show that the injuries were caused by them. LORD SUMNER has explained this and I need not refer to it further.

The next point is that s. 17 does not apply to injuries caused by water in pipes which were laid before the passing of the Act of 1884. The Act of 1884 is to be read with the preceding Act, and it imposes, in my opinion, a limitation upon the exercise of their powers. They were exercising their powers at the time they caused this nuisance, which was after the passing of the Act of 1884, and, therefore, it seems to me that s. 17 imposed that limitation on the exercise of the defendants' powers. The last point taken was this: "We got there first." In order to make that good, it seems to me that it must be shown that, by virtue of the powers given to the defendants, they were given some right to interfere with the beneficial use of the land by the adjoining owner. In my opinion, they were given no such right at all. If this Act did not deprive the owner of the surrounding land from any beneficial use of his land, and if he might use his land in this way, he would be entitled to exactly the same remedies as he could otherwise have got, so that there is no protection, in my opinion, to be given because of the defendants coming there first. It does not matter to whom the surrounding land belongs. When the legislature gave to them these powers, they did not take away from the right of the owner of that surrounding land any of the rights which he otherwise had, and, therefore, in my opinion, the judgment must be affirmed.

Appeal dismissed.

Solicitors: *Fladgate & Co.*; *Beale & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

CRANE *v.* SOUTH SUBURBAN GAS CO.

[KING'S BENCH DIVISION (Avory and Lush, JJ.), November 1, 1915]

[Reported [1916] 1 K.B. 33; 85 L.J.K.B. 172; 114 L.T. 71; 80 J.P. 51; 32 T.L.R. 74; 60 Sol. Jo. 222; 14 L.G.R. 382]

Highway—Negligence—Nuisance—Dangerous work on or adjacent to highway - Absence of reasonable precautions—Intervention of third party -Injury to user of highway—Liability of original wrongdoer.

Where a person does something on or adjacent to a highway which is dangerous to persons lawfully using the highway he is guilty of a nuisance unless proper steps are taken to guard such persons from danger, and if, through the intervention of a third party such a person is injured the person who originally caused the nuisance is guilty of negligence if he ought reasonably to have anticipated the intervention and foreseen what the result would be.

The defendants, in the exercise of their statutory authority, were repairing a gas main in a highway, work necessitating the use of molten lead which was placed on a fire pail standing on a piece of vacant land adjoining the highway where children were playing. The pail was left unguarded and a boy accidentally knocked against it and upset the lead, thereby injuring the plaintiff. The county court judge held that the defendants were negligent in leaving the lead unattended knowing it was surrounded by young children and gave judgment for the plaintiff.

Held: (i) the county court judge was entitled to find that the defendants were guilty of negligence, and their negligence was the effective cause of the injury to the plaintiff, as the action of the boy who accidentally knocked over the pail should have been reasonably foreseen; (ii) the act of the defendants constituted a nuisance as they were doing something on or adjacent to a highway which was dangerous to persons lawfully using the highway without taking proper precautions to guard such persons from the danger.

Notes. Referred to: *Jacobs* v. *L.C.C.*, [1950] 1 All E.R. 737.

As to the standard of care in negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 10 et seq.; and for cases see 36 DIGEST (Repl.) 22 et seq. As to nuisances on the highway, see 19 HALSBURY'S LAWS (3rd Edn.) 270 et seq.; and for cases see 26 DIGEST (Repl.) 466 et seq. As to the proximate cause in tort see 11 HALSBURY'S LAWS (3rd Edn.) 277 et seq.; and for cases see 17 DIGEST (Repl.) 115–117.

Cases referred to:

(1) *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(2) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(3) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(4) *Barnes* v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100*.

(5) *Hounsell* v. *Smyth* (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 Jur.N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, *356*.

Also referred to in argument:

Jenkins v. *Great Western Rail. Co.*, [1912] 1 K.B. 525; 81 L.J.K.B. 378; 105 L.T. 882, C.A.; 36 Digest (Repl.) 64, *346*.

M'Lelland v. *Johnstone* (1902), 4 F. (Ct. of Sess.) 459; 39 Sc.L.R. 326; 9 S.L.T. 379; 36 Digest (Repl.) 124, **919*.

Appeal from Dartford County Court.

In the circumstances stated in the headnote the county court judge gave judgment for the plaintiffs for £25 and costs. The defendants appealed upon the following grounds: (i) there was no evidence of negligence on the part of the defendant company or its servants on which the learned judge could give judgment for the infant plaintiff; (ii) there was no evidence of any negligence on the part of the defendant company or any of its servants which caused the injuries to the infant plaintiff; (iii) the defendant company were not responsible for the act of the boy who upset the fire pail and lead ladle and so caused the injury to the infant plaintiff; (iv) the learned judge's judgment was wrong in law.

Morton Smith for the defendants.
J. D. Cassels for the plaintiff.

AVORY, J.—In this case the defendants in the execution of their duty, certainly in the execution of their right, were repairing a gas pipe in the highway and for that purpose they had made an excavation in the highway, and I will assume for the purpose of my judgment that it was necessary for the execution of the repairs to have a fire upon or close to the highway, and that it was necessary that they should have molten lead upon or close to the highway. The fire and the molten lead were in fact at a spot close to the paved portion of the highway and clearly at a spot to which the public had a right of access. Whether the spot was part of the highway or not is immaterial; if not part of, it was adjacent to the highway and a place to which the public had the right of access. A boy passing along and lawfully using the highway and passing this spot accidentally knocked against the pail in which the fire was, and the molten lead was thereby spilt upon the infant plaintiff, who was standing close to the fire. Under these circumstances this action was brought and the learned county court judge gave judgment for the plaintiff finding, as he said in his note, that "the defendants were guilty of negligence in leaving a fire of this character unattended and unguarded with the knowledge that it was surrounded by young children and that it was being used for molten lead."

The only question that this court has to determine is whether or not there was any evidence upon which the learned county court judge could come to that conclusion. Our attention has been called to the fact that the claim was originally framed in two ways. First on the ground that the defendants were negligent in leaving the fire and the molten lead unattended and unfenced, and alternatively that they were committing a nuisance. In my opinion, there was evidence upon both these alternative heads of claim upon which the learned county court judge could properly find a verdict for the plaintiff. Had I tried the case myself I should have preferred to base my decision upon the second point—namely, that the acts of the defendants constituted a nuisance, in this sense, that they were doing something on or adjacent to a highway which was dangerous to persons lawfully using the highway unless proper steps were taken to guard such persons from danger. It is clear from the authorities that a person doing such a thing on or adjacent to a highway, even though it is something which he might lawfully do if he took proper precautions to guard the public from injury, is in fact committing a nuisance if he does that thing without taking these precautions. *Latham* v. *R. Johnson and Nephew, Ltd.* (1) which counsel for the defendants relied upon as showing that *Cooke* v. *Midland Great Western Railway of Ireland* (2) is not binding upon us, does not, in my opinion, help the defendants' argument, because in the course of their judgments in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) the lord justices took care to point out that the case they were dealing with was that of a licensee upon land that was not part of a highway or adjoining a highway. FARWELL, L.J., after referring to the authorities which lay down the law as to mere licensees, points out ([1913] 1 K.B. at pp. 405, 406) that there are four exceptions to the freedom from liability of the owner of the land—namely, "allurement,"

A "concealed trap," "invitation," and "the introduction into the land to which the licence applies of something out of the normal user of the land, known to the owners to be dangerous, without warning the licensee"; and he continues (ibid. p. 407):

> "If the law be as I have stated and believe it to be, there is nothing in this case to raise any liability in the defendants. There is neither allurement nor trap, invitation, or dangerous animal or thing."

B

The learned lord justice then points out that no new principle was established by *Cooke* v. *Midland Great Western Railway of Ireland* (2), and adds (ibid. at p. 408), that the real mischief in that case was:

> "a machine 'attractive to children and dangerous as a plaything,' to use LORD MACNAGHTEN'S words ([1909] A.C. at p. 236), and there is cast on persons who put in a place, open to their licensees a thing dangerous in itself, a duty to take precautions for the protection of others who will certainly come into its proximity";

C

and HAMILTON, L.J., says ([1913] 1 K.B. at p. 412):

> "It is necessary to distinguish all these cases which turn upon negligence from those which turn on nuisance upon or adjoining a highway. Such cases, so far as they relate to children, may in that particular be to some extent in point, but the differences between cases of nuisance and cases of negligence must never be lost sight of."

D

E It is only necessary to consider one further point, which I think does not help the defendants, but rather the contrary. The authorities, like *Lynch* v. *Nurdin* (3), which were cited to us are cases in which the proximate cause of the injury was a child, other than the plaintiff, playing or interfering with the thing which caused the injury. The present case is not a case of a child wilfully interfering or playing with the thing which caused the injury. Upon the facts we must take it that the injury was caused by a passenger accidentally knocking against the dangerous F thing, which was standing on the highway. In these circumstances, I cannot doubt that it, therefore, comes within the principle that the person who originally caused the nuisance is guilty of negligence, and will still be the effective cause of the injury, if he ought reasonably to have anticipated such intervention and to have foreseen what the result would be. Under these circumstances, I think that the learned county court judge was entitled to find that the defendants were guilty G of negligence. The appeal must, therefore, be dismissed.

LUSH, J.—Counsel for the defendants raised three contentions: (i) That the only obligation on the defendants, so far as the plaintiff was concerned, was not to create a hidden trap, and he says that no such trap was created by the defendants or their servants. (ii) That if there was a duty imposed upon the defendants to H take reasonable care beyond this, there was no evidence of any breach of such duty; and (iii) that, even if there was such a duty and a breach thereof, the proximate or effective cause of the accident was the intervention of a third party, and that there was no connection between the breach of duty and the accident.

As to the first contention, it seems to me that the question whether or not there was a trap has nothing to do with a wrongful act done upon a highway or upon I land adjacent to a highway. That question only arises where the person who is alleged to have created the trap has given a licensee permission to use the premises upon which the nuisance exists. This case is not of that kind. When you are dealing with a highway or land adjacent to a highway you get out of the region of hidden traps. The obligation is not to create a nuisance, and land adjacent to a highway is on exactly the same footing as a highway itself: *Barnes* v. *Ward* (4); *Hounsell* v. *Smyth* (5). What the defendants did here was to put a thing which was a danger on a highway or on land adjacent to a highway. My own opinion is that the place where this fire was must be considered to be the highway, but for

the reasons which I have indicated it is immaterial whether it was the highway or land adjacent to it.

Had they authority to do this as they did? They certainly had no express authority to place a dangerous thing on the footpath. They had authority to do what was reasonably necessary to fulfil their duty with regard to the repair of the gas pipes; but if they could have done this without committing a nuisance, as they clearly could by fencing or guarding in some way, it is impossible to say that they could do it in a way which would cause a nuisance. They did it in a way which created a nuisance; they, therefore, not only owed a duty to the plaintiff, but there was evidence of a breach of that duty, because they did what might have been done in safety in such a way as to be a nuisance, and the plaintiff was injured owing to that breach of duty.

With regard to the third point, that the intervention of the boy was a reason for saying that the creation of this nuisance was not the effective cause of the injury, in my opinion, the county court judge was right in dealing with this matter also in the way he did. Undoubtedly the intervention of a third party may break the link which joins the wrong and the injury which follows from it. If a third party intervenes as the immediate cause of a wrong and the original alleged wrongdoer had no reason to anticipate such an intervention, clearly there would be a break and the injury could not be said to be the necessary consequence of the breach of duty on the part of the original wrongdoer. But the evidence in this case affords no support to the contention that there was such an intervention as would relieve the defendants of liability. Here the boy and the child were both lawfully using the highway, the boy accidentally tripped against the pail and upset it, and the accident resulted. The principle has been laid down by HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) ([1913] 1 K.B. at p. 413):

> "That a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself that injury would not have occurred."

That being the principle applicable, it is clear that the defendants were liable and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Hartley & Blyth: T. G. Baynes, Dartford.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

A

WILLIAMS BROS. *v.* Ed. T. AGIUS LTD.

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Moulton and Lord Parker of Waddington), February 16, 27, 1914]

B [Reported [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 30 T.L.R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200]

Sale of Goods—Contract—Breach—Measure of damages—Difference between contract price and market price—Relevance of agreement by buyer to re-sell—**Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 51 (2).**

By a contract dated June 25, 1910, the respondents sold to the appellants six C cargoes of coal at a price of 16s. 3d. per ton, c.i.f., to be shipped to specified ports in Italy, shipment every alternate month beginning in January, 1911. By a contract dated Oct. 28, 1911, the appellants sold to one G. a cargo of the coal at the price of 19s. per ton, and they appropriated the November shipment to that contract. On or about Oct. 31 the respondents bought from G. the D cargo sold to him by the appellants under the contract of Oct. 28, which G. purported to assign to them, and they then failed to deliver the November shipment to the appellants. At the date of this breach of the contract of June 25, 1910, the market price of coal of the class contracted to be sold under that contract was 23s. 6d. per ton. On a claim by the appellants for damages for the breach of contract,

E **Held:** the transaction between the appellants and G. did not arise out of the consequences of the breach and so could not be taken into account in estimating the damages payable by the respondents to the appellants; the measure of damages for a breach of contract by the non-delivery of goods under a contract was the difference between the contract price and the market price at the date of the breach, unaffected by any contract to re-sell entered into by the F buyer; and, therefore, the damages payable by the respondents to the appellants was the difference between 16s. 3d. and 23s. 6d. per ton, i.e., £1,631 5s., and not the difference between 16s. 3d. and 19s. per ton, i.e. £618 15s.

Rodocanachi v. *Milburn* (1) (1886), 18 Q.B.D. 67, approved and applied.

Notes. Considered: *Weir* v. *Dobell*, [1916] 1 K.B. 718. Applied: *Slater & Co.* G v. *Hoyle and Smith*, Ltd., [1918–19] All E.R.Rep. 654. Considered: *James Finlay & Co., Ltd.* v. *N. V. Kwik Hoo Tong Mandel Maatschappij*, [1928] All E.R.Rep. 110; *The Arpard*, [1934] All E.R.Rep. 326; *Brading* v. *McNeill & Co.*, [1946] Ch. 145. Referred to: *Jamal* v. *Moolla Dawood*, [1916] 1 A.C. 175; *Lebeaupin* v. *Crispin & Co.*, [1920] All E.R.Rep. 353; *Montevideo Gas and Drydock Co.* v. *Clan Line Steamers* (1921), 37 T.L.R. 544; *Sheik Mohammad Habib Ullah* v. *Bird & Co.* H (1921), 37 T.L.R. 405; *Taylor* v. *Bank of Athens*, *Pinnock* v. *Bank of Athens* (1922), 91 L.J.K.B. 776; *Foscolo Mango & Co.* v. *Stag Line, Ltd.*, [1931] 2 K.B. 48; *Biggin & Co.* v. *Permanite, Ltd.*, [1950] 2 All E.R. 859; *British Motor Trade Association* v. *Gilbert*, [1951] 2 All E.R. 641; *Mouat* v. *Betts Motors, Ltd.*, [1958] 3 All E.R. 402.

As to damages in an action for non-delivery of goods, see 34 Halsbury's Laws I (3rd Edn.) 148–155, and for cases see 39 Digest 668–672. For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

Cases referred to:

(1) *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 55 W.R. 241; 3 T.L.R. 115; 6 Asp.M.L.C. 100, C.A.; 39 Digest 669, *2570*.

(2) *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Rail Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734, H.L.; 39 Digest 480, *1025*.

(3) *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 16 Com. Cas. 297, P.C.; 39 Digest 672, *2588*.

(4) *Great Western Rail. Co.* v. *Redmayne* (1866), L.R. 1 C.P. 329; 12 Jur.N.S. 692; 39 Digest 152, *958*.

Also referred to in argument:

Williams v. *Reynolds* (1865), 6 B. & S. 495; 6 New Rep. 293; 34 L.J.Q.B. 221; 12 L.T. 729; 11 Jur.N.S. 973; 13 W.R. 940; 122 E.R. 1278; 39 Digest 675, *2608*.

Charles v. *Altin* (1854), 15 C.B. 46.

Appeal from an order of the Court of Appeal (108 L.T. 906) (VAUGHAN WILLIAMS, L.J., and BRAY, J., HAMILTON, L.J., dissenting), reversing an order of BAILHACHE, J. (107 L.T. 707), upon an award of an umpire in the form of a Special Case.

The facts appear in the headnote and their Lordships' opinions.

Roche, *K.C.*, and *Cuthbertson* for the appellants.

Leck, *K.C.*, and *Raeburn* for the respondents.

Their Lordships took time for consideration.

Feb. 27, 1914. The following opinions were read.

VISCOUNT HALDANE, L.C.—The facts out of which this appeal arises may be stated shortly. The respondents sold to the appellants six cargoes of a certain coal to be shipped every two months in 1911. It is as to one of these cargoes, which was to be shipped in November, that the dispute arises. The price was to be 16s. 3d. per ton net, c.i.f., Genoa, or Savona, or Spezzia, or Leghorn, orders to be given on signing bill of lading, or 17s., c.i.f., Venice, on certain terms. The point to be decided relates to the cargo in question, which the respondents failed to ship, and is: What damages are payable by the respondents to the appellants on the facts as stated by the umpire in his award in an arbitration?

The umpire, having found the breach of contract, found further the following among other facts—that at the date of the breach the market price of the coal in question was 23s. 6d.; that about Oct. 28, 1911, the appellants sold, through one Colonna, their agent at Genoa, a cargo of coal to one Ghiron on the terms of a sale note of that date, which I shall call the broker's note, at the price of 19s. per ton, that the intention of the appellants was to resell to Ghiron the November cargo to be delivered to them by the respondents, and that they appropriated this cargo to their contract with Ghiron; that about Oct. 31, 1911, the appellants sent to Ghiron a sold note dated Oct. 28, 1911; that about Nov. 28 in the same year Ghiron sold to the respondents the cargo referred to in the broker's and sold notes at 20s. a ton, and by endorsement on the sold note ceded all his rights and liabilities under the contract with the appellants for £225, being 20s. per ton, or 1s. per ton above the price which he had agreed to pay to the appellants; that by certain letters which the umpire referred to, Ghiron had given notice to the appellants that he cancelled the contract of the appellants with the respondents so far as it related to the November cargo, but that the appellants immediately repudiated Ghiron's right to so cancel. It was not found by the umpire, but was agreed between counsel at the hearing before the learned judge who heard the case, BAILHACHE, J., that Ghiron signed and returned to the appellants a bought note, dated Oct. 28, corresponding to the sold note referred to.

The contention of the appellants before the umpire was that the true measure of damages was 7s. 3d. per ton, being the difference in price between 16s. 3d., the contract price, and 23s. 6d., the market price at the date of the breach; 4,500 tons at 7s. 3d. amounts to £1,631 5s. The contention of the respondents was that the true measure of damages was 2s. 9d. per ton, being the difference between 16s. 3d., the contract price, and 19s., the price of the coals sold by the appellants to Ghiron: 4,500 tons at 2s. 9d. amounts to £618 15s. The umpire stated his award in the form of a Special Case under the provisions of the Arbitration Act, 1889. He appended

among other documents, those to which I have referred. He also in his award expressed the opinion that

> "it is in accordance with trade equity and fair dealing that [the respondents] should be entitled to purchase the said P. Ghiron's contract with [the appellants,] and cancel the whole transaction, paying the differences in prices as was purported to be done."

BAILHACHE, J., decided in favour of the appellants. He pointed out that, although the broker's note was silent on this point, the sold note, which was signed and returned by Ghiron, the purchaser, contained an additional term. It stipulated that the "sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them" from the respondents. He would, but for this term, have held that the respondents had the right to say to the appellants that the latter, who had not delivered to them the cargo which they had re-sold to Ghiron, the assignor of the respondents, were liable to the respondents for the difference between 19s. and 23s. 6d., as the umpire had found. But he thought that under the additional term incorporated in the sold note the appellants had no obligation to deliver unless they had first got delivery from the respondents, and that as they had not got such delivery the cross claim of the respondents failed. For the rest, he thought that in ascertaining the measure of damages he ought to follow the judgment in *Rodocanachi* v. *Milburn* (1). The majority in the Court of Appeal (VAUGHAN WILLIAMS, L.J., and BRAY, J.) took a different view. Following the finding of the umpire, they considered that the sold note given by the broker, Colonna, governed the contract, and that, as it did not contain the additional term which BAILHACHE, J., had thought decisive, making the obligation of the appellants to deliver to Ghiron conditional on their getting delivery under their contract with the respondents, the latter had, by their assignment from Ghiron, become assignees of an unqualified contract of sale and delivery by the appellants. They held that it was open to them to decide that, on the principle of avoiding circuity of action, the amount which the respondents were thus entitled to recover from the appellants, being damages respresenting the difference between 19s., Ghiron's contract price, and 23s. 6d., the market price, must be deducted from the difference between 16s. 3d. and 23s. 6d. They, therefore, gave judgment to the effect that the amount due to the appellants was the sum of £618 15s. only, instead of £1,631 5s. which they had claimed. HAMILTON, L.J., dissented. He agreed that BAILHACHE, J., was wrong in departing from the finding of the umpire that the broker's note given by Colonna governed the transaction of Oct. 28. But he was unable to agree with his colleagues that the respondents so stood in the shoes of Ghiron, that, if the appellants failed to deliver to them, the respondents could claim against them the excess over the 19s. per ton at which Ghiron had bought. He considered that as no coals had been shipped by the respondents and appropriated to their contract, no property of any kind passed, but the right remained a contractual one in respect of unascertained goods. He pointed out the divergences between the terms of Colonna's contract note and those of the original contract between the appellants and the respondents, and further that there was no finding in the award of an assignment of the original contract to the respondents. He went on to add that no such case appeared to have been either raised before the umpire or established by his award. All that the umpire had really decided was a question as to the measure of the damages payable by the respondents to the appellants for the breach of their original contract, and as to this it appeared on the face of the Special Case that he had suggested an opinion as to the proper measure of damages which is inconsistent with the law as laid down in *Rodocanachi* v. *Milburn* (1).

I have arrived at the conclusion that the view taken by HAMILTON, L.J., was the true one. It may be that we are precluded by the terms of the award from looking beyond its finding that the contract between the appellants and Ghiron was contained in the Colonna sold note. But the result is carried no further by the statement in the award that the appellants "appropriated" the cargo they had the right to

claim to their contract with Ghiron. No doubt it must be taken that they intended to re-sell it to the latter. But what difference can this make? No property in the cargo had passed to them. Their right remained in contract, and was a right to damages. It appears to me to have primâ facie remained intact, and if *Rodocanachi* v. *Milburn* (1) was correctly decided it was quite clear what they were entitled to claim. No doubt if they had assigned their contract to Ghiron, and Ghiron had in his turn assigned it to the respondents, the appellants' right would have been extinguished. But there is no finding to this effect in the award, and if I were at liberty to look for such a result outside the award I should be of opinion that on the materials before us it was impossible to hold that such an assignment had been made. What really appears is that there were two separate contracts, on one of which the appellants were entitled to sue the respondents, and on the other of which the respondents could claim against the appellants. But the difference is that while as regards the first contract the respondents, who have been found to be in breach, have no answer, on the second there may or may not be a defence on the ground that this contract was to be satisfied out of the coal which the respondents failed to deliver. On this point I express no opinion. It was not before us, and it was not before the umpire. Nor would he have had jurisdiction to deal with it. What was referable to him under the original contract was any dispute as to

> "meaning of any of the conditions thereof, or as to any matter arising out of this contract."

Indeed, his award purports to deal with the obligation of the respondents to deliver, and the measure of damages alone. If it is argued that he could have dealt with a question of the effect of any assignment which he had found as a fact in extinguishing pro tanto the title of the appellants to sue for a breach, the obvious comment is, first, that he found no such assignment, and, secondly, that in the absence of such an assignment the question is, not one of reduction of the amount of damages, but one of a cross-action or counterclaim. Now, he deals with nothing of this kind, nor, in my opinion, would he have had jurisdiction to deal with it. What right, if any, the respondents may have, they must, therefore, assert in other proceedings. For these reasons I have arrived at the same result on this point as HAMILTON, L.J.

But a wholly distinct point was taken in addition to the one I have now discussed. It was argued for the respondents that, even assuming the appellants to be entitled to claim full damages from the respondents without deduction, the principle laid down by the Court of Appeal in *Rodocanachi* v. *Milburn* (1) which was accepted by the courts below as binding them, was wrong. In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by LORD ESHER he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party. He said that if the plaintiff had sold the goods before the breach for more than the market price at that date he could not recover on that footing, and that it would, therefore, be unjust if the market price did not govern when he had sold for less. This decision is quite in harmony with what was recently said in this House in *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Rail. of London, Ltd.* (2) where it was pointed out that a subsequent transaction, if it is to be taken into account in mitigating damages, must be one which arises out of transactions naturally attributable to the consequences of the breach, and must not be of an independent character. I agree with the statement of the law in *Rodocanachi* v. *Milburn* (1) and with the view of this part of the present case taken by all the learned judges in the courts below.

I will only add on this point that I do not think that the law so laid down has been affected by s. 51 of the Sale of Goods Act, 1893. By sub-s. (3) of the section

the general principle is recognised as the rule which obtains primâ facie, and I do not find in sub.-s. (2) anything inconsistent with this recognition. For the reasons I have given, I move that the judgment of the Court of Appeal be reversed and that of BAILHACHE, J., restored. The respondents must pay the costs in this House and in the courts below.

LORD DUNEDIN.—This is an appeal arising upon an award put in the form of a Special Case. [HIS LORDSHIP stated the facts]. I will assume that the contract between Ghiron and Messrs. Williams is contained in the Colonna note above. I am not satisfied of that. I am inclined to the view that though the umpire stated that as a question of fact, he was in reality deciding a question of law—viz., that the Colonna note was not superseded by the formal bought and sold notes, and if so, that he may be corrected. But as there is difference of opinion on this point I will pass it by, and assume that the Colonna note rules. I dismiss at once all argument founded on the expression "cede the original contract" and the affected cancellation by Ghiron of Agius' contract with Messrs. Williams. Not only do I entirely agree with HAMILTON, L.J., that we should require to know a great deal more as to the true legal significance of the Italian word which is represented by "cede," but what is conclusive is that, if there was assignation of the original contract, then Messrs. Williams had nothing left on which they could sue. Such a plea was never taken before the arbitrators, and the whole course of the arbitration is negative of its existence.

What, then, is the position? Messrs. Williams have an action for breach of contract against Agius. Ghiron has an action for breach of contract against Messrs. Williams. Now, if *Rodocanachi* v. *Milburn* (1) be good law, then Williams' damages as against Agius are to be measured by the difference of market price, unaffected by the fact that Williams had contracted to re-sell. But then it is said that, even if that be so, yet inasmuch as Agius is in right as assignee of Ghiron's contract, he is entitled to make good his position without circuity of action as defence to the action brought against him. It is obvious that this is counterclaim, and nothing else. How far counterclaim is available as defence is truly a matter of pleading. Different systems of law vary as to this power, and the same system of law will be found to vary at different dates of its development. But this at least is certain, that no counterclaim can be given effect to as a defence unless the court dealing with the original action has also jurisdiction in the matter of the counterclaim. Here the court, dealing with the original action, viz., the arbitrators and umpire, only derives its jurisdiction from consent, and that consent is limited to matters arising out of the Agius-Williams contract. It has no jurisdiction whatever in the matter of the contract between Williams and Ghiron—and Agius can have no higher rights in respect of that contract than those possessed by his assignor, Ghiron. This consideration is, in my opinion, fatal to the conclusion reached by the majority of the Appeal Court.

It was, however, argued at your Lordships' Bar that *Rodocanachi* v. *Milburn* (1) was wrongly decided, and it was said to be in conflict with the principles laid down in the recent case before the Privy Council of *Wertheim* v. *Chicoutimi Pulp Co.* (3). It is certain that LORD ATKINSON, who delivered the judgment in that case, did not think that he was going against *Rodocanachi* v. *Milburn* (1) for he says so in terms. Nor, in my mind, is there any discrepancy between the two judgments. *Wertheim* v. *Chicoutimi Pulp Co.* (3) was a case, not of delivery withheld, but of delivery delayed. The buyer, therefore, got the goods, and the only damage he had suffered was in delay. Delay might have prejudiced him; the amount of prejudice was no longer a matter of speculation, it had been put to the test by the goods being actually sold, and he was rightly, as I think, only held entitled to recover the difference between the market price at the date of due delivery and the price he actually got. But when there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date.

That position is the position of a man who has goods at the market price of the day —and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price: *Great Western Rail. Co.* v. *Redmayne* (4), nor can he take benefit of the fact that the buyer has made a forward re-sale at under the market price. The general principle is expressed by the learned judges in both cases in identical words. ERLE, C.J., WILLES, KEATING, and MONTAGUE SMITH, JJ., in *Great Western Rail. Co.* v. *Redmayne* (4) say (L.R. 1 C.P. at p. 330):

"The market value of the goods was their value in the market, independently of any circumstances peculiar to the plaintiff [the buyer]."

And the very same phrase is used in the counter-case of *Rodocanachi* v. *Milburn* (1) by ESHER, M.R. (18 Q.B.D. at pp. 76, 77) and LOPES, L.J. (ibid. at p. 80). LINDLEY, L.J., says that there is no difference between the two cases.

The truth is that the respondents' argument leaves them in a dilemma. Either the sub-sale was for the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract? All that will depend upon what the sub-buyer will be able to make out. The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns. I am, therefore, of opinion that the appeal should be allowed, and the judgment of BAILHACHE, J., restored.

LORD ATKINSON expressed the opinion that on the face of the award the umpire had dealt with matters relating to the transaction between the appellants and Ghiron which, he said, could not be said to be "matters arising out of" the original contract between the appellants and the respondents within the meaning of the arbitration clause in that contract, and with regard to the point which calls for report in this case he said: BAILHACHE, J., was of opinion that the contention of the appellants was right, and that the sum of £1,631 5s., with the interest mentioned, should be awarded to the appellants. HAMILTON, L.J., concurred in that result. I agree with them. I think there is nothing in the case to make the principle of the decision in *Rodocanachi* v. *Milburn* (1) inapplicable to it, and that it is governed by that authority, the soundness of which has been many times recognised and never questioned. The case has, of course, no reference whatever to cases of late delivery of goods purchased, as distinguished from their non-delivery. On the whole, therefore, I am of opinion that the decision of the Court of Appeal was erroneous and should be reversed, and the decision of BAILHACHE, J., restored, and that this appeal should be allowed with costs.

LORD MOULTON.—The question for the decision of your Lordships in this appeal is set out very plainly in the award in the form of a Special Case, which forms the basis of this litigation. It is whether the appellants are right in their contention that the measure of damages put forward by them in respect of the admitted breach by the respondents of the contract to deliver a cargo of coals in November, 1910, is correct. That contention is that the proper measure of damages is the difference between the contract price of 16s. 3d. per ton and the market price on the date of the breach of contract, which the arbitrator finds to be 28s. 6d. per ton. Inasmuch as this is a plain case of a failure to deliver a specified quantity of an article obtainable in the market, the measure of damages is well established

The case comes under the rule laid down in *Rodocanachi* v. *Milburn* (1), and regularly and repeatedly followed ever since, and ultimately embodied in the Sale of Goods Act, 1893, s. 51 (3). The contention of the appellants is in accordance with that rule, and the question put to the court in the Special Case must, accordingly, be answered in their favour.

This consideration is, in my opinion, sufficient to decide this appeal, but in deference to the opinions expressed by the majority of the Court of Appeal, I propose to examine the matters which it is suggested make the measure of damages in the present case other than that given by the recognised rule to which I have already referred. From the facts of the case as found in the award, and the documents therein referred to, we learn that the appellants made a contract to sell a cargo of coal to the Italian firm of P. Ghiron, and that they intended to fulfil that contract by the cargo to be delivered by the respondents in November. The price to be paid by the said P. Ghiron was 19s. per ton, and the respondents contend that it is the difference between 19s. per ton and the contract price of 16s. 3d. per ton which is the true measure of damages. If these were the only facts of the case, the contention of the respondents would be precisely that view of the damages in the case of an article purchasable in the market which was negatived by the decision in *Rodocanachi* v. *Milburn* (1). That case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price. To do so, he must pay a sum which is larger than that which he would have had to pay under the contract by the difference between the two prices. This difference, is, therefore, the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled. But the respondents contend that there are certain further facts which are relevant to the dispute before the arbitrator, and which afford an answer to the above reasoning. To appreciate them it will be necessary to give in a little detail the circumstance attending and subsequent to the sale to P. Ghiron.

[HIS LORDSHIP examined the transactions between the appellants and Ghiron, and concluded:] There is, however, one overriding consideration which makes it immaterial to consider what would have been the position of the parties if there had been any assignment [of the contract between the appellants and Ghiron]. The tribunal before whom the parties appeared derived its authority from the arbitration clause contained in the original contract of sale between appellants and respondents, and it had no authority to decide any matters other than those "arising out of" that contract. The question whether subsequently to the making of that contract there was in fact any assignment of any portion of the rights under that contract to P. Ghiron is a matter entirely outside the scope of the arbitration, and the arbitrator had no jurisdiction to deal with it. The claim of the respondents to diminish the damages legally due under the contract is of the nature of a counterclaim based on rights acquired subsequently to the contract by transactions with third parties. Whether or no in the courts of the realm such matters could be brought in as an answer pro tanto to the appellants' claim with a view to avoid circuity of action is immaterial. No such course is permissible to a domestic tribunal of limited authority. The arbitrator ought, therefore, to have refused to go into any of the matters relating to the transactions between respondents and P. Ghiron, and to have confined himself to deciding the measure of damages under the contract independently of all such questions. I am of opinion, therefore, that this appeal should be allowed, and that the appellants should have the costs here and in the courts below.

LORD PARKER OF WADDINGTON.—My lords, I concur.

Solicitors: *Ince, Colt, Ince & Roscoe*, for *A. M. Jackson & Co.*, Hull; *Lowless & Co.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

JOSEPH TRAVERS AND SONS, LTD. *v.* COOPER

[COURT OF APPEAL (Buckley, Kennedy and Phillimore, L.JJ.), July 1, 2, 3, 31, 1914]

[Reported [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703, 12 Asp.M.L.C. 561; 20 Com. Cas. 44]

Bailment—Carriage of goods—Special contract—Carrier not responsible "for any damage to goods, however caused"—Goods damaged through carrier's negligence—Liability.

By a contract made between the plaintiffs, the owners of goods, and the defendant, a wharfinger and lighterman, it was provided: "I [the lighterman] will not be responsible for any damage to goods, however caused, which can be covered by insurance." A lighter in which were the plaintiff's goods was left unattended by a servant of the defendant and in his absence became submerged, possibly by either underpinning or mud-suction, with the result that the goods were damaged. In an action by the plaintiffs for damages for the loss of and damage to the goods,

Held: (i) the burden lay on the defendant of proving that the loss was not due to the negligence of his servant, he had failed to discharge that burden, and, therefore, was guilty of negligence; (ii) the exemption clause, however, was so worded as, according to the natural and plain interpretation of its language, clearly to comprehend and exclude all loss and damage however it might have been caused, and, therefore, the defendant had protected himself against liability for the loss and the plaintiffs were not entitled to recover.

Per PHILLIMORE, L.J.: When the bailee of goods has to admit that the goods have been damaged while in his custody, and in the absence of their custodian, and it is found that the absence was improper and negligent, and that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage.

Notes. Considered: *Coldman* v. *Hill*, [1918–1919] All E.R.Rep. 434; Distinguished: *The Santa Catherina* (1919), 8 L.J.P. 170. Considered: *Layton & Co.* v. *General Steam Navigation Co.* (1923), 130 L.T. 662; *Turner* v. *Civil Service Supply Association*, [1926] 1 K.B. 50; *Gosse Millard* v. *Canadian Government Merchant Marine, American Can Co.* v. *Canadian Government Merchant Marine*, [1927] 2 K.B. 432; *Calico Printers' Association, Ltd.* v. *Barclays Bank* (1930), 145 L.T. 51; *Aslan* v. *Imperial Airways, Ltd.*, [1933] All E.R.Rep. 567; *Beaumont-Thomas* v. *Blue Star Line, Ltd.*, [1939] 1 All E.R. 174; *Imperial Smelting Corpn., Ltd.* v. *Joseph Constantine Steamship Line, Ltd.* [1940] 2 All E.R. 46. Applied: *A. E. Farr, Ltd.* v. *The Admiralty*, [1953] 2 All E.R. 512. Referred: *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.*, post; *Williams* v. *Curzon Syndicate* (1919), 35 T.L.R. 475; *Diamond Alkali Export Corpn.* v. *Bourgeois*, [1921] All E.R.Rep. 283; *Gibaud* v. *Great Eastern Rail Co.*, [1921] All E.R.Rep. 35; *Reynolds* v. *Boston Deep Sea Fishing and Ice Co.* (1921), 38 T.L.R. 22; *Rutter* v. *Palmer*, [1922] All E.R.Rep. 367; *Fagan* v. *Green and Edwards*, [1925] All E.R.Rep. 266; *Brooks Wharf and Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 3 All E.R. 696.

As to the obligations of a bailee, see 2 HALSBURY'S LAWS (3rd Edn.) 114–120, and as to special contracts of carriage, see ibid., vol. 4, p. 154 et seq. For cases see 3 DIGEST (Repl.) 76–90 and 7 DIGEST (Repl.) 39 et seq.

Cases referred to:

(1) *Tamvaco* v. *Timothy and Green* (1882), Cab. & El. 1; 8 Digest (Rep. 1) 5, 1.

(2) *Liver Alkali Co.* v. *Johnson* (1874), L.R. 9 Exch. 338; 43 L.J.Ex. 216; 31 L.T. 95; 2 Asp.M.L.C. 332, Ex. Ch.; 8 Digest (Repl.) 10, *38.*

(3) *Chattock & Co.* v. *Bellamy & Co.* (1895), 64 L.J.Q.B. 250; 15 R. 340; 8 Digest (Repl.) 9, *34.*

(4) *Consolidated Tea and Lands Co.* v. *Oliver's Wharf*, [1910] 2 K.B. 395; 79 L.J.K.B. 395; 102 L.T. 648; 26 T.L.R. 388; 54 Sol. Jo. 506; 15 Com. Cas. 212; 8 Digest (Repl.) 9, *35.*

(5) *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 12 Asp.M.L.C. 387; 19 Com. Cas. 105, C.A.; 41 Digest 417, *2609.*

(6) *Price & Co.* v. *Union Lighterage Co.*, [1903] 1 K.B. 750; 72 L.J.K.B. 374; 88 L.T. 428; 19 T.L.R. 328; 8 Com. Cas. 155; affirmed [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 8 Digest (Repl.) 46, *277.*

(7) *Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.*, [1907] 1 K.B. 769; 76 L.J.K.B. 411; 96 L.T. 402; 23 T.L.R. 302; 10 Asp.M.L.C. 390; affirmed sub nom. *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.*, [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 24 T.L.R. 114; 52 Sol. Jo. 170; 10 Asp.M.L.C. 581; 13 Com. Cas. 104, H.L.; 41 Digest 474, *3056.*

(8) *Sutton & Co.* v. *Ciceri & Co.* (1890), 15 App. Cas. 144; 62 L.T. 742, H.L.; 8 Digest (Repl.) 47, *282.*

(9) *The Pearlmoor*, [1904] P. 286; 73 L.J.P. 50; 90 L.T. 319; 20 T.L.R. 199; 9 Asp.M.L.C. 540; 41 Digest 426, *2678.*

(10) *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1851), 16 Q.B. 600; 20 L.J.Q.B. 440; 15 Jur. 670; subsequent proceedings (1852), 10 C.B. 454, 7 Ry. & Can. Cas. 300; 21 L.J.C.P. 179; 19 L.T.O.S. 256; 16 Jur. 763; 138 E.R. 181; 8 Digest (Repl.) 146, *933.*

(11) *Great Northern Rail. Co.* v. *Morville* (1852), 621 L.J.Q.B. 319; Cox, M. & H. 616; 7 Ry. & Can. Cas. 830; sub nom. *Morville* v. *Great Northern Rail. Co.*, 19 L.T.O.S. 140; 16 J.P. 696; 16 Jur. 528; 8 Digest (Repl.) 55, *361.*

(12) *Taubman* v. *Pacific Steam Navigation Co.* (1872), 26 L.T. 704; 1 Asp.M.L.C. 336; 8 Digest (Repl.) 138, *894.*

(13) *The Stella*, [1900] P. 161; 69 L.J.P. 70; 82 L.T. 390; 16 T.L.R. 306; 9 Asp.M.L.C. 66; 8 Digest (Repl.) 59, *389.*

(14) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703; 53 L.J.Q.B. 124; 50 L.T. 281; 48 J.P. 388; 32 W.R. 207, H.L.; 8 Digest (Repl.) 66, *441.*

(15) *Morison, Pollexfen, and Blair, Ltd.* v. *Walton*, May 10, 1909, H.L., unreported; 3 Digest (Repl.) 78, *163.*

(16) *Phipps* v. *New Claridge's Hotel, Ltd.* (1905), 22 T.L.R. 49; 3 Digest (Repl.) 78, *162.*

(17) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 145, *772.*

(18) *Barnabas* v. *Bersham Colliery Co.* (1910), 103 L.T. 513; 55 Sol. Jo. 63; 4 B.W.C.C. 119, H.L.; 34 Digest 325, *2656.*

(19) *Thompson* v. *Royal Mail Steam Packet Co.* (1875), 5 Asp.M.L.C. 190, n.; 8 Digest (Repl.) 138, *892.*

(20) *Haigh* v. *Royal Mail Steam Packet Co.* (1883), 52 L.J.Q.B. 641; 49 L.T. 802; 48 J.P. 230; 5 Asp.M.L.C. 189, C.A.; 8 Digest (Repl.) 113, *728.*

(21) *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.*, [1914] 2 K.B. 788; 83 L.J.K.B. 1321; 111 L.T. 41; 30 T.L.R. 430; 19 Com. Cas. 246; affirmed post; [1915] 2 K.B. 729; 84 L.J.K.B. 1235; 112 L.T. 1103; 31 T.L.R. 243; 13 Asp.M.L.C. 64; 20 Com. Cas. 259, C.A.; 41 Digest 976, *8660.*

Also referred to in argument:

Dollar v. *Greenfield* (1905), Times, May 19, H.L.; 3 Digest (Repl.) 98, *256*.

Giblin v. *McMullen* (1868), L.R. 2 P.C. 317; 5 Moo.P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C.; 3 Digest (Repl.) 64, *60*.

Medawar v. *Grand Hotel Co.*, [1891] 2 Q.B. 11; 60 L.J.Q.B. 209; 64 L.T. 851; 55 J.P. 614; 7 T.L.R. 269, C.A.; 29 Digest 16, *201*.

Brid v. *Dale* (1837), 8 C. & P. 207; 2 Mood. & R. 80, N.P.; 8 Digest (Repl.) 6, *13*.

Finucane v. *Small* (1795), 1 Esp. 315; 3 Digest (Repl.) 76, *148*.

Peek v. *North Staffordshire Rail. Co.* (1863), 10 H.L.Cas. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 708; 9 Jur.N.S. 914; 11 W.R. 1023; 11 E.R. 1109, H.L.; 8 Digest (Repl.) 60, *394*.

Ashendon v. *London, Brighton and South Coast Rail. Co.* (1880), 5 Ex.D. 190; 42 L.T. 586; 44 J.P. 203; 28 W.R. 511; 2 Digest (Repl.) 368, *474*.

Ajum Goolam Hossen & Co. v. *Union Marine Insurance Co.*, *Hajee Cassim Joosub* v. *Ajum Goolam Hossen & Co.*, [1901] A.C. 362; 70 L.J.P.C. 34; 84 L.T. 366; 17 T.L.R. 376; 9 Asp.M.L.C. 167, P.C.; 29 Digest 195, *1547*.

The Glendarroch, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp.M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, *2580*.

Appeal by plaintiffs from a decision of PICKFORD, J., in the Commercial Court, in an action in which the plaintiffs claimed from the defendant damages for loss of and damage to the plaintiff's goods.

The facts appear in the judgments.

Leck, K.C., and *F. D. MacKinnon* for the plaintiffs.

Roche, K.C., and *Cranstoun, K.C.*, for the defendant.

July 31, 1914. The following judgments were read.

BUCKLEY, L.J.—In this action the plaintiffs sue for damages sustained by the defendant's negligence in relation to the lighterage of goods by the lighter *Mabel*. The lighter was lying at night at the Aberdeen Wharf. The defendant left her unattended. The tide fell so that she took the ground; when the tide rose again she was either underpinned or mud-sucked, and failed to rise. The water got in, the barge was submerged, and the goods were damaged. The defendant was guilty of negligence in leaving her unattended, but he says that, assuming negligence, and assuming that the negligence caused the loss, he is not liable by reason of certain words in the contract. These words are:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any loss of or damage to goods, however caused, which can be covered by insurance."

Before coming to any authorities, let me examine these words and see what they import. It is not every loss which is excluded by the words in question. The losses are confined to "any loss or damage which can be covered by insurance." This infers that there may be losses which cannot be covered by insurance. It may be that practically every loss can be covered by insurance, but this document evidently contemplates that within its meaning some cannot. The clause of immunity, therefore, is confined to certain losses—namely, losses which can be covered by insurance. The next step is to consider what are the losses or damages which this contractor would be under if he were not protected against them. For it is to such that the words must be addressed. For this purpose it is necessary to ascertain what the defendant's business was. Was he a common carrier or was he a person who came under the same liability as if he were a common carrier? It seems to me unnecessary to consider whether this defendant was a common carrier. If he has undertaken the liability of a common carrier, he stands in the same position as regards liability. The question whether he has undertaken such liability or not is, according to *Tamvaco* v. *Timothy and Green* (1), one of fact. He was a person who did not hold himself out as ready to carry goods for everyone, but he

A did, I think, hold himself out as a person ready to carry goods for reward for anyone who resorted to his wharf as a customer of himself as a wharfinger. All his bill-heads and stationery were headed with these words:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of
B craft and are made without recourse to lighterman."

According to *Liver Alkali Co.* v. *Johnson* (2), such a person may incur the liability of a common carrier. As a lighterman he was, I think, a person who incurred the liability of a common carrier in respect of the goods he carried. *Chattock & Co.* v. *Bellamy & Co.* (3) and *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (4)
C are, no doubt, cases in which the question of fact was resolved the other way. In the last-mentioned case HAMILTON, J., thought that the wharfinger only occasionally rendered to the customer of the wharf the subsidiary service of collecting and carrying his goods from the import steamer, and on that ground held that he was not subject to the liability of a common carrier. The question is one of fact, and, looking at the business in the present case, it is to be resolved, I think, in favour of
D holding that the defendant undertook the liability of a common carrier.

This being so, the defendant's liability was not confined to the liability to take proper care of the goods and not to be negligent, but extended to a liability to carry the goods safe against all events except the act of God and the King's enemies. He was, therefore, under two liabilities—the one a liability for negligence and the other a liability, as it is commonly expressed, as an insurer. His position is similar
E to that of the shipowner who is under two liabilities—the one as insurer, arising from the fact that he is a carrier, and the latter a liability arising from the implied warranty of seaworthiness. This was much discussed in *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport* (5). In this position of affairs an intelligible meaning is at once given to the words of exemption, "loss or damage which can be covered by insurance." To the extent of his liability as insurer the contract
F relieved him from liability, but the contract leaves him liable for negligence.

In this state of things the decision in *Price & Co.* v. *Union Lighterage Co.* (6) is, I think, exactly in point. That decision may be summarised by saying that the contract is to be read as if it contained the words "I will use reasonable care and skill, and will be liable for negligence, but as to losses which can be covered by insurance and for which, but for contract to the contrary, I should be responsible
G to you as insurer, I am not liable for those. If you want to provide for them you must cover them by insurance." If the carrier, says WALTON, J., ([1903] 1 K.B. at p. 752), desires to exempt himself he must do so in express terms, plain, and unambiguous terms. The parties are to be taken as contracting with reference to losses which are the common misfortune of both to the exclusion of losses which are due to the fault of one, unless the contrary be so expressed. The decision in
H that case was approved and followed in *Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.* (7) where LORD COLLINS ([1907] 1 K.B. at p. 778) pointed to the same considerations as I have mentioned with reference to the use of the word "insurance." Again in *Sutton & Co.* v. *Ciceri & Co.* (8) LORD HERSCHELL (15 App. Cas. at p. 152) deals in the same way with the words "insurance risks," as to which he says that, where spoken of in contradistinction to freight, the words cannot have so
I extensive a meaning as to exempt the party from liability as an ordinary carrier. *The Pearlmoor* (9) is to the same effect.

We have, however, been referred to cases earlier in date than *Price & Co.* v. *Union Lighterage Co.* (6) in which a larger exemption has been allowed in cases in which there have occurred words such as "in any case" or "under any circumstances" or "however caused," words which did not occur in *Price & Co.* v. *Union Lighterage Co.* (6). They are mostly railway cases. The first, in 1851, *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (10) is not, I think, of general application. In that case the owner of the horses accepted under the contract an

obligation to see to the efficiency of the carriage before he allowed his horses to be placed therein. There was a special contract in the matter again in a second action between the same parties. In *Great Northern Rail. Co.* v. *Morville* (11) the words were "for any damage, however caused," but again the contract contained the terms of a special agreement in the matter. In *Taubman* v. *Pacific Steam Navigation Co.* (12) the words were "under any circumstances whatsoever." It was held that this covered a case of wilful default and misfeasance. In *The Stella* (13) the words were "however caused." GORELL BARNES, J., said that the condition was clearly one which excluded the company from liability for the accident in that case. But the point does not seem to have been argued. I doubt whether the decisions in *Taubman* v. *Pacific Steam Navigation Co.* (12) and *The Stella* (13) can stand with the decision in *Price & Co.* v. *Union Lighterage Co.* (6).

The case which creates most difficulty is that of *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14). The words there were "liability for loss or damage by delay in transit or from whatsoever cause arising." These were the words contained in the offer as made by the company. The document signed by Brown ran "free and relieve the railway company from all claim or liability for loss or damage," not adding "from whatsoever cause arising." But the case proceeded upon the footing that the words in the offer and not the more limited words in the acceptance were the words to be considered. The language of LORD BLACKBURN is this (8 A.C. at pp. 709, 710):

> "Custom and ordinary usage says, in bills of lading when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

These words, it will be noticed, contrast the liability as an insurer with the liability for negligence, and contrast them in a case in which there was not, as in the present case, a limited class of loss contemplated by the exemption clause in question. Had the words been, as in the present case: "I will not be responsible for insurance risks," inferring "I will be responsible for other risks," LORD BLACKBURN's words would not, I think, apply. It is, moreover, to be borne in mind as regards all the railway cases, that they are cases in which a company enjoying a monopoly, but compellable to carry and covered by such a provision as is contained in s. 7 of the Railway & Canal Traffic Act, 1854, is the defendant in an action. The effect of s. 7 is that the company is liable for negligence notwithstanding notice to the contrary subject to a proviso that the company may make such conditions as the court shall find to be just and reasonable. Negligence, therefore, is within the subject-matter dealt with, and a condition which is found to be just and reasonable may possibly be imposed even in the matter of negligence. The railway cases are to be treated, I think, as being a class of their own.

The conclusion at which I arrive with regard to this clause is that it relieves the defendant from liability for loss falling within a certain class, and that the class is that of insurance risks in the ordinary meaning of that word as distinguished from liability for negligence. For these reasons I think that the defendant is not protected by the clause in question.

There arises, therefore, the question whether the plaintiffs have proved their case. They have proved negligence, but the learned judge has held that they

fail because they have not proved that the negligence caused the loss. If the learned judge had enjoyed the assistance which we have of the decision of the House of Lords in *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15), I doubt whether he would have decided this point as he did. The language of LORD LOREBURN in that case seems to me to be directly in point. It was a case in which a fire float which was being towed was lost, and the reason why she sank was unknown because there was no one on board her as there ought to have been. LORD LOREBURN said:

> "Here is a bailee, who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make that loss good." LORD HALSBURY said: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

That is, I think, precisely applicable to the present case. Upon the evidence there is the greatest difficulty in saying what happened, whether the barge was underpinned or whether she was mud-sucked. PICKFORD, J., thought that the evidence was more consistent with the latter than the former, and said (110 L.T. at p. 160):

> "I come to the conclusion that the evidence leads me to say that this arose from mud-sucking and not from being under-pinned."

But having to choose between the two theories, he said no more than that he was led to the one rather than to the other. What did take place it was impossible to prove, and the impossibility arose from the fact that the defendant neglected his obligation to keep a man in charge. The defendant, as bailee of the goods, is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and the loss would still have resulted. He has not discharged himself of that onus. *Phipps* v. *New Claridge's Hotel* (16), *Scott* v. *London Dock Co.* (17) are in point except that the question there was whether there was negligence or not, not whether the negligence caused the loss, and *Barnabas* v. *Bersham Colliery Co.* (18) contained, I think, nothing to the contrary. LORD LOREBURN, who gave judgment in the last-mentioned case, is the learned Lord from whom I have already cited in *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15). Upon this ground I think that the decision under appeal should be reversed, and judgment given for the plaintiffs.

KENNEDY, L.J.—In this case there is no doubt that the defendant's servant, who ought to have been in attendance upon the lighter during the night in the course of which, through some cause or other, it became submerged with the valuable cargo of the plaintiffs on board, improperly absented himself, and that through this misconduct the defendant must be held guilty of negligence in regard to the property of the plaintiffs of which the defendant was bailee. PICKFORD, J., has so found, and upon the hearing of this appeal the defendant's counsel did not dispute the propriety of this finding of fact. The learned judge, nothwithstanding, gave judgment for the defendant, because he held that it was not proved by the

plaintiffs that the submersion of the lighter with her cargo was attributable to this negligence.

Two causes of submersion were suggested, "mud-sucking" and "underpinning." The learned judge said that there were the greatest possible difficulties in preferring one of those theories to the other, but he came to the conclusion that the difficulties in the way in regard to underpinning were greater than those which were involved in the "mud-sucking" solution. Thereupon, if it be assumed that the cause of the submersion was "mud-sucking," came the further question: Might the submersion have been prevented if the defendant's lighterman had not absented himself? The learned judge held that it was not proved to him that, if the defendant's servant had been there, he could have prevented the accident, and, therefore, although, as he says, he did not like to free the defendant from the consequence of what he thought was negligence, he came to the conclusion that it was not shown that the defendant's negligence was the cause of the accident. It is clear that the propriety of this result depends upon a view as to the burden of proof that in such a case that burden lies upon the plaintiff. PICKFORD, J., said:

"Mr. Leck [counsel for the plaintiffs] argued that once I find negligence it is for the defendant to prove conclusively that the negligence could not have been the cause of the accident—that is to say to prove conclusively that the man could not have done anything to free the barge. I do not think that is the right point of view. I think that in this case, just as in any other, it is for the plaintiffs to prove that the negligence which occurred was the cause of the accident. . . . I have no evidence before me at all to lead me to conclude that if the man had been there he would have obtained assistance of any kind, and therefore, as I say with some regret, because I do not like to free the defendant from the consequences of what I think was negligence, I come to the conclusion that it is not shown that negligence was the cause of the accident."

With due deference I must say that I am unable to concur in this treatment of the burden of proof in such circumstances. I agree with counsel for the plaintiffs that the burden of disproof rested upon the defendant. We have properly been referred by the plaintiffs' counsel to the opinions expressed in the House of Lords by LORD LOREBURN, L.C., and LORD HALSBURY in the unreported case of *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15). A copy of the shorthand notes of the proceedings has been supplied to us. There, as here, the claim was by a bailor against a bailee. LORD LOREBURN said:

> "Here is a bailee who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discern at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his wrongdoing, he must make that loss good."

And LORD HALSBURY:

> "It appears to me that there was a bailment made to a particular person—a bailment for hire and reward—and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment. The proof of that rested upon him."

If the decision in this appeal depended simply upon this question of the burden of proof, this court would have to consider whether it could properly, upon the evidence already taken, give judgment for the plaintiffs, or should order a new trial. But, independently and outside of it, there is an important question of law in regard to the terms of the contract of carriage which the defendant's

counsel have very fully argued in this court, as they were entitled to do, although it is clear that it was not much discussed before my brother PICKFORD in the court below. He states the view which he was inclined to prefer, but he did not give any definite judgment upon the point. The defendant relies upon a certain condition in the contract as exonerating him from liability for negligence. The learned judge, while, as I have said, expressly stating that it was unnecessary for him to decide it, because he held it was not proved that the defendant's negligence caused the loss and damage sued for, stated also, adversely to the defendant, that if he had to decide the point his inclination would be to hold that the condition in the contract did not cover the defendant and did not protect him from liability.

This point of contractual liability arises in the following way. The defendant, who is a warehouseman, also undertakes for reward lighterage for his customers. He performs this lighterage sometimes in barges of his own and sometimes in hired barges. He undertook such lighterage in the case of the plaintiffs' goods on this occasion upon the terms of a written notice in the following words:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft, and are made without recourse to lighterman."

The question is whether the terms of this condition are such as to protect the defendant from liability for the loss of or damage to the plaintiffs' goods, if such loss or damage was caused by the negligence of the defendant's servant in charge of the lighter and the plaintiffs' goods on board of it. In dealing with this question, it is not necessary to decide whether, apart from the special condition, the liability of the defendant as a lighterman would or would not have been analogous to that of a common carrier according to the doctrine laid down by the Exchequer Chamber in 1874 in *Liver Alkali Co.* v. *Johnson* (2). I incline to think that it was. The decision of HAMILTON, J., in *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (4), which was cited to us in support of a different view, may, I think, be distinguished on the facts. The warehousing firm in that case owned no lighters, and, while in some cases conveying a customer's goods in a hired lighter from ship to wharf, made no charge for that, but had a uniform rate, called a management rate, from which no abatement was made in cases in which the customer did his own lightering.

In the present case the defendant, though it appears from the evidence that he lighters only for customers who employ his services as a warehouseman, also appears from the terms of the notice which I have quoted to undertake lighterage and to make a charge for that particular service. In the absence of an express contract between the parties, the measure of the liability of a warehouseman who undertakes the lighterage of a customer's goods must, I think, depend upon the inference to be drawn from the particular facts in each case. In *Tamvaco* v. *Timothy and Green* (1) in the year 1882, tried before CAVE, J., sitting with a London special jury in Guildhall, the facts were that the defendants, who were wharfingers in the Thames, carried in a lighter for the plaintiffs, their customers, certain rice in a barge, which stuck in the mud, whereby the rice was injured. They made one common charge for carrying and warehousing. CAVE, J., left the question of the terms of the contract of carriage, which were not the subject of any express agreement, but had to be inferred from these arrangements, to the jury, and they, after hearing the matter argued by very eminent counsel, found by their verdict that it was understood between the plaintiffs and the defendants when the agreement was made as to these goods that the defendants should undertake the liability of common carriers. In the present case, whether he had the larger liability of a common carrier or not, there can be no doubt that the defendant had at least the duty not to be negligent in regard to the carriage of the goods in his lighter, and he was negligent.

Is he protected by the terms of the special contract from the consequences of that negligence to the owner of the goods? But for the words "however caused," I am of opinion that he would not be, and that the decision of this court in *Price & Co.* v. *Union Lighterage Co.* (6) affirming the judgment of WALTON, J., which is referred to by PICKFORD, J., in his judgment in the present case, would bind us so to hold. In that case, however, there were no such words as "however caused." The contract of carriage exempted from liability only "for any loss or damage to goods which can be covered by insurance." There were no words referring to causation. Counsel for the defendant, in his full and able argument, has satisfied me that the presence of such words creates an essential difference, and that, while it is settled law that a contractual exemption, whether from loss or damage generally or from certain enumerated forms of loss or damage (such, e.g., as collisions, stranding and other perils), will not be read as protecting the carrier from liability for loss or damage if the loss or damage is proved to arise from the carrier's negligence and that the words "for any loss or damage to goods which can be covered by insurance" do not operate to enlarge the exemption, as appears from the case to which I have just referred, a different position in regard to the carrier's liability is created if the exemption clause is so worded as, according to the natural and plain interpretation of its language, clearly to comprehend all loss or damage, however that loss or damage may originate.

The general principle was laid down by LORD BLACKBURN in *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14) (8 A.C. at pp. 709, 710):

> "When an exception is made, the question is, What is excepted? Custom and ordinary usage says, in bills of lading when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage, however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

So a protective effect against the consequence of the carrier's negligence has been given to an exemption clause in 1872 in *Taubman* v. *Pacific Steam Navigation Co.* (12) where the words were "under any circumstances whatever"; in 1875, in *Thompson* v. *Royal Mail Steam Packet Co.* (19), where the words were "under any circumstances"; in 1883, in *Haigh* v. *Royal Mail Steam Packet Co.* (20), "in any circumstances"; in *The Stella* (13), where the words were "any injury howsoever caused"; and quite recently by BAILHACHE, J., in *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.* (21), where the words were "whatever be the nature of such accident and damage or howsoever arising." In the present case the condition which we have to consider uses the very words of exemption referred to by LORD BLACKBURN in *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (14), "damage however caused", and I see no sufficient reason not to treat them as sufficient to protect the defendant from liability for the negligence of his servant in regard to the carriage of the plaintiff's goods. On this ground, therefore, while, for the reasons which I have stated, I respectfully differ from my brother PICKFORD in regard to the view which he has taken as to the burden of proof upon the question of negligence, I think that in the result the defendant is entitled to retain the judgment in his favour, and that this appeal should be dismissed.

PHILLIMORE, L.J.—The plaintiff company was the owner of a cargo of tinned salmon in cases which was shipped on board the defendant's lighter and was

damaged owing to the submergence of the lighter on a rising tide in the river Thames off Aberdeen Wharf about midnight between Jan. 9 and 10, 1913. The lighter was in charge of a lighterman who was absent from his post for a period beginning at 8.45 or 9 p.m. till about 12.30 a.m., by which time the mischief had been done. This absence was without justification, and has been rightly found by the learned judge who tried the case, PICKFORD, J., to have been an act of negligence. According to the terms of the contract of carriage, the defendant was not liable as an insurer, but he may be liable for the negligence of his servants.

The first question, therefore, to be determined is whether the loss can be imputed to the negligent absence of the lighterman from his post. [HIS LORDSHIP examined the evidence, said that PICKFORD, J., had held that it was not proved that the presence of the lighterman who had been left in charge would have prevented the loss, and, so holding, had given judgment for the defendant, and continued:] This gives rise to the question: On whom was the burden of proof? It is here that I differ from the learned judge. I think he has imposed the burden of proof on the wrong party. I think that, when the bailee of goods has to admit that the goods have been damaged while in his custody, and in the absence of their custodian, and it is found that the absence was improper and negligent, and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage. As was said by LORD LOREBURN, L.C., *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15):

> "It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make that loss good."

I think I should have come to the same conclusion rather as a matter of business and common sense than of law, if I had been unaided by this decision in the House of Lords. If, therefore, there were no point upon the contract, I should think that the plaintiff company were entitled to recover; but there is a point upon the contract, on which provisionally PICKFORD, J., took a view unfavourable to the defendant, but which it was unnecessary for him to determine. This now becomes of importance.

The defendant is a wharfinger as well as a lighterman, and his business as a lighterman is subordinate or ancillary to his business as a wharfinger. He received these goods to carry them for storage at his wharf, upon terms which are contained in a printed notice appended to all his letters and invoices, of which the plaintiff company had notice, and which must be deemed to form part of the contract. These terms are thus expressed:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any loss of or damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman."

Thereupon the question arises whether by this language he has stipulated that he shall not be liable for a loss which may be due to the negligence of his servants. The words "any loss, however caused," are large enough to include a loss due to negligence, but it is said that a series of decisions have put a limited construction upon these general words.

Before proceeding to determine the question of construction, it is desirable to see what would have been the defendant's position had there been no such clause. The plaintiff company contends that without such a clause the defendant would have been in the ordinary position of a barge owner who carries by water, or, at any rate, on the sea or tidal waters, which is that he has the liabilities of a common carrier, and is responsible for the safe delivery of the goods, being allowed

to set up no excuses except those called "the act of God" and "the King's enemies." The defendant contends on the authority of *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (4) and *Chattock & Co.* v. *Bellamy* (3) that he is not under this liability. In the two cases on which he relies the circumstances were very special. In *Chattock & Co.* v. *Bellamy* (3) there were other grounds for deciding in favour of the defendant, and it does not appear to me that either of them is a sufficient authority for the present case. The general rule is that the barge owner is liable. This was well established by *Liver Alkali Co.* v. *Johnson* (2). If there were sufficient circumstances in either of the two cases relied upon to take the particular contract of carriage out of the general rule, there are no sufficient circumstances in this case. If it be said that the difference between the circumstances in this case and the circumstances in those cases is slight, I reply that either it is sufficient or those decisions must be wrong.

I approach, therefore, the construction of the contract from the position that, without it, the barge owner would be liable for all losses except those occasioned by the "act of God" and the "King's enemies", so that the clause protecting him from liability for loss is wanted for protection in other cases besides those of negligence. Thus far I am in favour of the plaintiff company. But it remains that the words are wide enough to protect from loss by negligence. There have been two lines of decision as to general words of this nature. One line is conveniently represented by the decision in *Price & Co.* v. *Union Lighterage Co.* (6) to the effect that by such an exemption in general terms, not expressly relating to negligence, the barge owner is not exempt from liability for a loss caused by the negligence of his servants. This is well established for the words "any loss of or damage to goods," whether with or without the words "which can be covered by insurance." On the other hand, there is the decision in *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14), where the words "all liability for loss or damage by delay in transit or from whatever cause arising" were held to protect the railway company from liability for the negligence of their servants in accepting for carriage fish which they could not carry in time. Lord Blackburn in that case says (8 A.C. at pp. 709, 710):

> "Such a contract as this was meant to protect, and did in effect protect, the company from the negligence of their servants . . . When a man says that he will not be responsible for damage, however caused, that is not to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

In *The Stella* (13) the same construction was given to a pass for a journey partly by railway and partly by sea, where the words were "the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused." In that case the claim was twofold—for loss of life, but also for loss of luggage. An earlier decision—*Taubman* v. *Pacific Steam Navigation Co.* (12)—held that a stipulation that a shipowner would not be answerable for loss of baggage under any circumstances whatsoever covered wilful default or misfeasance by the defendant's servants.

How are these two lines of decision to be reconciled, and what principle is to be extracted from a comparison of them? It would be a good broad principle if one could say that, wherever the bailee has the liability of a common carrier, this clause would be satisfied by giving it the effect of relieving him from that liability, but making him still responsible for the absence of due care, while, on the other hand, where his only liability in the absence of written terms would be to take due care, then the words must be given a wider effect, on which principle the decision of Bailhache, J., in *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.* (21) appears to rest. But railway companies have, in the absence of express contract, the liability of common carriers, and yet *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14) gives what I may call the

double effect to this clause, and shipowners have the same liability, and yet in *Taubman* v. *Pacific Steam Navigation Co.* (12) and in *The Stella* (13) the clause received a similar construction, so this broad principle will not hold. It was suggested that, where the clause takes the form that the barge owner will not be responsible for any loss which can be covered by insurance, the words "covered by insurance" point to a restriction, and mean any loss which the barge owner would be liable for as an insurer. I cannot take this view. It is true that by a metaphor the carrier, in the absence of special contract, is called an insurer. He is not really an insurer. There is no contract of insurance. His liability omits two of the primary losses for which an ordinary underwriter makes himself liable, the "act of God" and the "King's enemies." The word "insurer" is borrowed as a convenient word for expressing his liability. Even if it were otherwise, the expression is not: I will not be responsible "for any loss or damage for which I should be liable as an insurer," but "for any loss or damage which you can cover by insurance." Now the goods owner by insuring in the ordinary way covers himself against loss by perils of the seas howsoever caused, whether by negligence of the carrier's servants or otherwise. It seems to me that if these words "which can be covered by insurance" are to lend any colour, they intensify the force of the words "any" and "however," "mind you, any and every loss, however caused, against which you can protect yourself by an ordinary insurance, so that if you lose you need not come upon me for recoupment."

This, then, is the distinction. It is a fine one, and I am sorry to think that it is so fine, but it seems to be this: If you say "any loss," you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean "any and every loss" irrespective of the cause, and, therefore, you have not brought home to the person who is intrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or even, possibly, for your own personal want of care. But if you direct attention to the causes of any loss; if you say "any loss," "however caused," or "under any circumstances," you give sufficient warning, and it is not necessary to say in express terms "whether caused by my servants' negligence," or, in the bill of lading phrase, "neglect or default or otherwise." This seems to be indicated by the decision in *Haigh* v. *Royal Mail Steam Packet Co.* (20). The case itself is a decision upon a claim for loss of life, and, as shipowners may be said not to have the liabilities of common carriers in respect of passengers, it may not so far be to the point. It is true also that the case was mainly argued upon the question whether the words "loss or damage" could be applied to human beings. But the analysis of the argument is as follows. To a claim by an executor for the loss of life of a passenger by reason of negligent navigation the defence was a clause in the ticket to the effect that the company would not be responsible for any loss or damage arising from any act, neglect or default whatsoever of the pilot, master, or mariners. To this it was replied that these were not apt words to cover loss of life. The defendant company rejoined that they could have no other meaning, for loss of luggage was covered by an earlier clause—viz.: "The company will not be responsible for any loss, damage, or detention of luggage under any circumstances." To this the plaintiff surrejoined, as it were, that these words were not large enough to cover loss or damage by any act, neglect, or default of servants. The Court of Appeal held that they were large enough, that, therefore, the company was already protected against loss of luggage even by negligence, and that, accordingly, the words in the later clause must apply to loss of life or they would have no application. Further, the court gave its approval to the decision of the Court of Exchequer in an action by one Thompson against the same company, and dwelt upon the circumstances that the words "any loss" in an earlier form of the same company's ticket had been held to be insufficient, but the addition of the words "under any circumstances" made it sufficient. This is a direct approval of the view that, if the clause directs attention to the cause of

loss, and excludes all causes, it gives sufficient protection. I think this must be our guiding line, and that the judgment for the defendant was therefore right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *William A. Crump & Son; Keene, Marsland, Bryden & Besant.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

POLURRIAN STEAMSHIP CO., LTD. *v.* YOUNG

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Kennedy, L.J., and Warrington, J.), December 11, 14, 15, 1914, February 5, 1915]

[Reported [1915] 1 K.B. 922; 84 L.J.K.B. 1025; 112 L.T. 1053; 31 T.L.R. 211; 59 Sol. Jo. 285; 13 Asp.M.L.C. 59; 20 Com. Cas. 152]

Insurance—Marine Insurance—Constructive total loss—Need to prove unlikelihood of recovery of insured vessel—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60 (2) (*i*) (*a*).

Before the passing of the Marine Insurance Act, 1906, to establish the constructive total loss of a vessel it was enough to show that her recovery was uncertain. The Act of 1906 was entitled: "An Act to codify the law relating to marine insurance," but if the court found that in plain and unambiguous language it had altered the pre-existing law the duty of the court was to decide in accordance with the change. Under s. 60 (2) (i) (a) there is a constructive total loss where the assured is deprived of the possession of his ship by a peril insured against and it is unlikely that he can recover the ship, and, therefore, since the enactment of that section, it is not sufficient, on a claim for a constructive total loss, for the assured to prove uncertainty of recovery; he must prove unlikelihood.

Notes. Considered: *Horlock* v. *Beal*, [1916-17] All E.R.Rep. 81. Applied: *Rouse & Forgas* v. *Townend*, [1918-19] All E.R.Rep. 341. Considered: *Marstrand Fishing Co.* v. *Beer*, [1937] 1 All E.R. 158; *Czarnikow, Ltd.* v. *Java Sea and Fire Insurance Co.*, *Leslie and Anderson, Ltd.* v. *Java Sea and Fire Insurance Co.*, [1941] 3 All E.R. 256. Referred to: *Sanday* v. *British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; *Wilson Bobbin Co.* v. *Green* (1915), 31 T.L.R. 605; *Moore* v. *Evans*, [1917] 1 K.B. 458; *Cohen* v. *Standard Marine Insurance Co.* (1925), 30 Com. Cas. 139; *Green Star Shipping Co., Ltd.* v. *London Assurance Co.*, [1933] 1 K.B. 378; *Carras* v. *London and Scottish Assurance Corpn., Ltd.* (1935), 40 Com. Cas. 288; *Société Belge des Bretons Société Anonyme* v. *London and Lancashire Insurance Co.*, [1938] 2 All E.R. 305; *Rickards* v. *Forestal Land, Timber and Railways Co.*, *Robertson* v. *Middows, Ltd.*, *Kahn* v. *Howard Bros. & Co.*, [1941] 3 All E.R. 62; *Cook* v. *Gateshead Corpn.* (1944), 37 B.W.C.C. 166; *Rutherwell* v. *Caverswall Stone Co.* (1944), 171 L.T. 289; *Court Line, Ltd.* v. *R.*, [1945] 2 All E.R. 357; *Pesquerias Seccaderos de Espana S.A.* v. *Beer* (1946), 175 L.T. 495.

As to constructive total loss, see 22 HALSBURY'S LAWS (3rd Edn.) 149-159; and for cases see 29 DIGEST 268 *et seq.* For Marine Insurance Act, 1906, see 18 HALSBURY'S STATUTES (2nd Edn.) 14.

Cases referred to:

(1) *Rugs* v. *Royal Exchange Assurance Corpn.*, [1897] 2 Q.B. 135; 66 L.J.Q.B. 534; 77 L.T. 23; 13 T.L.R. 444; 8 Asp.M.L.C. 294; 2 Com. Cas. 201; 29 Digest 266, *2146*.

(2) *Goss* v. *Withers* (1758), 2 Burr. 683; 2 Keny. 325; 97 E.R. 511; 29 Digest 272, *2207*.

(3) *Andersen* v. *Marten*, [1908] A.C. 334; 77 L.J.K.B. 950; 99 L.T. 254; 24 T.L.R. 775; 52 Sol. Jo. 680; 11 Asp.M.L.C. 85; 13 Com. Cas. 321, H.L.; 29 Digest 216, *1725*.

(4) *De Mattos* v. *Saunders* (1872), L.R. 7 C.P. 570; 27 L.T. 120; 20 W.R. 801; 1 Asp.M.L.C. 377; 29 Digest 241, *1943*.

(5) *Cossman* v. *West*, *Cossman* v. *British America Assurance Co.* (1887), 13 App. Cas. 160; 57 L.J.P.C. 17; 58 L.T. 122; 4 T.L.R. 65; 6 Asp.M.L.C. 233, P.C.; 29 Digest 254, *2054*.

(6) *Sailing Ship Blairmore Co.* v. *Macredie*, [1898] A.C. 593; 67 L.J.P.C. 96; 79 L.T. 217; 14 T.L.R. 513; 8 Asp.M.L.C. 429; 3 Com. Cas. 241; 24 R. 893, H.L.; 29 Digest 266, *2145*.

Also referred to in argument:

Hamilton v. *Mendes* (1761), 2 Burr. 1198; 1 Wm. Bl. 276; 97 E.R. 787; 29 Digest 273, *2208*.

Cologan v. *London Assurance Co.* (1816), 5 M. & S. 447; 105 E.R. 1114; 29 Digest 254, *2058*.

Dean v. *Hornby* (1854), 3 E. & B. 180; 2 C.L.R. 1519; 23 L.J.Q.B. 129; 22 L.T.O.S. 222; 18 Jur. 623; 2 W.R. 156; 118 E.R. 1108; 29 Digest 220, *1764*.

Lozano v. *Janson* (1859), 2 E. & E. 160; 28 L.J.Q.B. 337; 33 L.T.O.S. 270; 5 Jur.N.S. 1401; 7 W.R. 654; 121 E.R. 61; 29 Digest 267, *2148*.

Shepherd v. *Henderson* (1881), 7 App. Cas. 49, H.L.; 29 Digest 286, *2333*.

Cory v. *Burr* (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp.M.L.C. 109, H.L.; 29 Digest 217, *1736*.

Bank of England v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 39 W.R. 657; 7 T.L.R. 333; sub nom. *Vagliano* v. *Bank of England*, 55 J.P. 676, H.L.; 42 Digest 779, *2094*.

Robinson Gold Mining Co. v. *Alliance Insurance Co.* [1904] A.C. 359; 73 L.J.K.B. 898; 91 L.T. 202; 53 W.R. 160; 20 T.L.R. 645; 9 Com. Cas. 301, H.L.; 29 Digest 217, *1734*.

Rankin v. *Potter* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp.M.L.C. 65, H.L.; 29 Digest 278, *2259*.

M'Iver v. *Henderson* (1816), 4 M. & S. 576; 105 E.R. 947; 29 Digest 266, *2143*.

Bainbridge v. *Neilson* (1808), 10 East, 329; 103 E.R. 800; 29 Digest 265, *2140*.

Mansell & Co. v. *Hoade* (1903), 20 T.L.R. 150; 29 Digest 277, *2246*.

Rous v. *Salvador* (1836), 3 Bing.N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex. Ch.; 29 Digest 263, *2129*.

Hall v. *Hayman*, [1912] 2 K.B. 5; 81 L.J.K.B. 509; 106 L.T. 142; 28 T.L.R. 171; 56 Sol. Jo. 205; 12 Asp.M.L.C. 158; 17 Com. Cas. 81; 29 Digest 271, *2188*.

Rodoconachi v. *Elliott* (1873), L.R. 8 C.P. 649; 42 L.J.C.P. 247; 28 L.T. 840; 2 Asp.M.L.C. 21; on appeal (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp.M.L.C. 399, Ex. Ch.; 29 Digest 218, *1747*.

Roach v. *Edie* (1795), 6 Term Rep. 413; 101 E.R. 623; 29 Digest 277, *2241*.

Barker v. *Blakes* (1808), 9 East, 283; 103 E.R. 581; 29 Digest 284, *2315*.

Stringer v. *English and Scottish Marine Insurance Co.* (1870), L.R. 5 Q.B. 599; 10 B. & S. 770; 39 L.J.Q.B. 214; 22 L.T. 802; 18 W.R. 1201; 3 Mar.L.C. 440, Ex. Ch.; 29 Digest 255, *2067*.

Bolton v. *Gladstone* (1804), 5 East, 155; affirmed (1809), 2 Taunt. 85; 127 E.R. 1008; 29 Digest 184, *1419*.

Powell v. *Hyde* (1855), 5 E. & B. 607; 25 L.J.Q.B. 65; 26 L.T.O.S. 74; 2 Jur.N.S 87; 4 W.R. 51; 119 E.R. 606; 29 Digest 217, *1735*.

Appeal by the plaintiffs from a decision of PICKFORD, J., in an action by shipowners on a policy of marine insurance claiming for the constructive total loss of the vessel insured.

The facts are stated in the judgment of the court.

Roche, K.C. (with him *Alexander Neilson*), for the assured.
Maurice Hill, K.C., and *R. A. Wright* for the insurer.

Cur. adv. vult.

Feb. 5, 1915. The following judgment of the court was read by

WARRINGTON, J.—The question for our determination upon the appeal in this case is whether or not on Oct. 26, 1912, when the plaintiffs, the owners of the steamship *Polurrian*, gave notice of abandonment of that vessel to the defendant, the insurer, and are by agreement to be taken as having issued the writ in this action, the state of things was such as to entitle the plaintiffs to recover upon the policy of insurance as for a constructive total loss. PICKFORD, J., has dismissed the plaintiffs' claim, and the plaintiffs have appealed to this court against his decision. The policy of insurance, so far as its contents are material to the matter in dispute, covered the plaintiffs against the risks of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. The plaintiffs allege, and the defendant denies, that on Oct. 26, 1912, there was a constructive total loss of the *Polurrian* by one of the perils thus insured against.

It is indisputable that according to the law of England, in deciding upon the validity of the claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date. If there then existed a right to maintain a claim for a constructive total loss by capture, that right would not be affected by a subsequent recovery or restoration of the insured vessel: see the judgment of COLLINS, J., in *Ruys* v. *Royal Exchange Assurance Corpn.* (1), which reviews the history of the law on this point. In strictness, therefore, in regard to the facts, I might, I think, confine myself for the purpose of this judgment to a statement of them as they stood on Oct. 26, which, as I have already said, is by agreement to be taken as the date of the issue of the writ in this action, and was also the date of the plaintiffs' notice of abandonment. As, however, the learned judge in the court below has in his judgment included a review of the events which occurred in reference to the *Polurrian* after she had been taken by the Greek naval forces out of the possession of the plaintiffs on Oct. 25, 1912, until her release seven weeks later on Dec. 8 and has drawn therefrom, in support of his conclusions, inferences more favourable to the defendants' case than do I venture with all respect to think the evidence warrants, I do not think it would be proper for me, having to consider that judgment, wholly to confine my reference to the facts to their position on Oct. 26. But that is the material date, and I shall deal with the later period as briefly as possible.

The *Polurrian*, laden with a cargo of Welsh coal and bound for Constantinople, was on Oct. 25, 1912, off the island of Tenedos. Her master, Mr. Jones, had known of the war between Italy and Turkey, which existed when the *Polurrian* started on her voyage, but had terminated before Oct. 25. He did not know that Greece was at war with Turkey. Off Tenedos the *Polurrian* was overhauled by Greek warships and taken by them to Mudros Bay, a harbour in the island of Lemnos, in which a portion of the Greek fleet was lying. The master, in the course of his interview with the Greek officer who had come on board the *Polurrian* when she was arrested, told the officer that he did not know of the war, and the order to follow the Greek destroyer to Mudros Bay was given after the officer had communicated by wireless telegraphy with the Greek admiral, with the result that he informed the master of the *Polurrian* "that he had orders to seize us; that he would have to convoy

A us to Mudros Bay, in the island of Lemnos." In the evening, after the *Polurrian* had anchored in the spot designated by an officer from the flagship, the master of the *Polurrian* was further interrogated as to his cargo and destination, the ship's papers were examined, and the master was told by the Greek officer (I quote the words textually from the shorthand notes) that

B "his country intended to confiscate the cargo, but they were not quite sure what they would do with the ship; but in the meantime the ship would be deemed a capture, although he personally did not think it could be maintained."

The master, either the same evening or the next day—the telegram is dated the 26th—telegraphed to the plaintiffs:

C "Arrived Mudros Bay, Lemnos Island, convoyed Greek destroyer. Now awaiting admiral's instructions. All well. Please inform families."

The next day the *Polurrian* was ordered alongside the flagship in order to coal her, and the master of the *Polurrian* had a conversation with the Greek admiral through an interpreter, the flag lieutenant, who spoke, says Mr. Jones, indifferent English, D in the course of which the master of the *Polurrian*, according to the account, told the admiral, in answer to questions as to his knowledge of hostilities between Greece and Turkey, that he had no knowledge of them. The conclusion of the interview, so far as regards the fate of the vessel as distinguished from her cargo, appears in the following question and the witness's answer thereto: "(Q.) Did he tell you at all what would ultimately be done with the ship?—(A.) No. With E regard to the ship he said he was not quite sure; it was a doubtful question; but that the question could be settled later on. In the meantime the capture of the vessel would be maintained and they would take the cargo."

This is the master's evidence as to facts in regard to Oct. 25 and 26, and I see no reason to doubt its substantial accuracy. But one important additional fact has to be added. Although the master of the *Polurrian* no doubt intended in his F interview with the Greek admiral to convey to him through the interpreter his ignorance of the existence of war between Greece and Turkey, it is quite plain that he conveyed in fact a very different impression. It is clear beyond doubt that the admiral understood him to admit that he did know of the war, and that, treating it as a serious admission, the admiral so informed his government at Athens, and that it was upon this ground that the government maintained the capture until G Dec. 8. I say that this is quite clear, because on Oct. 28 our Foreign Office, whose intervention had been invoked by the plaintiffs and the defendants, telegraphed to the plaintiffs:

"H.M. Minister at Athens reports Greek government maintain capture to be lawful. He has demanded reference to Prize Court."

H On the same day Mr. Henderson, the underwriters' agent at Athens, telegraphed to the Salvage Association, acting for the underwriters in London:

"*Polurrian*, Government considers prize, alleging captain admitted was aware declaration war. British Minister had informed Greek government vessel must come Piræus and matter decided by Prize Court here":

I see also the letter from Henderson at Athens to the Salvage Association in London, Oct. 28.

I have now stated, and, I hope, accurately stated, the facts as they existed on the material date, Oct. 26, 1912, the agreed date of the commencement of the present action, and the date on which the plaintiffs, having received from the master of the *Polurrian* at Mudros Bay the telegram which I have already set out, caused notice of abandonment on the ground of loss by capture to be given to the insurer. As it is, I think, for the reason which I have given, proper that I should deal with the subsequent history of the transaction it will be convenient, for the

sake of clearness, that I shall now complete the narrative before considering the legal rights of the parties to this litigation as they stood at that date. A few days after Oct. 26, and after the commencement of the discharge of the *Polurrian's* cargo into the Greek warships in Mudros Bay, the master had an interview with an officer whom he describes as the admiral's secretary. The master asked him as to the ship, and was told that the question of the ship would be settled by the government, and that he (the secretary) thought it would have to go to the Piræus. On Nov. 28, when the discharge was completed, the master of the *Polurrian* was ordered to proceed to the Piræus and there present himself at the general shipping office. He obeyed those orders, sailed to the Piræus, which he reached on Nov. 29, and was there directed by the captain of the port to await the instructions of the Minister of Marine. He was informed by the British Minister at Athens that the Greek admiral stated that he (Captain Jones) had admitted knowledge of the declaration of war before sailing, and that the Greek government was claiming that the *Polurrian* was a lawful prize; that a Prize Court was going to be held, and that he (Captain Jones) would have to give evidence. On Dec. 1 an armed guard was put on board by the Greek authorities, and by orders of the officer in command of the guard the *Polurrian*, with the guard on board, was navigated to the naval arsenal at Salamis, and there remained until her release on Dec. 8.

Meanwhile, from Oct. 28 onwards, the underwriters and the owners, without prejudice to their respective contentions as to the validity of the notice of abandonment, had continued vigorously and persistently through the Foreign Office in London and the British Minister at Athens, to press the Greek government for the release of the *Polurrian*. At one time during the first fortnight of November, it appeared likely that the application would succeed, so far, at any rate, as regards her release after her cargo had been discharged at Lemnos: see the correspondence of Nov. 1–14. But if the Greek government ever led our Minister at Athens, as it seems that they did, to suppose that such a course would be adopted, they altered their views on Nov. 15. The *Polurrian*, after her cargo had been taken out of her, was brought to the Piræus and thence to Salamis, with the intention that her case should be dealt with by a Prize Court. And on Dec. 4 Mr. Henderson, who, as I have already said, represented the interest of the underwriters at Athens, telegraphed to the Salvage Association in London:

> "*Polurrian* must go before the Prize Court on ground that captain made statement alleged knowing state of war. Court will be formed in about two days. Will cable later asking certain instructions."

There is in the correspondence a letter written from Athens on Dec. 5 by the same gentleman to the like effect. On Dec. 8 the Greek government released the *Polurrian*. It appears from a letter from Messrs. Harris and Dixon, Ltd., to the plaintiffs, dated Dec. 9 and referring to a communication just received in London from Lloyds' agent at Athens, that the government did so after submitting the question to the Legal Council of State, "who decided no capture under art. 43 of the Declaration of London." On Oct. 15, 1913, the Greek Administrative Prize Court rejected the claim put forward on behalf of the owners of the *Polurrian* for indemnity for her seizure and detention of the *Polurrian*, holding that the seizure and detention was justifiable, and holding in substance and effect, that whilst in fact he was, while carrying the coal cargo, ignorant of the outbreak of the Greco-Turkish War, the master of the *Polurrian* had used words which might fairly be constructed as meaning that he was aware of the war, and "it could well be considered that both the vessel and her cargo were subject to seizure." On careful consideration of the evidence given by the master of the *Polurrian*, and of the admitted correspondence and admitted documents, I must confess myself with all respect to my brother PICKFORD unable to concur in the view which, reading his judgment, I understand him to express—viz., that neither the Greek admiral nor the Greek government ever entertained any real doubt as to the right of the owners of the *Polurrian* to have the ship restored to them; that the Greek authorities knew quite well that

A they had no grounds for condemning the ship, and meant only to keep her so long as it was convenient for them to keep her to coal their fleet.

In my view, the evidence shows that the Greek admiral attached serious importance to the admission which he understood the master of the *Polurrian* to make when examined by him at Lemnos as to his knowledge of the state of war; and so did the Greek government when he communicated it to them between Oct. 26 and B 28, as shown by the communication to our Foreign Office, which appears in the telegram of the latter from our Foreign Office to the plaintiffs. A few days after the capture, and, therefore, soon after the discharge of the cargo at Mudros Bay had begun, the master of the *Polurrian* was informed by the Secretary of the admiral that the question as to the ship would be settled by the government, and that he thought the ship would go to the Piræus—for the purpose, as I understand C the words, of having the question of the right to condemn her as a prize settled by a Prize Court. In regard to our own Minister at Athens the inference which I draw from the evidence is that he also treated the question of the release of the *Polurrian* as a real question. On the arrival of the *Polurrian* at the Piræus he calls the attention of the master to his alleged admission to the admiral and tells him that he will have to go into court and give evidence. And indeed it was the British D Minister who had from the first insisted that the *Polurrian* ought to come to the Piræus and be dealt with by a Prize Court:

> "Government considers prize, alleging captain having admitted was aware declaration war. British Minister had informed Greek government must come Piræus and matter decided by Prize Court here.":

E Henderson's telegram to Salvage Association, Oct. 28, 1912.

The release of the *Polurrian* on Dec. 8 was due, no doubt, mainly, to the fact that the evidence of her master, obtained after the arrival of the *Polurrian* at the Piræus, had then been shown to the Greek government, and that the government, after consulting the Legal Council of State, decided to accept his denial of knowledge of the war, and his denial of having intended in his interview with the Greek F admiral to make any admission to the contrary. As to what the master thought at any time as to the prospect of the *Polurrian* being released, either soon or ultimately, I cannot find in the evidence any satisfactory proof, and I venture to think that the learned judge in the court below was under some misapprehension when he stated in the course of his judgment that the master in the evidence which he gave in court said that practically all the officials that he saw expressed their C own personal view that they had no right to touch the ship—that is to say, no right to condemn it—and he certainly did not think that the ship was not going to be restored within a reasonable time. At any rate, I have failed to find such a passage in the shorthand notes of his evidence taken at the trial. It is quite true that in a written statement which he gave to the underwriters' solicitors at Athens, made, as he deposed, "for the benefit of the underwriters in the interest of underwriters" H and "against the Greeks," there are words which might have that effect.

The fair result of the evidence in regard to the position of the *Polurrian* on Oct. 26, whether viewed apart from subsequent events, as I think it should be, or by the light of those events, was, in my judgment, one in which her ultimate release from capture was a matter of uncertainty. There was, of course, a possibility that she would be released after her cargo had been discharged out of her I without her being subjected to adjudication in the Greek Prize Court. There was a good ground for belief that the Greek government would release the vessel, being a neutral vessel, as in fact they did, without waiting for the decision of a Prize Court, if that government could be persuaded that the master of the *Polurrian* was pursuing his voyage in ignorance of the war, and that at all events the Prize Court would be satisfied of this when the evidence of the master was before it. On the other hand, the Greek admiral believed that he had an admission from the master that he did know of the war, and both he and the Greek government did take the view which finds expression in the judgment given by the Greek Prize

Court as appears by their judgment, published Oct. 29, 1913, that, if this knowledge existed, "it could well be considered that both the vessel and the cargo were subject to seizure," or, as Henderson's telegram from Athens of Oct. 28 puts it, and Harris and Dixon's letter to the plaintiffs of the same date puts it, that the *Polurrian* might be considered a lawful prize. Even if the *Polurrian* should be released, either by the Greek government or by the decision of a Prize Court, the date of such release was obviously uncertain- it might be weeks, or months, or longer before the matter would be settled.

Assuming that this was, as it appears to me to have been, the true position of affairs, I am of opinion that, if the present action had come to be decided before the Marine Insurance Act, 1906, had come into force the plaintiffs would have been held to have been entitled to recover upon the policy of insurance as for a constructive total loss. According to the law as it stood before the passing of that Act, the seizure or arrest or detention of a vessel for that which is either avowedly or obviously a temporary purpose, which will end within a period not, from the commercial standpoint, unreasonably long, as in the case cited by ARNOULD ON MARINE INSURANCE (9th Edn.), vol. ii, s. 1108, from EMERIGON, gives no ground of abandonment. But if the taking of the vessel, lawful or unlawful, out of the possession of the owner was, at the date of the commencement of the owner's action to enforce his notice of abandonment, a taking which still continued in operation, and the owner's loss of the use and disposal of the ship, once total, was at that date one which may be permanent and is, at any rate, of uncertain continuance, the owner who had duly given notice of abandonment was held by English law entitled to recover upon his insurance for a constructive total loss. In giving judgment in *Goss* v. *Withers* (2), LORD MANSFIELD, in a passage which is quoted by LORD HALSBURY in *Andersen* v. *Marten* (3) ([1908] A. C. at p. 340) observed (2 Burr at p. 694):

> "The ship is lost by the capture; though she be never condemned at all, nor carried into any port or fleet of the enemy. And the insurer must pay the value."

Again his Lordship said (ibid. at p. 696): "The better opinion of the books says 'sufficit semel extitesse conditionem, ad beneficium assecurati, de amissione navis; etiam quod postea sequeretur recuperatio. Nam per talem recuperationem, non poterit præjudicari assecurato.'"

In *De Mattos* v. *Saunders* (4), WILLES, J., in a passage which is quoted in the judgment of the Privy Council in *Cossman* v. *West* (5) 13 App. Cas. at pp. 179, 180) said (L.R. 7 C.P. at p. 579):

> "The cases cited of hostile seizure and condemnation by a Prize Court have no application. In such a case the original seizure is prima facie a total loss."
>
> "A vessel by being captured is certainly lost to its owner; but, as in one case where the question arose, a vessel may be taken and retaken before anyone knows of the loss, and as the contract of insurance is mainly a contract of indemnity, one can see how the courts would struggle against a large profit being made out of such a contract."

(Per LORD HALSBURY, L.C., in *Sailing Ship Blairmore Co.* v. *Macredie* (6) ([1898] A.C. at p. 599.) MARSHALL, in his standard work on the LAW OF MARINE INSURANCE (4th Edn.), p. 403, after adverting to the law of France, which then fixed a period of six months before an arrest of a ship in Europe could be treated by the owner as a total loss, proceeds:

> "In England the rule is more just, for there, from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo, and are deprived of the free disposal of them; because, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, it is equivalent to a total deprivation. It is therefore unreasonable to oblige the insured to wait the event of a capture, detention, or embargo."

But while, if the law to be applied was the law as it stood before the Marine Insurance Act, 1906, came into force, I should, as I have said, have held upon the

A facts as I understand them that the plaintiffs were entitled to succeed in this action, we have now to consider the case as the law has been established by the relevant provisions of that Act. It is an Act, as appears by its title, to codify the law relating to marine insurance, but if the court finds that in plain and unambiguous language it has altered pre-existing law, its duty is to decide in accordance with the change. The section which governs the present case is s. 60 (1) and
B (2). So far as it relates to a constructive loss by capture that section runs thus:

> "(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable. . . . (2) In particular, there is a constructive total loss—(i) Where the assured is deprived of the possession of
C his ship . . . by a peril insured against, and (a) it is unlikely that he can recover the ship."

One may, I think, without disrespect, declare some regret that the two expressions "reasonably abandoned on account of its actual total loss appearing to be unavoidable" and "unlikely that he can recover the ship" should be used apparD ently to describe the same position of things. For in my view, at any rate, it is one thing to predicate that a total loss of a thing reasonably appears to be "unavoidable," and another to predicate that its recovery is "unlikely." Taking, however, the latter, and, as it seems to me, the less severe test of the right to treat a capture as constituting a constructive total loss, I think that the statute has modified the pre-existing law to the disadvantage of the assured. One is always properly afraid of incompleteness in attempting a definition, but I venture to say
E that the test of "unlikelihood of recovery" has now been substituted for "uncertainty of recovery." The assured must now show two things—the first, that he has been deprived of the possession of his ship; the second, that it is unlikely that he can recover it. Whence the statute derived the phrase "unlikely that he can recover" as expressing a necessary condition of the assured's right to recover for a constructive total loss by capture I do not know. I have referred to many
F of the reported capture cases and have been unable to find it used judicially in any of them. But there it stands in the section of the Act of Parliament; its meaning is quite clear.

Therefore, in the present case, to enable the plaintiffs to succeed they must establish fully, (i) that at the date of the commencement of this action they had been deprived of the possession of the *Polurrian*; and (ii) that it was not merely
G quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so. They have, as my brother PICKFORD has held, and I quite agree with him, made the first point good—the Greek captors did deprive the plaintiffs of the possession of their ship. Have they also shown that there was more likelihood that the plaintiffs would not, than that they would, recover her? The test, in my humble judgment, is one the applica-
H tion of which in this case is, and generally in similar cases of capture would be, very difficult to apply with any sense of satisfaction, because it necessarily involves conjecture and speculation as to what is likely to be the outcome of a number of possible contingencies. Addressing myself, however, to the best of my ability to the question which this s. 60 directs me to consider, my conclusion is that, while I hold that on Oct. 26—the crucial date, because the date of the commencement
I of the plaintiffs' action—the recovery of the *Polurrian* by her owners was quite uncertain, I do not feel myself justified in holding that the balance of probabilities has been proved so clearly against her recovery that I can say that such recovery was "unlikely." This being so, the plaintiffs must be held to have failed to make out their case, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Botterell & Roche*, for *Vaughan & Roche*, Cardiff; *Parker, Garrett & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

PWLLBACH COLLIERY CO., LTD. *v.* WOODMAN

[House of Lords (Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), February 4, 26, 1915]

[Reported [1915] A.C. 634; 84 L.J.K.B. 874; 113 L.T. 10; 31 T.L.R. 271]

Nuisance—Business—Permission to carry on—Commission of nuisance—Nuisance not necessary to practical conduct of business—Business conducted without negligence and in customary way.

Easement—Implied grant—Need of express grant of right to which implied grant necessarily ancillary—Grant of real property—Implication of easement relating to definite, and not possible use.

By a lease of certain lands and premises dated Sept. 28, 1907, and made between F.G. and the Y. company, the Y. company were authorised to put up works and erections and to carry on the trade of mining. By a sub-lease dated Aug. 8, 1908, the appellants became sub-lessees of the premises on the terms of the lease of Sept. 28, 1907. In 1909 F.G. demised to the respondent adjoining land on which the respondent erected buildings which he used as a slaughterhouse, sausage factory, etc. In 1912 the appellants erected on their land buildings in which they broke, screened, and washed coal, thereby creating dust which the respondent alleged penetrated his buildings and damaged his meat and sausages therein. In an action by the respondent for an injunction restraining the appellants from continuing this course of action the jury found that what the appellants had done amounted to a nuisance, but that they had carried on their operations in a way which was reasonable and customary in the neighbourhood.

Held: (i) permission to carry on a business did not imply permission to carry it on so as to create a nuisance unless (which was not the case here) it could be proved that the business authorised could not in a practical sense be carried on without committing a nuisance; if a nuisance were committed, it could not be excused by proving that the operation causing the nuisance had been carried out without negligence and in the way which was customary in the neighbourhood: (ii) the right to create dust which fell on the respondent's premises could not be justified as being in the nature of an implied easement, for there was no express grant of a right to which the right to create the dust must be necessarily ancillary, and in the case of a grant of real property an easement would only be implied if it were necessary to give effect to the common intention of the parties to the grant with reference to the definite manner and purposes in and for which the land granted was to be used, and not where the subject of the grant was intended to be used in a manner which might or might not involve that manner of use: and therefore, the respondent was entitled to the injunction which he claimed.

Notes. Considered: *A.-G.* v. *Cory*, *Kennard* v. *Cory*, [1921] 1 A.C. 521; *Underpant* v. *Mayfair Hotel Co.* (1929), 27 L.G.R. 752. Applied: *Bulstrode* v. *Lambert* [1953] 2 All E.R. 728. Referred to: *Priest* v. *Manchester Corpn.* (1915), 84 L.J.K.B. 1734; *Malzy* v. *Eichholz*, [1916] 2 K.B. 308; *Simpson* v. *Wicker*, [1925] All E.R.Rep. 248; *Aldridge* v. *Wright*, [1929] 2 K.B. 117; *Keewatin Power Co., Ltd.* v. *Lake of the Woods Milling Co.*, [1930] A.C. 640; *Liddiard* v. *Wadrow*, [1933] 2 K.B. 319.

As to implied easements and nuisances between neighbouring properties, see Halsbury's Laws (3rd Edn.), vol. 12, 538-543, and vol. 28, 131-142 respectively. For cases see 19 Digest 38 et seq. and 36 Digest (Repl.) 281 et seq.

Cases referred to:

(1) *Hall* v. *Lund* (1863), 1 H. & C. 676; 1 New Rep. 287; 32 L.J.Ex. 113; 7 L.T. 692; 9 Jur.N.S. 205; 11 W.R. 271; 158 E.R. 1055; 19 Digest 48, *267*.

(2) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 12 Digest (Repl.) 682, *5256*.

(3) *Liford's Case* (1614), 11 Co. Rep. 46b; 77 E.R. 1206; 2 Digest (Repl.) 99, *654*.

(4) *Pomfret* v. *Ricroft* (1669), 1 Wms. Saund. 321; 2 Keb. 543, 569; 1 Sid. 429; 1 Vent. 26, 44; 85 E.R. 454; 19 Digest 80, *482*.

(5) *Senhouse* v. *Christian* (1787), 1 Term Rep. 560; 99 E.R. 1251; 19 Digest 112, *726*.

(6) *Blakesley* v. *Whieldon* (1841), 1 Hare, 176; 11 L.J.Ch. 164; 6 Jur. 54; 66 E.R. 996; 31 Digest (Repl.) 121, *2593*.

(7) *Hinchcliffe* v. *Earl of Kinnoul* (1838), 5 Bing. N.C. 1; 1 Arn. 342; 6 Scott, 650; 8 L.J.C.P. 105; 132 E.R. 1004; 19 Digest 43, *233*.

(8) *Ewart* v. *Cochrane* (1861), 5 L.T. 1; 25 J.P. 612; 7 Jur.N.S. 925; 10 W.R. 3; 4 Macq. 117, H.L.; 19 Digest 44, *247*.

(9) *Royal Mail Steam Packet Co.* v. *George and Branday*, [1900] A.C. 480; 69 L.J.P.C. 107; 82 L.T. 539, P.C.; 19 Digest 88, *526*.

(10) *Jones* v. *Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.J. 386; 24 T.L.R. 309; 19 Digest 43, *229*.

(11) *Richards* v. *Rose* (1853), 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3; 22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest 42, *223*.

(12) *Dalton* v. *Angus* (1881), 6 App. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest 7, *4*.

Appeal by the colliery company, defendants in the action, from an order of the Court of Appeal.

The facts appear in the opinion of LORD ATKINSON.

Sir Robert Finlay, K.C., Cave, K.C., and *D. Villiers Meager* for the appellants. *Micklem, K.C.*, and *Griffith Jones*, for the respondent, were not called on to argue.

The House took time for consideration.

Feb. 26, 1915. The following opinions were read.

EARL LOREBURN.— In this case Mr. Woodman, a butcher in the county of Glamorgan, sued a neighbouring colliery company in respect of a nuisance caused to him in his trade by their screening and breaking operations. These operations discharged coal dust which was carried by the wind to plaintiff's premises and injured him in his trade. The jury found that this was a nuisance, but that the operations of the company were carried on in a reasonable manner and in the ordinary way in which such operations are usually carried on in the county of Glamorgan. Also they found that the nuisance was not caused by the negligence of the company. At the trial judgment was entered for the defendant company, but the Court of Appeal reversed that judgment, and it now comes before your Lordships.

It is quite clear that if a nuisance has been committed no one can excuse it by simply saying: "I only did what is usually done in this county, and I was not in any way negligent." No doubt the character of the locality may be considered when the question is whether or not there has been any nuisance, but here that question is settled by the jury's verdict. Nor is it material that the company are absolved from negligence. Their duty to their neighbour is not merely to take care so as to avoid causing a nuisance. Their duty is to abstain from causing one at all, unless, of course, they have a right to cause one, as, for example, by statute or by consent of the complaining party or of someone whose consent binds

him. Such consent may be proved like any other question of fact. It may appear from the conduct of the parties and the surrounding circumstances, as in the case cited to us of *Hall* v. *Lund* (1), or as in the case of *Lyttelton Times Co. Ltd.* v. *Warners Ltd.* (2), where both parties agreed that the very thing which was done should be done, though neither of them expected that it would cause a nuisance. It is a question of fact, but if in ascertaining the fact it becomes necessary to put a construction upon a document, then it is the function of a court of law to construe the document in the ordinary way. In the argument at your Lordships' Bar this point of consent was the matter really pressed on behalf of the appellant company, and the only point that could be pressed with any regard to the law. Counsel for the company said that they held their colliery by an underlease under a lease of 1907 from the lessor, Mr. Gough, and that by virtue of the lease they had a right to carry on the colliery business in a reasonable and usual manner, even if it caused a nuisance to Mr. Gough or to those who by subsequent demise should derive title from him. They also said that the plaintiff, Mr. Woodman, held the premises (for a nuisance to which the action is brought) under a lease from the same Mr. Gough, dated in 1909, "subject to all rights and easements belonging to any adjoining or neighbouring property," and that, therefore, he could not complain of the nuisance, which had been expressly authorised beforehand by the common lessor from whom he took his lease.

Questions were raised whether or not the right of spreading coal dust over adjoining premises constitutes an easement in law, whether a servient tenement must have certain boundaries, whether Mr. Woodman was bound or not bound by this clause in the lease of 1907. It is unnecessary to enter upon these questions, because, in my opinion, the lease of 1907 does not authorise anyone to commit a nuisance. In that lease the lessees, who were a limited company, are licensed by Mr. Gough "to carry on such industries and trades on the freehold premises hereby demised as the lessees are by their memorandum of association empowered to carry on," and then a number of industries are specified. Among others are those of miners and smelters. That is all. To my mind it is clear that permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. If, indeed, it could be proved that the business authorised could not possibly, in a practical sense, be carried on without committing a nuisance, so that everyone must have known the purpose was to commit a nuisance, or if some particular method of carrying it on had been authorised, which being faithfully observed had nevertheless necessarily resulted in an unexpected nuisance being committed, then it would have been different. But no question was asked of the jury raising such a case, nor was any such case raised in the pleadings or argued here, if, indeed, it could have been argued at this stage. Nothing was relied upon beyond the clauses in the lease of 1907, together with the findings of the jury that the appellants' operations were carried on in a reasonable manner as usual in the county, and without negligence. In these circumstances the case stands upon the fact that the company committed a nuisance which they cannot excuse, and the order of the Court of Appeal ought in my view to be affirmed.

LORD ATKINSON.—I concur. The appellants are sub-lessees under a lease dated Aug. 8, 1908, from the Ystalyfera Tinplate Co., Ltd., of certain lands and premises situated at Ystalyfera, in the parish of Llanguick in Glamorgan, held by the latter company under a lease dated Sept. 28, 1907, from one Fleming Gough for a term of ninety-nine years. It is not disputed that, for the purposes of the present case, it may be assumed that the sub-lessees, the appellants, stand in the same position and are clothed with the same rights as to the user of the demised lands as were their lessors. The respondent holds lands adjoining those sub-demised to the appellants, demised to him also by the same Fleming Gough by a lease dated May 3, 1909, and, therefore, subsequent in date to the lease granted to the Ystalyfera company. In 1909 the respondent erected a building on the lands

A demised to him, which he used as a slaughterhouse, sausage factory, and place for storing chilled meat, etc. In 1912 the appellants erected on their own lands, within about 130 yards of the respondent's slaughterhouse, certain buildings in which they carried on the business of breaking, screening, and washing coals. The respondent complains that the coal dust created by these operations is carried from these works in large quantities to his slaughterhouse, and penetrates into them, damag-
B ing his meat and sausages, so as to be to him a nuisance, and he brings the action out of which this appeal arises for damages, and for an injunction against the continuance of this nuisance. The jury have given the answer already mentioned by the noble and learned Lord.

The lease of Sept. 28, 1907, authorised and empowered the lessees to put up works and erections and to carry on between twenty and thirty different trades, one
C of which was that of "miners," but the minerals under the demised lands were reserved to the lessor. The appellants contend that, by reason of this provision empowering them to carry on the trade of "mining," a grant to them is to be implied of the right or privilege or easement, if it can be properly so called, to carry on this work in such a way as to cause a nuisance such as is complained of to anyone deriving any part of Fleming Gough's land under an instrument
D later in date than Sept. 28, 1907; that the premises demised by this instrument stand to the adjoining portions of Fleming Gough's property in the relation of a dominant to a servient tenement; and that the respondent took his premises subject to this right or privilege so impliedly granted to the appellants, even though it caused a nuisance such as that complained of. It was argued on behalf of the appellants that the finding of the jury that the appellants carried on their business
E in a reasonable and usual manner was sufficient to justify the appellants in causing this nuisance. The finding is, however, far short of a finding that the creation of the nuisance was necessary for the exercise of the aforesaid right or the enjoyment of the privilege or easement claimed to be granted to the lessees. Even assuming that the operation of breaking up, washing, and screening coals is an ordinary operation of mining, and, therefore, covered by the words of the lease,
F it is quite consistent with the second finding that there may be other methods of doing all these things, reasonably practical in character, which would not cause the nuisance complained of. In this fact lies the fatal defect and insufficiency in the verdict of the jury as a justification of the appellants' action.

I should myself have thought that the law was clear upon this point, but as it was so resolutely contended that it was not necessary for the appellants to establish
G that the operations causing the nuisance were necessary for the enjoyment by them of the right or privilege they claimed, it is desirable to refer to a few authorities on the point. In *Liford's Case* (3) (11 Co. Rep. at p. 52a) the following maxim is given as expressing the rule of law applicable to grants: "Lex est cuicunque aliquis quid concedit concedere videtur, et id sine quo res ipsa esse non potuit." In PLOWDEN'S COMMENTARIES 16a, the law is laid down in substantially the same
H words. In *Pomfret* v. *Ricroft* (4) (1 Wms. Saund. at p. 322 (e)) the same maxim is set out as a correct statement of the law. In *Senhouse* v. *Christian* (5) the question was whether under a grant of a free and convenient way over a certain close for carrying coals, among other things, the grantee had a right to lay down a paved waggon-way, and ASHURST and BULLER, JJ., laid it down that it was clear that the grantee had the right to use the way in any manner that was necessary
I for the purpose of enjoying the privilege so granted. BULLER, J., said (1 Term Rep. at p. 570):

> "It was granted to him [the grantee] that he should have a free and convenient way for the several purposes stated in the deed, amongst others that of carrying coals, and it is found by the jury that he cannot so conveniently carry his coals unless he has a paved waggon-way. Then if such a way be necessary for the purpose of carrying the defendant's coals, he has a right according to the terms of the grant to make it."

SIR JAMES INGRAM, in *Blakesley* v. *Whieldon* (6) founding himself on these two cases, laid down the law thus (1 Hare, at p. 180):

"The general principle of law, that, where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute."

In *Hinchiffe* v. *Earl of Kinnoul* (7) which was a case concerned with a right of way in which the jury had returned a special verdict, TINDAL, C.J., in delivering the judgment of a court composed of VAUGHAN, BOSANQUET, COLTMAN, JJ., and himself, said (5 Bing.N.C. at p. 24):

"We are of opinion on the facts found in this special verdict, such right [i.e., the right of way] did pass as a necessary incident to the subject-matter actually demised."

He then cites the passage from PLOWDEN'S COMMENTARIES already referred to, and says:

"TWISDEN, J., in *Pomfret* v. *Ricroft* (4) lays down the rule of law to be 'when the use of a thing is granted everything is granted by which the grantee may have and enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.'"

The special verdict had found that the right of way was not only convenient but necessary for the use of the lessee's premises.

From these authorities it is, I think, clear that what must be implied is, not a grant of what is convenient, or what is usual, or what is common in the district, or what is simply reasonable, but what is necessary for the use and enjoyment, in the way contemplated by the parties, of the thing or right granted. Three cases, however, were cited by counsel for the appellants in support of their contention on this point. First, *Hall* v. *Lund* (1). In that case a lessee of a mill carried on for a number of years on the premises demised the trade or business of a bleacher. In the course of this business he discharged into a certain watercourse, the property of his lessor, about seven times each fortnight, water used, and in the using fouled, in his works, thereby polluting the water in the watercourse. The lessee surrendered his lease, and a new lease was made by this same lessor to a lessee described in it as a "bleacher," the premises demised being themselves described as the premises late in the occupation of the former lessee. By the last clause of the new lease it was provided that all buildings erected by the lessee for the purpose of carrying on the bleaching business should at the end of the term belong to the lessor. It was held that there was an implied grant to the lessee of the right to use this watercourse, as the former tenant had used it, for the purpose of carrying on the bleaching business. That case, however, was wholly different from the present. Here the works causing the nuisance were erected and worked during the term. There was no user antecedent to the grant of the lease of any portion of these premises for a business such as the appellants carried on in them. The ground of the decision, as stated by MARTIN, B., shows that the case had no application to the present case. He said (1 H.C. at p. 681):

"In ascertaining what passes by a conveyance evidence may be given as to the state of the property at the time and the mode in which it was enjoyed."

Again, relying on the authority of *Ewart* v. *Cochrane* (8), he said (ibid. at p. 684):

"Where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor parted with these rights."

The next case was *Royal Mail Steam Packet Co.* v. *George and Branday* (9). In that case the plaintiffs and defendants were owners of two wharves on the harbour of Kingston in Jamaica, separated the one from the other by a street

called Duke Street. From 1840 till the date of trial the defendants kept coal stores on their wharf, and loaded and unloaded coals thereat. It was common ground between the parties that the defendants had by this user acquired a prescriptive right to continue this practice of loading and unloading coals, though it had constituted an annoyance to the plaintiffs. The action was brought, not for the nuisance caused by the exercise of this prescriptive right, but upon the allegation that the defendants had made alterations in the structure of their works and in the mode of conducting their business, which had produced injurious effects in excess of those which would have been produced by the exercise of the prescriptive right. The judge at the trial left to the jury the question whether the appellants had by this alteration of structure and change of practice caused greater injury to the respondents' works taken as a whole than they had caused before the change. The Judicial Committee held that this was not the question which should have been left to the jury, but the question whether by this extension and alteration of the appellant's works there had been a variation in the kind of servitude imposed on the respondents, substantial enough to cause a new and appreciable wrong; that this was a question of fact which must be found by jury; and that consequently there should be a new trial. The case has not, in my view, any application whatever to the present case.

In the third case, *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (2), the appellants and respondents had agreed that the appellants' printing house should be re-built and that the upper part of it should be let to the respondents to be used as bedrooms in connection with their adjoining hotel; that the appellants were to have the ground floor for their own use as an engine-house and for a printing machine for the prosecution of their business. The parties thus expressly contracted that the ground floor of the appellants' house should be used for a specific purpose, which, of course, meant reasonably and properly used for that purpose. There was no evidence that this machinery had been improperly or carelessly worked, but it was an undoubted fact that both parties were under the impression at the time they entered into the agreement that the proper working of the machinery would not cause vibration and noise such as it afterwards did. It was held that no action lay. Here nothing was done but the particular thing which it was contracted and agreed should be done. It was the effect which resulted from the carrying-out of the contract that the parties were mistaken about. In the present case the matter in controversy is the nature and terms of the contract made, not what would follow from the legitimate carrying out of its terms when ascertained. On this point by itself the appellants must, in my view, fail. The appeal should, I think, be dismissed with costs. Having come to this conclusion, it is unnecessary for me to express any opinion on the other point dealt with in the Court of Appeal.

LORD PARKER OF WADDINGTON.—In the present case the jury have found the defendants guilty of nuisance. The nuisance consists in allowing a quantity of coal dust to escape from their works on to and into the plaintiff's shop, to the damage of the sausages and meat which the plaintiff keeps and sells there. There is no question as to the existence of the nuisance itself, but the defendants claim a right to commit it, and the existence or non-existence of this right is the point which your Lordships have to decide.

The defendants claim the right in question under or by virtue of an indenture of lease dated Feb. 28, 1907, and made between Fleming Gough, the plaintiff's predecessor in title, of the one part, and the Ystalyfera Tinplate Co. Ltd., from whom the defendants derive title, of the other part. It is admitted that if the lease in question operated to create the right, such right is now vested in the defendants, and that the plaintiff, who acquired his shop from Fleming Gough after the date of the lease, is bound to submit to its exercise. The only question, therefore, is whether the lease in question operated to create the right. The terms of the lease are sufficiently known to your Lordships, and I will refrain from stating them in detail. There is no express grant of the right alleged; it is said to be

created by implication. The premises demised were partly freehold and partly leasehold, and the lease contained a power for the lessee to put up such buildings, and to carry on such industries and trades on the freehold premises, as the lessees were by their memorandum of association empowered to carry on and be engaged in, these industries and trades being specified in the words of the memorandum and including (inter alia) the business of miners. There is nothing to show that any part of the freehold premises was then used for mining purposes.

The right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. The principle is expressed in the legal maxim: Lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit. Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be necessarily ancillary, nor is there any evidence that the nuisance is necessarily incidental to the defendants' mining operations. The second class of cases on which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones* v. *Pritchard* (10) ([1908] 1 Ch. at p. 636) and *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (2). But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use. Thus in *Jones* v. *Pritchard* (10) it was obviously the intention of the parties that the chimney flues connected with the grantor's house should continue to be used by the grantor to get rid of his smoke, notwithstanding that a moiety thereof was conveyed to the grantee, and similarly that the flues connected with the grantee's premises should be used to get rid of the grantee's smoke, notwithstanding that a moiety thereof was retained by the grantor. There was no difficulty, therefore, in implying the appropriate easements. Similarly, in *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (2) the lessor was doing on property retained by him precisely what both parties at the time of the grant contemplated that he should do, neither more nor less, and under these circumstances the court implied a reservation of the right to do it, notwithstanding that it occasioned a nuisance to the grantee. *Richards* v. *Rose* (11) is a similar case. In *Hall* v. *Lund* (1) the decision may be explained on the doctrine of continuous and apparent easements, but it is equally explicable on the principle I am now considering. The common intention of the parties in that case may well have been that the bleaching works, the subject of the demise, should be carried on by the lessee in precisely the same manner as had theretofore been the case, the refuse therefrom being turned as theretofore into the natural watercourse which flowed through the lessor's property. I think, however, that WILDE, B., states the principle somewhat too broadly when he says (1 H. & C. at pp. 685, 686):

> "A demise of a brewery would carry with it the right to use the premises for brewing although that might be a nuisance to the lessor or his assigns. So if a mill were demised, the lessee would have a right to grind there, although the noise might annoy the lessor or his assigns."

It is true that a demise of an existing brewery or an existing mill would probably connote a common intention that the brewery or mill should be worked in the

manner in which it had been worked prior to the demise, and, therefore, that if so worked it caused a nuisance to the lessor, he could not be heard to complain. But I doubt whether this would hold if the method of working were subsequently altered and a nuisance thereupon ensued, even though it might be proved that this method of working was the usual method, and that the lessee had been guilty of no negligence.

If, as I think, the principle is as above stated, the real question is whether the use of the screens which occasioned the coal dust was in the contemplation of the parties when the lease was granted. There is no evidence of any circumstance pointing to such an intention. The lessee company was a tinplate company, and even if it had power to carry on the business of coalmining there is no evidence that it ever did so or ever intended to do so. The business of coal mining now carried on on the demised premises appears to have been started by the defendants, and it is only recently that the defendants have commenced to use the screens which occasioned the dust. There appears, therefore, to be no room for any implication based on common intention. In my opinion, therefore, the defendants cannot justify the nuisance in respect of which this action was brought, and the appeal therefore ought to be dismissed with costs.

LORD SUMNER.—In order to succeed in this case the appellants must show that the Ystalyfera lease of 1907 ought to be construed as authorising them to injure the respondent by committing the nuisance which was established by the verdict found at the trial. Like the Court of Appeal, I doubt whether their alleged right is an easement properly so-called. It is highly indefinite. It amounts to a claim to spread their coal dust in injurious quantities anywhere over the lessor's land, in any direction and to any distance, just as the wind, blowing where it listeth, may chance to carry it. The area and the limits of this servient tenement, if such it should be called, are determined only by ownership by the lessor and contiguity to the appellants' premises. For the reason given by LORD BLACKBURN (*Dalton* v. *Angus* (12), 6 App. Cas. at p. 824) in explaining why at common law there is no easement to have an uninterrupted view over another's landscape—namely, that "anything which would impose a burden on a very large and indefinite area should not be allowed to be created except by actual agreement"—I think this right is too indeterminate to be an easement proper.

There is, however, no doubt that by the use of apt and sufficient words such a right may be created by grant. The deposit of coal dust on another's close may be the subject, not of a mere covenant not to prevent it, but of an actual grant of the right to do it. Hence it is not necessary to ask whether such a right would pass under the general words "easements and appurtenances," which, indeed, this lease does not contain; it is enough to ask if the lease expresses or implies it. The appellants contend that it does. The lease does not demise this washing plant as an existing building, for it had not been erected at its date, a point which goes far to distinguish the authorities relied on. Power is given to put up erections for, and to carry on, the trade of miners. This clause is in its nature restrictive; it limits to the company's corporate powers those general lawful uses which a natural person would have inferentially enjoyed. I cannot see how this can be read so as to empower the company to erect and use a coal-mining washing plant, even at the cost of causing a nuisance to the neighbours. There will be no derogation from the lessor's grant, if he, or those claiming under him, successfully resist such an injury, for the appellants will still enjoy the full benefit of reasonable and careful use of the plant, and ample effect will have been given to the words used. There is no finding that they cannot do so without committing a nuisance, nor is a washing plant that will bespatter the countryside with coal dust shown to be an indispensable instrument of coal-mining.

I think the cases cited are all distinguishable. *Hall* v. *Lund* (1) is the case of a lease of a building with the apparent easements or quasi-easements theretofore enjoyed with it, which included a right to foul a stream. But for that prior

enjoyment the right implied would not have extended beyond a reasonable use of the premises themselves. This case is not in point. In *The Lyttelton Times Case* (2) a certain building was erected for the occupation of both parties, and then an agreement was entered into between them by which the one who was the owner of it leased to the other that portion which had been erected for his use. In the course of occupation each was doing the very kind of thing for which the building had been erected. It was held that each must take it as he found it. In the absence of language to the contrary each might, without objection, use in the contemplated way the building erected for the purposes of both. It again does not touch this case. In the same way I think that the principle of *Jones* v. *Pritchard* (10) is the converse of the appellants' claim here. There it was found that the particular use of the premises, which was in question, was actually contemplated between the parties to the instrument in suit when it was entered into—in other words, there was the equivalent of a grant of that use. The only limit in such grant was held to be reasonable care in its use; if, notwithstanding care, the use caused a nuisance to the other party, that was the very thing that was granted. In the present case the question is whether the right to commit a nuisance is granted at all, care or no care. I think it was not; in *Jones* v. *Pritchard* (10) it was, or that was granted which involved it. The case is distinguishable. No other authority was relied on, nor can I see how the appellants' construction can succeed in principle. I think the appeal fails.

LORD PARMOOR [after stating the facts]: The appellants cannot succeed unless they can establish that the term of the lease of Sept. 28, 1907, empowering them, inter alia, to erect buildings and carry on the trade of miners authorises them, as sub-lessees from the Ystalyfera company, to carry on the business of miners so as to cause a nuisance over the adjoining property of the lessor, and that the respondent, in respect of the slaughterhouse and wooden shed, holds, under his demise, subject to this right or easement conferred in the prior lease. It is not contended that the covenant in question directly authorises the original lessees or the appellants to carry on any business so as to cause a nuisance to the adjoining property of the lessor, but it is said that such a right can be, and ought to be, inferred by implication, as being the common intention of the parties, so long as the business is carried on without negligence and in a manner usual in the district.

I confess that I am quite unable to understand this contention unless it can be said that it is practically impossible to carry on the business of mining upon the demised site without causing a nuisance. In the present case there is no evidence that it was in any way necessary, in order to carry on the business of mining, to cause a nuisance, and all the circumstances point to a different conclusion. The nuisance was not complained of until the new plant and machinery came into operation in October, 1912, and up to that date the mining business had been carried on under conditions so that no nuisance was occasioned. The provision relied on in the lease of Sept. 28, 1907, is in truth a covenant of restriction, and not a covenant enlarging the rights of the lessee. Apart from this provision, the appellants might, so far as appears, have carried on any business upon the land in question, subject, no doubt, to the ordinary obligation not to commit a nuisance. The provision, so far as it is effective, restricts the character of the business which may be carried on to those contained in the memorandum of the association of the Ystalyfera company, and it is an extravagant proposition that authority given to a company to carry on any business according to their memorandum of association authorises, by implication, the carrying on of such business so as to cause a nuisance to the occupier of the adjoining property of the lessor, and that this was the common intention of both parties to the lease. I desire to express my concurrence in the judgment of PICKFORD, L.J., when he said in the Court of Appeal (111 L.T. at p. 174):

"The highest the case can be put in favour of the defendants is that Gough and his tenant, the plaintiff, are under an obligation (using the language of

LORD LOREBURN in the case, to which we were referred, of *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.* (2)) not 'to frustrate the purpose for which, in the contemplation of both parties, the land was hired,' and, therefore, the defendants would have to make out that to restrain the carrying on of the business as a nuisance must frustrate the object for which the land was hired—namely, the carrying on of the business of mining upon it."

In my opinion, it is not material to decide whether an easement has been granted over the land on which the premises occupied by the respondent are situated, since if, on the construction of the lease, a right—other than an easement—has been given to carry on the mining business so as to create a nuisance, the lessor could not by a subsequent lease have derogated from his previous grant, and the appellants would have been entitled to succeed in their appeal. In my opinion, the decision of the Court of Appeal is right, and the appeal should be dismissed with costs.

Order accordingly.

Solicitors: *White and Leonard*, for *William Jones*, Swansea; *J. T. Lewis & Wood*, for *J. Moy Evans*, Swansea.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

PRODUCE BROKERS CO., LTD. *v.* OLYMPIA OIL AND CAKE CO., LTD.

[HOUSE OF LORDS (Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), October 15, 18, November 15, 1915]

[Reported [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 32 T.L.R. 115; 60 Sol. Jo. 74; 21 Com. Cas. 320]

Arbitration—Power of arbitrator—Dispute arising out of contract—Determination whether any usage or custom affecting obligations of parties—Implication as term of contract.

Arbitrators empowered to decide all disputes arising out of a mercantile contract, in determining a dispute referred to them, are competent to decide whether or not there is any trade usage or custom which affects the obligations of the parties under the contract and to give effect to the implication in the contract of the terms of that usage or custom, for they must decide what are the terms of the contract before interpreting and applying it, to which question the existence or non-existence of a usage or custom is relevant.

Hutcheson v. *Eaton* (1) (1884), 13 Q.B.D. 861, and *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.* (2), [1908] 2 K.B. 907, disapproved.

Notes. Considered: *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.*, [1926] A.C. 497; *London Export Corpn., Ltd.* v. *Jubilee Coffee Roasting Co.*, [1958] 2 All E.R. 411. Referred to: *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; *Young* v. *Bristol Aeroplane Co.*, [1944] 2 All E.R. 293; *Getreide-Import-Gesellschaft m.b.H.* v. *Contimar S.A. Compania Industrial Comercial Y-Maritima*, [1953] 2 All E.R. 223.

As to the powers of an arbitrator and the conduct of an arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 31, 32, 34–38; and for cases see 2 DIGEST (Repl.) 550–552, 555 *et seqq.*, 600–602. For Arbitration Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 89.

Cases referred to:

(1) *Hutcheson* v. *Eaton* (1884), 13 Q.B.D. 861; 51 L.T. 846, C.A.; 2 Digest (Repl.) 601, *1287*.

(2) *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K.B. 907; 78 L.J.K.B. 51; 99 L.T. 680, C.A.; 2 Digest (Repl.) 602, *1288*.

(3) *Meyer* v. *Dresser* (1864), 16 C.B.N.S. 646; 33 L.J.C.P. 289; 10 L.T. 612; 2 Mar.L.C. 27; 143 E.R. 1280, sub nom. *Mayer* v. *Dresser*, 12 W.R. 983; 17 Digest (Repl.) 39, *465*.

(4) *Metzner* v. *Bolton* (1854), 9 Exch. 518; 23 L.J.Ex. 130; 2 W.R. 362; 2 C.L.R. 685; 156 E.R. 221; 17 Digest (Repl.) 51, *590*.

(5) *Tucker* v. *Linger* (1883), 8 App. Cas. 508; 52 L.J.Ch. 941; 49 L.T. 373; 48 J.P. 4; 32 W.R. 40, H.L.; 17 Digest (Repl.) 51, *593*.

(6) *Hutton* v. *Warren* (1836), 1 M. & W. 466; 2 Gale, 71; Tyr. & Gr. 646; 5 L.J. Ex. 234; 150 E.R. 517; 17 Digest (Repl.) 38, *449*.

(7) *Wigglesworth* v. *Dallison* (1779), 1 Doug.K.B. 201; 99 E.R. 132; 17 Digest (Repl.) 38, *448*.

(8) *Humphrey* v. *Dale and Morgan* (1857), 7 E. & B. 266; 26 L.J.Q.B. 137; 28 L.T.O.S. 284; 5 W.R. 466; 3 Jur.N.S. 213; affirmed sub nom. *Dale* v. *Humphrey* (1858), E.B. & E. 1004; 6 W.R. 854; 120 E.R. 783; sub nom. *Humphrey* v. *Dale and Morgan*, 27 L.J.Q.B. 390; 31 L.T.O.S. 328; 5 Jur.N.S. 191, Ex. Ch.; 17 Digest (Repl.) 47, *552*.

Appeal from the decision of the Court of Appeal ([1914] 3 K.B. 1262), affirming a decision of the Divisional Court ([1914] 1 K.B. 442).

By a contract dated May 30, 1912, the appellants, the Produce Brokers Co., Ltd., sold to the respondents, the Olympia Oil and Cake Co., Ltd., 6,000 tons of soya beans, to be shipped from an oriental port in December, 1912, and/or January, 1913, by steamer to Hull. Clause 3 of the contract provided:

"Particulars of shipment . . . to be declared by original sellers, not later than 40 days from the date of the last bill of lading . . . In case of re-sales copy of original appropriation shall be accepted by buyers and passed on without delay . . ."

Clause 10 provided:

"This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract. . . ."

The form of contract used was the printed form of contract issued by the Incorporated Oil Seed Association for adoption by persons engaged in the oil seed trade in sales of cargoes of Manchurian soya beans with slight variations adopted by the parties. The contract contained a clause providing that "all disputes arising out of this contract shall be referred to arbitration." By a contract dated Sept. 9, 1912, the Produce company purchased from the East Africa Co. (the shippers of the cargo) under a similar contract 6,000 tons 10 per cent. more or less of soya beans for shipment in December, 1912, and/or January, 1913. On Feb. 4, 1913, the Produce company received a declaration and appropriation of a cargo of 6,400–6,600 tons of soya beans per steamship *Canterbury*, which was stated to have sailed from Vladivostock on Jan. 31, and on the same date the Produce company declared and appropriated this shipment to their contract with the Olympia company. On Feb. 4 the steamship *Canterbury* was wrecked and her cargo totally lost, the loss being known in London about 3 p.m. on that day. The fact of the loss of the ship was not known to the East Africa Co. at the time of their tender to the Produce company, but the latter company was aware of it at the time of their making their tender to the Olympia company. The Olympia company refused to accept the tender, and the question whether the tender was a good tender or not was referred to arbitration under the arbitration clause in the contract. The umpire by his award, dated May 7, 1913, awarded "that the appropriation per *Canterbury* is a good appropriation in the terms of the contract, and must be accepted by the buyers." That was carried to the Committee of

Appeal of the Incorporated Oil Seed Association, and they stated a Special Case for the opinion of the court. Certain questions were asked the court, the material one being whether under the terms of the contract there could be a valid tender or appropriation of a cargo shipped on board the steamship *Canterbury* to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Divisional Court answered these questions in the negative. Thereupon the matter went back to the Committee of Appeal, and on June 25, 1914, they made an award in which they stated that while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law apart from the custom of the trade," they nevertheless found that there was a long-established and well-recognised custom of the trade in cases of re-sales that buyers under the form of contract in question impliedly agreed with their sellers that they would accept the original shipper's appropriation if passed on without delay. On a motion by the buyers to have the award set aside, of which notice was given on July 11, 1914, the Divisional Court held that the arbitrators had no jurisdiction to find conclusively the existence of a trade custom, and the Court of Appeal (BUCKLEY, PHILLIMORE and PICKFORD, L.JJ.), on the authority of *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd., and Hüttenbach & Co.* (2) and, against their own opinion, affirmed this decision. The Produce company appealed.

Sir Robert Finlay, K.C., Leck, K.C., and *F. D. MacKinnon, K.C.*, for the appellants.

Leslie Scott, K.C., and *Dunlop* for the respondents.

The House took time for consideration.

Nov. 15, 1915. The following opinions were read.

EARL LOREBURN.—If in this case we allow the appeal it is to be understood that we are not differing from the opinions expressed by the lords justices. The Court of Appeal felt itself bound by previous decisions of co-ordinate authority though it disapproved of them, while this House is not bound. I agree with the opinions expressed by all the lords justices, and propose to give effect to them by moving that the order appealed from be reversed. It is in one aspect of it a deplorable case. These men of business made contracts and therein agreed to arbitrate upon all disputes arising out of their contracts. Yet there have already been seven distinct stages of argument and decision, four of them in courts of law, upon a dispute arising on those contracts, and the end is not yet. I do not know how many more stages there will be. Parties have a right to prefer what some may consider the imperfect though expeditious wisdom of arbitrators to the slower and more costly justice of His Majesty's courts. It is to be regretted when they have to encounter the inconveniences of both methods with the advantage of neither.

I will not recapitulate the facts of this case or the steps by which it has been brought here. I go direct to the notice of motion of July 11, 1914, by which the Olympia company sought to set aside an award of the Appeal Committee of the Incorporated Oil Seed Association. The appeal before your Lordships springs from this motion. The Olympia company in their notice specified four grounds upon which they relied to set aside the award, the gist of their complaint throughout being that the Arbitral Committee had found and acted upon a custom of trade. I will deal presently with the first ground set out in this notice of motion. The third and fourth grounds, which allege judicial misconduct by the Arbitral Committee, disappear. They were abandoned by counsel for the Olympia company when he perceived how hopeless it must be to sustain them upon the evidence. The arbitrators needed not to hear evidence in regard to customs of a trade in which they were experts when the custom was distinctly raised, both parties had an opportunity of adducing evidence upon it, and neither party chose to do so. If nothing was said about this custom in the Special Case stated for the opinion of the High Court, it was so because the Olympia company who complained of the omission did not ask that the custom should be stated in the Case which they alone

asked for in order to raise points which they alone put forward. Counsel was well advised in abandoning these two grounds. On the remaining ground – namely, the second, the Olympia company partially succeeded, both in the Divisional Court and in the Court of Appeal, to the evident regret of both courts. The point was this. The Olympia company maintained that the Arbitral Committee had no jurisdiction to find that there was a custom of trade binding the parties, and cited two authorities. Certainly these authorities appear to be in their favour, and upon them both courts felt bound so to hold. Accordingly, they adjourned the hearing of the motion and gave both parties liberty to file affidavits as to the existence of the alleged custom. They did so on the footing that there was no jurisdiction finally to find the custom.

In my opinion, the Appeal Committee had jurisdiction finally to find as they did in regard to the custom of trade. I confess that I am no better able than was BUCKLEY, L.J., to understand the contrary principle laid down in *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd. and Hültenbach & Co.* (2). When an arbitrator has power, as here, to decide all disputes arising out of a contract, including questions of law, surely he must decide what the contract is, and he cannot decide that without introducing the custom. These decisions seem to mean that he can decide on the existence of a custom only if he decides rightly. There is no such magic in a custom that an issue as to its existence should be treated differently from any other issue of fact before an arbitration tribunal. With all respect, it seems to me that a court plainly usurps the function of an arbitrator when it claims to decide that issue for itself on a submission such as we find here. It is true that a court will decide for itself whether an inferior court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction. I do not see the analogy. Here the jurisdiction of the Appeal Committee to decide the dispute did not depend upon its finding about the custom. There was an agreement of the parties to submit all disputes, and this certainly is a dispute. Therefore, the second ground for the motion in the King's Bench Division fails.

I come back to the first ground, which was that the award was "bad on its face or wrong in point of law." I understand this to mean that on the face of the award there is an incompatibility between the written contract and the custom. It may mean something more, as, for instance, that the custom was unreasonable, for we did not enter upon this part of the case. I was tempted to suggest that, having the case before us, we should dispose of it once for all by deciding this first ground also. But the respondents deprecated that course, and the appellants were lukewarm, if not disinclined, and it is undesirable that this House should, without necessity, act as a court of first instance without the aid of considered judgments in other courts, which are of priceless value to a final Court of Appeal. Therefore, the first ground of the motion still remains to be disposed of by the Divisional Court. Not having heard argument, I express no opinion upon the scope of the first ground, still less upon its merits. I think the best course will be to reverse the order appealed from, to declare that the motion ought to be dismissed as to grounds 2, 3, and 4 contained in the notice, and that the Case be remitted to the Divisional Court to determine it upon the first ground contained in the notice. The reversal is merely a technical reversal, for the judgments were given in accordance with previous decisions, and against the opinion of the judges.

LORD ATKINSON. Owing to the course the argument in this case has taken, the second only of several questions raised by the notice of motion to set aside the award of the Appeal Committee, upon which the Divisional Court made the order affirmed by the order now appealed from, remains to be decided by this House. That question is whether the Appeal Committee exceeded their jurisdiction in determining that the usage or custom mentioned in the award existed in fact, or in deciding that the respondent company were bound by the alleged usage to accept the appropriation therein referred to. The Divisional Court by their order directed

A that the motion should stand adjourned, both parties to be at liberty to file, within a week, further affidavits on the question of the existence of the custom mentioned in the awards. This order amounts, therefore, in effect, to a decision: (i) that arbitrators or an umpire were incompetent to decide finally the question of the existence of a trade usage or custom affecting obligations under a commercial contract, though the submission entered into by the parties fully empowered them B to decide all disputes arising out of that contract, and (ii) that the Divisional Court had itself jurisdiction to determine that question. The Court of Appeal, feeling itself bound by the authority of *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.* (2), upheld this decision, but at the same time, by a line of reasoning absolutely convincing, in my opinion, showed that these cases were wrongly decided. Primâ facie one would suppose that C authority to decide disputes arising out of a contract necessarily conferred authority to decide what were the terms of that contract. It would appear to me to be impossible for any judge or arbitrator to determine whether any particular dispute arose out of a contract unless and until he knows what that contract is. This involves that the arbitrator must in such a case construe the contract which the parties entered into, and thus determine what they meant to express by the D language they have used. If, for instance, in a contract relating to any art or trade or business the parties use terms having technical meanings in that art, trade, or business, then those terms should primâ facie have that meaning attributed to them, simply because the parties to the contract presumably used those terms in their technical sense. In such a case, it would appear to me that arbitrators or an umpire would, under such a submission as existed in this case, necessarily have E authority to determine what was the technical meaning of those technical terms. It would, I think, be quite impossible for any court of law not to treat such a determination as one made with full authority, and final in itself.

Now, is there any essential difference between such a case as that and a case where it is sought to construe the language of a contract in relation to, and through the medium of, a trade usage or custom? In my opinion, there is not. The F language expressing a trade custom is taken to be imported into the language used by the contracting parties, whether written or oral, because it is presumed that they had the usage in their minds when they made their contract, made it in reference to that usage, and intended that the usage or custom should form part of it. If they have used language in their contract inconsistent with the custom, that is one of the most effectual ways of negativing this presumption, excluding the cus- G tom, and declaring that their contract is unaffected by it. Erle, C.J., in *Meyer* v. *Dresser* (3) states the law upon this point very neatly thus (16 C.B.N.S. at p. 660):

> "In the cases where local usages are imported into a contract it is because they tacitly form part of it, like those contracts in which we find the words 'other usual terms.' They then form part of the contract itself. The contract H expresses what is peculiar to the bargain between the parties; the usage supplies the rest."

Parke, B., in *Metzner* v. *Bolton* (4) says (9 Exch. at p. 521) that where persons enter into contractual obligations with one another under circumstances governed by a particular usage, then the usage when proved must be considered as part of the agreement. Lord Blackburn, in *Tucker* v. *Linger* (5), speaking of an agri- I cultural usage in reference to a lease of land, expresses himself thus (8 App. Cas. at p. 511):

> "Now, is this custom excluded by the terms of the agreement? The custom, when proved, is to be considered as part of the agreement, and if the agreement be in writing, though the custom is not written, it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, 'We exclude the unwritten customary incident,' of course it is excluded;

and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then, too, the unwritten clause must yield to, and is excluded by, the written one."

This inclusion or exclusion of the so-called "customary clause" is thus necessarily involved in the determination of what is the contract of the parties, and the existence or non-existence of the custom is necessarily involved in determining whether the "customary clause" is to be included or not.

I do not know that it was disputed by counsel on behalf of the respondents that a "customary clause" not expressly or impliedly excluded in the manner pointed out by LORD BLACKBURN would form part of the contract of the parties, or that when included the language of the so-called "customary clause" is to be taken as the language of the contracting parties. He took his stand, rather, on the two decisions of the Court of Appeal already referred to, and contended that the decisions of the arbitrators under such a submission to arbitration as exists in the present case, on the question of the existence of the custom alleged was like, and should be treated in the same way as, the decision of an inferior tribunal, in their own favour, upon some question of fact or law which gave them jurisdiction to decide a case or make an order. I am quite unable to accept that view. It is quite true that under this reference disputes may arise for the decision of the arbitrators, if the "customary clause" be incorporated, which would not arise had it been excluded, and in that sense the field of their judicial investigation might be extended to additional members of the class of matters referred, but that is a wholly different thing. If the contract of the parties were contained in a number of letters, some of which were ambiguously worded, and capable of two or more different constructions, it could not, I think, be contended that the arbitrators would not, under such a reference as the present, be entitled to decide finally that a particular construction of the ambiguous letters was their true construction, though on that construction a greater number of points in dispute might arise for decision than would arise on any other construction. It could not be objected that by deciding as they did they gave themselves jurisdiction over the additional matters of dispute, and that, therefore, their decision on the construction of the letters was not final, but subject to review by the court on a motion to set aside their award. The answer of the arbitrators to such an objection, if made, would naturally and rightly be: "We got full authority to decide all disputes arising out of the contract of the parties, that necessarily involved deciding what the contract was, we have done this by construing their letters; the extra number of disputes arising on the construction we have adopted is immaterial." For my part, I am entirely unable to see upon what ground arbitrators who are expressly or impliedly authorised by the terms of a reference to determine finally what are the terms of a contract into which parties have entered are not authorised to determine finally whether the language, written or verbal, which they have employed constitutes by itself their contract, or, to use the words of ERLE, C.J., whether that language only expresses what is peculiar to their bargain, leaving some trade usage to supply the rest. As a non-existing usage cannot supply anything, it follows that they must have authority to decide finally if the alleged usage exists. I think, therefore, that the two authorities by which the Court of Appeal felt themselves bound in the present case were wrongly decided. Upon that point the reasoning, especially that of BUCKLEY, L.J., is, in my opinion, as I have already said, quite convincing. The appeal should, I, therefore, think, be allowed with costs, and the order of the Court of Appeal should be set aside, the parties to be at liberty to proceed as they may be advised to litigate the other points raised in the motion to set aside the award, other than those mentioned in paras. 3 and 4 of the notice of motion, which have been abandoned during the argument. I approve of the motion suggested by my noble and learned friend LORD LOREBURN on the Woolsack.

LORD PARKER OF WADDINGTON.—I agree that this appeal ought to be allowed. The binding force of an award must depend in every case on the sub

A mission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission. For example, if disputes arise under any particular contract and the parties thereupon agree to refer all disputes arising under that contract, the arbitrator cannot give himself jurisdiction by deciding that B any particular dispute arises under the contract in question when it does not, in fact, so arise. This seems reasonably clear when the submission is subsequent to the contract. Where, however, the submission is contained in the contract it may be a question of construction whether such expressions as "all disputes arising under this contract" include questions as to the ambit of the submission itself. Primâ facie I do not think that they would, though it is unnecessary to decide the C point.

In the present case the submission covers all disputes arising out of the contract including disputes on questions of law. Questions as to the true meaning and effect of the contract with the possible exception of questions as to the ambit of the submission itself are, therefore, left to the arbitrator. In order to ascertain the meaning and effect of the contract the arbitrator is bound to admit evidence of and D consider all relevant facts. The existence or non-existence of any state of circumstances which, if proved, would be relevant on any issue as to the true meaning and effect of the contract, must consequently be within the submission. Clearly mercantile contracts such as the one in question, fall to be interpreted by the light of any custom prevailing in the trade. PARKE, B., in *Hutton* v. *Warren* (6) said:

E "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters in respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in F writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."

It follows that existence or non-existence of the custom alleged in the present case is relevant to the true meaning and effect of the contract, and is, therefore, within the submission.

G The respondents endeavour to displace this conclusion in two ways. First, they contend that the expression "this contract" in the submission means this written document taken apart from all extrinsic facts which might be relevant in determining its true meaning and effect. Such an interpretation of the submission would, in my opinion, defeat the primary object the parties must have had in view. It would be no use to anyone to arbitrate and obtain an award as to what H the contract would mean if all relevant extrinsic evidence were excluded. The object of every such clause is to determine the liabilities of the parties having regard to all relevant facts. Secondly, the respondents argued that the effect of the award is to subject them to a liability which does not arise under or by virtue of the contract, but which arises out of the custom either taken alone or in connection with the contract. This again appears to me to be fallacious. The liJ ability of any party to a contract is none the less a liability arising under the contract because the contract itself has to be interpreted with reference to a custom prevailing in the trade. I, therefore, concur in the motion proposed by my noble and learned friend on the Woolsack.

LORD SUMNER.—I agree. The question in this appeal is purely one of construction. Clause 13 says:

"All disputes from time to time arising out of this contract . . . shall be referred to arbitration, according to the rules endorsed on this contract."

Your Lordships have to decide how much is included in this submission. The words are less precise than they look. In strictness disputes arise not out of a contract but out of conflicting views taken by the parties to the contract. The determination of such disputes may involve the determination not only of the meaning of the language used, but of a variety of subordinate issues of fact, and it is clear that the jurisdiction which the submission confers is, and is intended to, be wide.

The precise dispute, which arose and was referred in this case, is stated in the document of May 9, 1913, in which the arbitrators record their inability to agree and call on their umpire to decide. It is this:

> "A dispute has arisen . . . as to whether the appropriation of about 6,600 tons soya beans per steamship *Canterbury*, under contract dated May 30, 1912, is a good appropriation in the terms of the contract, and as such to be accepted by the buyers."

On the face of it this dispute arises "out of" some contract, which can be no other than that of May 30, 1912. So far the dispute and the whole of the dispute seems to be within the submission. It must be taken on the affidavits that at some stage of the hearings, whether only before the Committee of Appeal or at an earlier stage may not be clear, the sellers affirmed that a custom existed which was applicable to this transaction and conclusive in their favour. The buyers, if they did not actually deny the existence of such a custom, at any rate put it in issue. The matter was validly raised. Admittedly it was the duty of the tribunal to investigate it. The question is whether their decision on the existence of the custom was final or is open to review. The difference is between deciding facts on an issue submitted to the tribunal and investigating facts to see whether they fall within the jurisdiction conferred by the submission. Nobody doubts that arbitrators have a limited jurisdiction, conferred by the submission, which they cannot exceed, and that equally they cannot amplify that jurisdiction by erroneously finding facts, which the submission does not authorise them to decide as arbitrators. Such questions, however, do not arise if on the true construction of the submission it extends to and includes authority to decide, as arbitrators, this incidental issue as to the existence of the custom in question.

The argument for the respondents, which gained point by its brevity, may be put in a nutshell. It was said that this dispute does not arise out of the contract, but out of the contract plus something else—to wit, the custom. One asks what is meant by "the contract" according to this argument? If it is the terms written and printed on the piece of paper and no more, the argument might be good. Whether the words of the contract as a whole are or are not inconsistent with the incorporation of the custom, in either case, the words of the submission would then exclude it. Questions of custom are not referred on this hypothesis, but it is to be supposed that the parties meant to refer part only of their possible disputes when they adopted the trade tribunal. The result is that they chose to refer to trade arbitrators for their final decision the construction and effect of the written contract, although involving questions of law about which they might know nothing, but to reserve to the High Court the ultimate decision of any issue as to the existence of a trade custom, I suppose because the High Court would know little about it, while trade arbitrators might know too much. This seems to me an impossibly narrow construction, none the less that in the latter part of the same sentence the "contract" evidently is the piece of paper—something with a back to it on which rules are indorsed. Besides, the logical result would be that in this case the arbitrators would have no jurisdiction at all, since there is no dispute of which it can be predicated that it arises—that is, wholly arises—only out of the terms written and printed on the piece of paper. The actual dispute is indivisible—the point about the custom is an integral part of it. It could only be decided without raising this point at the cost of real injustice to the sellers. On the other hand, if a dispute, which only in part arises out of the terms written and printed

on the piece of paper, is within the submission, the respondents have no case. Rather inconsistently, as I think, it is admitted that the arbitrators had some authority to inquire into the existence of the custom, and, having informed their minds, had jurisdiction to give effect to it, if it existed—that is, if it existed in the opinion of the High Court or of any tribunal of appeal therefrom, not if it merely existed in their own. This seems to dwell on the limited character of the jurisdiction of arbitrators, while overlooking the real question, which is the definition of the limits as expressed in the submission. If "this contract" in the arbitration clause means the real bargain between the parties, expressed in the written and printed terms, though, where trade customs exist and apply, not entirely so expressed, then the jurisdiction is complete. The custom, if any, was part of the bargain. Whether there is anything in the expressed terms inconsistent with it, and, therefore, controlling or excluding it, is not before your Lordships, nor is any question of its reasonableness. If the bargain is partly expressed in ink and partly implied by the tacit incorporation of trade customs, the first function submitted to the arbitrators is to find out what it is, to read the language, to ascertain the custom, to interpret them both, and to give effect to the whole. If so, the reasoning founded on the analogy of the jurisdiction of county courts fails. The dispute, which arose in fact and raised a question of custom, did not arise out of the contract and something else, it arose out of the contract itself, and involved the contract by raising the custom, and so was within the submission.

It may be that the decisions in *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd., and Hüttenbach* (2) which bound the Court of Appeal, can be supported on other grounds, but in so far as, to employ the language of BRETT, M.R., in the former case, they answer in the negative this proposition: "Can a question whether a custom is to be added to the written contract be 'a dispute arising upon this contract'?" I think them erroneous. The proposition is really a petitio principii. Of course the arbitrators cannot add to the contract, but their admitted power to inquire into the existence of the custom provisionally is due to the very fact that in so doing they add nothing to the contract, but are rightly finding out what the contract is before interpreting and applying it. No doubt the expression that customs of trade add terms to written contracts is often used. LORD MANSFIELD spoke of a custom as neither altering nor contradicting an agreement, but only super-adding a right, as long ago as *Wigglesworth* v. *Dallison* (7). It is more exact to say that the contractual terms, which the custom imports, are already tacitly incorporated as a part, though an unexpressed part, of the agreement between the parties. The maxim is In contractibus tacite insunt ea quæ sunt moris et consuetudinis. PARKE, B., in *Hutton* v. *Warren* (6) (1 M. & W. at p. 475), said:

> "Usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent . . . upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."

The ground is the same as if the admissibility of evidence of a custom were in question. LORD CAMPBELL in *Humfrey* v. *Dale* (8) said (7 E. & B. at p. 275):

> "The principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex."

On these grounds I think that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating objections to them, and further that in your Lordships' House those objections should prevail. It would have been matter for regret if the construction for which the respondents contend had succeeded.

During the last thirty or forty years most wholesale trades dealing in imported produce have formed trade associations, adopted standard forms of contracts which are invariably used, and created arbitral tribunals formed exclusively of members of the association, which yearly settle thousands of trade disputes to the satisfaction of the trade. Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all these forms of contract. The system has been devised by mercantile men to suit their needs, and they have found it highly beneficial; they have been naturally anxious to establish trade control over the transactions of the trade as completely as possible. A construction which would have conferred on the Appeal Committee a true arbitral function as to the interpretation and performance of the printed contract, and a provisional and appealable function over so important a matter as the customs of the trade itself, would have been equally anomalous and inconvenient. Further, I think that the transaction in question is pre-eminently one with which the established arbitral tribunal is fitted to deal in its entirety. The transaction, as I understand it, is this. The present sellers had bought back from their buyers an equal quantity of soya beans for the same time of shipment, but at an increased price, and, as they contended, had done so on the understanding that the one contract should be set against the other. If the contracts stood they were losers to the extent of a difference of some £1,850. As the contracts were for the purchase and sale of unascertained goods they provided for the delivery of particulars of the shipments which the sellers elected to appropriate to the contracts. They provided further that "in case of re-sales" (no doubt a most common case) "copy of original appropriation shall be accepted by buyers and passed on without delay." There was also a clause providing that the contract "should be void as regards any portion shipped that may not arrive by the ship or ships declared against the contract." When the present sellers received a declaration from their sellers of the cargo per the *Canterbury*, and before passing it on to their buyers, learnt that the *Canterbury* with her cargo was lost, they conceived that they could pass on the declaration and that their buyers would be bound to accept it, and that, as the portion shipped would never arrive by the *Canterbury*, or at all, the contract would automatically be avoided. The return of the same declaration by the buyers on the second contract, that of re-purchase, which they considered had to be set against the first, would automatically cancel that contract also. Thus, profiting by the ill-fortune of the *Canterbury*, they would escape their loss of £1,850. Of the merits of such a transaction and such an argument, I say nothing, but the matter seems to me to be pre-eminently one to be settled in its entirety by a trade tribunal. If your Lordships had felt constrained to decide that, on the true interpretation of the arbitration clause, the Appeal Committee had power to decide the question of custom only provisionally, while deciding everything else finally, I make no doubt that it would have been imperatively necessary for this and all similar associations forthwith to alter the wording of their form of contract, so as to make its effect correspond to what I am sure was their intention.

LORD PARMOOR.—By a contract in writing of May 30, 1912, the appellants agreed to sell to the respondents about 6,000 tons of soya beans to be shipped from an Oriental port during December, 1912, and/or January, 1913. The contract contained an arbitration clause, that "all disputes arising out of this contract shall be referred to arbitration according to the rules endorsed on this contract." The third clause of the contract provided that "in case of re-sales copy of original appropriation shall be accepted by buyers and passed on without delay." A dispute having arisen whether a good appropriation and tender had been made under the contract, it was referred to the arbitration tribunal. On June 25, 1914, the arbitration Committee of Appeal made their award in favour of the appellants, and found that by the long-established and well-recognised custom of the trade in case of re-sales, buyers under this form of contract impliedly agree with their sellers that they will accept the original shipper's appropriation if passed on without delay

On July 11, 1914, the respondents gave notice of motion to set aside the award, on three grounds, but only one is material in the present appeal. This ground is that the appeal committee had exceeded their jurisdiction in determining whether the custom mentioned in the award had any existence in fact or in deciding that the respondents were bound by the alleged custom to accept the appropriation therein referred to which was invalid under the terms of the contract. The Divisional Court decided in favour of the respondents, and made an order adjourning the motion to enable the parties to file further evidence on the alleged custom set out in the award, and to be at liberty to give notice requiring the attendance of the deponents before the court for cross-examination. The effect of this order is to withdraw the question whether the alleged custom existed from the arbitration tribunal, and to bring it before the court for determination. This order was confirmed by the Court of Appeal. In giving their judgments the lords justices expressed a strong opinion that had they not been bound by authority they would have come to a different conclusion. I agree in the opinions expressed by the lords justices in the Court of Appeal and in the criticism by BUCKLEY, L.J., of *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.* (2). It is unnecessary to refer further to these cases, but I desire to express my concurrence with the dissenting judgment of FRY, L.J., in the earlier case, and can see no answer to his view that an arbitration tribunal cannot decide a dispute arising under a contract without first ascertaining what the contract is, and that to enable the tribunal to ascertain the interpretation of the contract it is competent for it to have regard to all customs, if any, which affect its construction.

In my opinion, the respondents fail to establish the initial step on which their contention is based. They are unable to make good the allegation that there has been any excess of jurisdiction. It is not sufficient to suggest that the arbitration tribunal has gone wrong, having made an error on some matter of fact or law. Under the procedure of the Arbitration Act, 1889, questions of law which arise in the course of an arbitration can be brought before the court either by a consultative Case or by stating the final award in the form of a Special Case [see now Arbitration Act, 1950, s. 21]. In the present instance a consultative Case was brought before the Divisional Court, and the arbitration tribunal states that it has followed the directions which the court gave. The question of jurisdiction depends on different considerations. It is not denied that a dispute did arise under the contract within the meaning of the submission in the arbitration clause. The dispute was whether, under the terms of the contract, the sellers had made an appropriation and tender of the goods sold to the buyers. It is not possible for the arbitration tribunal to determine this dispute, which it is within their jurisdiction to determine, without construing the contract and ascertaining the nature of the bargain between the parties. In the present instance the appellants alleged a mercantile custom which, if reasonable in itself and not contradictory to the written language in the contract, directly affects the construction of the contract. The respondents, however, contended that it is not within the jurisdiction of an arbitration tribunal to determine the existence and effect of a mercantile custom, or at least not to determine it conclusively, although such mercantile custom is included in the contract, and it is impossible to determine the dispute which has been referred, if the inquiry into the existence and effect of such custom is excluded from the consideration of the tribunal. In other words, whenever the existence of a mercantile contract comes in question it is for the decision, not of the arbitrator, but of the courts, and the Divisional Court was right in directing an inquiry before itself by affidavit and cross-examination.

I cannot assent to this proposition. The plea of want of jurisdiction cannot be maintained, unless the determination of the arbitration tribunal as to the existence of the alleged mercantile custom can be said to be an alteration, either by omission or addition, of the contract under which the limit of the jurisdiction of the arbitration tribunal has been agreed between the parties. There is no question that an

arbitration tribunal has no authority to exercise jurisdiction outside the conventional limit agreed in the terms of the submission. It is quite unnecessary to emphasise a point which is beyond controversy. The answer is that a mercantile custom cannot in any way alter the bargain made either by omission or addition, but that it is included in the bargain and affects and regulates the rights and obligations of the parties to the bargain. In the present instance the language used in the written contract is said to have a conventional meaning based on mercantile custom. The meaning and intention of the parties as expressed in the contract cannot be ascertained without first determining whether the language used should be conventionally interpreted in accordance with the implication which the custom would introduce if its existence is proved. It is a matter of the proper interpretation of the language which the parties have used, and that is always a matter of construction. I have stated above that if an error in law is made there are the remedies provided by the Arbitration Act, and the further remedy of direct application to the courts if an award is bad on its face. In order to meet this difficulty counsel for the respondents argued that the words "the contract" in the arbitration clause were limited to so much of the contract between the parties as appeared in the actual written language, although this did not contain the true bargain between the parties or regulate their rights and obligations in reference to the dispute which had arisen. I think that to import such a limitation is inconsistent with the terms of the submission, and that the parties did not agree to refer a dispute, except one which had arisen in reference to the bargain which they had made, and the decision of which would affect their mutual rights and obligations. In my opinion the appeal should be allowed.

Solicitors: *Walton & Co.*; *W. A. Crump & Son*, for *Andrew M. Jackson & Co.*, Hull.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

Re RYDER. BURTON *v.* KEARSLEY

[Chancery Division (Warrington, J.), March 11, 1914]

[Reported [1914] 1 Ch. 865; 83 L.J.Ch. 653; 110 L.T. 970; 58 Sol. Jo. 556]

Power of Appointment Power to trustee, tenant for life, to appoint "such part of the corpus of my estate as he shall think fit for his own use and benefit" —Appointment exercised by trustee by deed poll in favour of himself— Validity.

A testatrix who died in 1910 by her will appointed her husband and another person (who disclaimed) her executors and trustees, and directed them to pay one third of the income of the proceeds of the sale and conversion of her residuary estate after the death of her mother (who died in her lifetime) and also the remaining two-thirds to the husband for his absolute use and benefit until he should marry or die. She authorised the husband so long as he shall be entitled to the income "to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit," and subject thereto her residuary estate was to be applied for charitable purposes. The husband died in 1913 without having re-married and having in 1911 by deed appointed the residuary estate of the testatrix to himself for his own benefit.

Held: the will gave the husband a power to appoint the corpus of the whole residuary estate of the testatrix to himself absolutely, and under the combined effect of the will and the deed of appointment he became absolutely entitled to the property at his death.

Re Richards (1), [1902] 1 Ch. 76, applied.

Notes. Considered: *Re Shuker's Estate, Bromley* v. *Reed*, [1937] 3 All E.R. 25. As to life interest with power to resort to capital, see 30 HALSBURY'S LAWS (3rd Edn.) 216, and for cases see 37 DIGEST 395 et seq.

Cases referred to:

(1) *Re Richards, Uglow* v. *Richards*, [1902] 1 Ch. 76; 71 L.J.Ch. 66; 85 L.T. 452; 50 W.R. 90; 46 Sol. Jo. 50; 37 Digest 396, *86*.

(2) *Scott* v. *Josselyn* (1859), 26 Beav. 174; 28 L.J.Ch. 297; 32 L.J.O.S. 250; 5 Jur.N.S. 560; 53 E.R. 863; 37 Digest 395, *80*.

(3) *Pennock* v. *Pennock* (1871), L.R. 13 Eq. 144; 41 L.J.Ch. 141; 25 L.T. 691; 20 W.R. 141; 37 Digest 396, *84*.

(4) *Re Thomson's Estate, Herring* v. *Barrow* (1880), 14 Ch.D. 203; 49 L.J.Ch. 622; 43 L.T. 35; 28 W.R. 802, C.A.; 37 Digest 396, *86*.

(5) *Re Pedrotti's Will* (1859), 27 Beav. 583; 29 L.J.Ch. 92; 1 L.T. 390; 6 Jur.N.S. 187; 54 E.R. 231; 37 Digest 395, *81*.

Adjourned Summons.

Alice Ann Ryder, the wife of Thomas Ryder, by her will made in 1907, after appointing her husband and another person (who disclaimed) to be her executors and trustees, and making a pecuniary bequest to that other executor and a specific bequest to her husband, devised and bequeathed her real and personal estate not thereby otherwise disposed of to her executors and trustees upon trust for sale and conversion, and, after payment of her debts and funeral and testamentary expenses, for investment of the residue of the proceeds of sale and conversion, and to pay one third of the income to her mother (who died in the lifetime of the testatrix) for her life, and after her death to pay the same to the husband of the testatrix for his own absolute use and benefit until he should marry again or die, and upon trust to pay the remaining two thirds of the income of the trust fund to her husband for his own use and benefit until he should marry again or die. Clause 5 of the will was as follows:

"I authorise my husband so long as he is entitled to the income of part or of the whole of my estate to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit."

Clause 6 provided that "Subject as aforesaid my trustees shall hold my residuary estate and the investments for the time being representing the same" for certain charitable purposes. Then followed clauses empowering the trustees to postpone the sale and conversion of her estate and naming the authorised investments. The testatrix died in 1910. Her husband did not marry again. By a deed poll made in 1911 the husband in exercise of the power given him by the will and every other power enabling him appointed the net moneys to arise from the sale of the real and personal estate of the testatrix, and all other the moneys or investments constituting the corpus of her residuary estate, subject to the powers and trusts over such estate vested in him as executor and trustee of the will, unto himself for his own absolute use and benefit. The husband died in 1913 having by his will appointed the plaintiff and William Kearsley the executors of his will, and bequeathed the residue of his estate to William Kearsley. The other executor by this summons asked the court whether under the will of Mrs. Ryder and the deed poll of Feb. 28, 1911, Thomas Ryder was entitled to the real and residuary personal estate of his wife absolutely or for life only.

A. L. Ingpen for the trustee.

Clauson, K.C., and *R. H. Hodge* for the defendant Kearsley.

WARRINGTON, J.—The question in this case is whether certain property once part of the estate of the testatrix, Alice Ann Ryder, is to be treated as still part of her estate, or as part of the estate of her husband, Thomas Ryder: and that question depends entirely upon the true construction of the will of the testatrix. [His Lordship stated the facts, and continued:] The defendant Kearsley contends that so much of the estate as was vested in the husband at the date of his death was the absolute property of the husband, and passed under his will. The Attorney-General contends that so far as the wife's estate can be traced, and has not been completely applied by the husband, it is now subject to the charitable purposes declared by the will. The question depends upon the construction of the fifth paragraph of the will, whether or not it confers on the husband a general power of appointment. I do not think that it gave him any power to appoint by his will, but, in my opinion, it did give him power to appoint such portion of the estate as he should think fit for his own use and benefit during his lifetime. Suppose that he had desired to appoint a portion for the benefit of some third person, that would have been one mode of applying it within the meaning of the will. If he could do that, I see no reason why he should not appoint it in favour of himself. In my opinion para. 5 gives him absolute power inter vivos to do with the corpus whatever he thinks is for his own use and benefit. If he considered that the best thing to do was put the property in his own possession, he was to be entitled to do so. The execution of a deed poll is only machinery by which he applies the property for his own benefit.

So far I have stated the question apart from authority. With respect to the authorities, I have been referred to *Scott* v. *Josselyn* (2), *Pennock* v. *Pennock* (3), and *Re Thomson's Estate* (4). These are all cases very much like the present one, but in each of them there was no express decision on the point. The question in those cases arose after the death of the person in the position of the husband in the present case; and after the death of that person, without having exercised the suggested power of appointment. But in each of those cases, without exception, the contest was between those who contended that the tenant for life only had a power of appointment and those who contended that he was absolute owner of the property, and in each case the court decided that he was not absolute owner, but that the property passed under the gift over. But in each case, with one exception, the court expressed an opinion that the tenant for life had power to appoint the property inter vivos. The only exception is that James, L.J.—though it was not necessary to the decision—said in *Re Thomson's Estate* (4) that the strong inclination of his opinion was that the tenant for life took, not a power of appointment, but only an estate for life

> "with full power of enjoying the property in specie, so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie."

That, however, was nothing more than a dictum, and, moreover, the words in the will then before the court differed materially from those of the present will. But there is another case, *Re Richards* (1) decided by Farwell, J., which seems to me directly in point. In that case the question arose in the lifetime of the tenant for life, who took out the summons to have it determined what interest she took in the capital of the estate. The testator had given her the income for her life, and directed that, if such income should not be sufficient, she was to use such portion of his real and personal estate as she might deem expedient—in substance a provision the same as that in the will before me. I can see no distinction between them. The only question was as to the meaning of "such portion . . . as she might deem expedient." It was contended, on the authority of *Re Fedrick's Will* (5), that the tenant for life could only resort to the capital if the income was in fact insufficient. But Farwell, J., said that in his opinion the tenant for life was to be the judge whether the income was sufficient or not, and that therefore, though the gift was in form conditional, there was no real condition at all, and

he decided that the lady had a general power of appointment inter vivos. I come to the same conclusion here, and I hold that the husband was absolutely entitled to the property at his death.

Solicitors: *Johnson, Weatherall & Sturt*; Treasury Solicitor.

[*Reported by* N. TEBBUTT, ESQ., *Barrister-at-Law*]

A. G. SPALDING BROTHERS *v.* A. W. GAMAGE, LTD.

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), February 5, 9 and March 23, 1915]

[Reported 84 L.J.Ch. 449; 113 L.T. 198; 31 T.L.R. 328.]

Passing-Off—Misdescription of another trader's goods—Inferior goods of other trader represented to be superior goods of that trader.

No person has a right to sell, or offer for sale, goods of another trader of an inferior or different class or quality under conditions calculated to represent such goods as goods of that trader of a superior and distinctive class. If this is done, an actionable wrong is committed, irrespective of motive or fraud. A plaintiff who establishes a case of this character is entitled to an injunction, and, if necessary, to an inquiry into damages.

Notes. Considered: *Draper* v. *Trist*, [1939] 3 All E.R. 513; *Jaques (John) & Son, Ltd.* v. *Chess*, [1939] 3 All E.R. 227; *Bollinger (J.)* v. *Costa Brava Wine Co.*, [1959] 3 All E.R. 800. Referred: *Illustrated Newspapers, Ltd.* v. *Publicity Services (London), Ltd.*, [1938] 1 All E.R. 321; *Saville Perfumery, Ltd.* v. *June Perfect, Ltd. and Woolworth & Co. Ltd.* (1941), 58 R.P.C. 147; *Gor-Ray, Ltd.* v. *Gilray Skirts, Ltd. and Garment Industries, Ltd.* (1952), 69 R.P.C. 99; *Electrolux, Ltd.* v. *Electrix, Ltd.* (1953), 71 R.P.C. 23; *Reuter (R. J.) Co.* v. *Mulhens (Ferd)*, [1953] 2 All E.R. 1160; *Harker Stagg Ltd.'s Trade Mark* (1954), 71 R.P.C. 136; *Wilts United Dairies, Ltd.* v. *Thomas Robinson Sons & Co.*, [1958] R.P.C. 94; *Brestian* v. *Try*, [1958] R.P.C. 161; *Sim* v. *H. J. Heinz Co., Ltd.*, [1959] 1 All E.R. 547.

As to passing off, see 32 HALSBURY'S LAWS (2nd Edn.) 614 et seq.; and for cases see 43 DIGEST 264 et seq.

Cases referred to:

(1) *Burgess* v. *Burgess* (1853), 3 De G.M. & G. 896; 22 L.J.Ch. 675; 21 L.T.O.S. 53; 17 Jur. 292; 43 E.R. 351, L.JJ.; 43 Digest 286, *1155*.

(2) *Reddaway* v. *Banham*, [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 44 W.R. 638; 12 T.L.R. 295; 13 R.P.C. 218, H.L.; 43 Digest 277, *1095*.

(3) *Edelsten* v. *Edelsten* (1863), 1 De G.J. & Sm. 185; 7 L.T. 768; 9 Jur.N.S. 479; 11 W.R. 328; 46 E.R. 72, L.C.; 43 Digest 217, *614*.

(4) *Iron-Ox Remedy Co., Ltd.* v. *Co-operative Wholesale Society, Ltd.* (1907), 24 R.P.C. 425; 43 Digest 300, *1248*.

(5) *Blofeld* v. *Payne* (1833), 4 B. & Ad. 410; 1 Nev. & M.K.B. 353; 2 L.J.K.B. 68; 110 E.R. 509; 43 Digest 334, *1555*.

(6) *Burberry's* v. *Cording & Co. Ltd.* (1909), 100 L.T. 985; 25 T.L.R. 576; 26 R.P.C. 693; 43 Digest 304, *1280*.

(7) *Payton & Co.* v. *Snelling, Lampard & Co.*, [1901] A.C. 308; 70 L.J.Ch. 644; 85 L.T. 287; 17 R.P.C. 628; H.L.; 43 Digest 308, *1310*.

Appeal by the plaintiffs in the action from an order of the Court of Appeal (LORD COZENS-HARDY, M.R., BUCKLEY and PHILLIMORE, L.JJ.) reversing a judgment of SARGANT, J., in favour of the plaintiffs.

For about three years previous to 1910 the plaintiffs advertised and sold a novel kind of football under the name of the "Orb" or "Improved Orb" football, the outer cover of which was moulded instead of sewn. In 1910, defects having been found in the making of the balls, the plaintiffs discarded a large number of them as unsatisfactory, and sold them as waste rubber to a firm who re-sold them to the defendants. In 1912 the plaintiffs brought out a new ball, which they advertised as the "Improved Sewn Orb," "Improved Orb," or "Specially Tested Orb," "patent 15,168," at 10s. 6d. each. In August, 1912, the defendants advertised the old "Orb" balls for sale at 4s. 9d. each, under the description of "Improved Orb" footballs. "Patent No. 15,168." On Aug. 29 the plaintiffs pointed out to the defendants that the advertisements were not justified, and on the next day they issued the writ in the present action. On the following day they received a letter from the defendants, who said that they did not wish to describe their footballs under the description complained of, that the advertisement was due to a stupid mistake, and that they had taken steps to stop the advertisement, and they offered an apology. Notwithstanding this letter the plaintiffs proceeded with the action.

By the statement of claim the plaintiffs claimed an injunction to restrain the defendants from selling or advertising footballs other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs as and for the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs, and an inquiry as to damages and costs. By their defence the defendants relied on the letter already referred to, and said that they had stopped all advertisements such as were complained of as soon as their attention was called to the mistake, and had posted notices in their shops, saying that they did not stock the "Improved Orb" but only sold the original pattern of "Orb." The defendants subsequently issued advertisements which were held at the trial to be innocuous in themselves, but which contained no reference to the mistake which had been made in the earlier advertisements. On an application for an interim injunction, the defendants undertook not to sell, advertise, or offer for sale, or supply footballs other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs as or for the plaintiffs' balls of those descriptions, and they offered a perpetual undertaking not to sell any balls other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" football under those descriptions. The plaintiffs, however, proceeded to trial. SARGANT, J., granted an injunction and inquiry as to damages. The Court of Appeal, however, were of opinion that the plaintiffs were not entitled to an injunction or to an inquiry as to damages. An action of this sort was analogous to a quia timet action, and even where passing off was threatened the plaintiff could only recover nominal damages. If actual passing off was proved, substantial damages no doubt might be recovered. But here, after the issue of the writ, there was no threat or claim of right to repeat the advertisements complained of, and there was nothing upon which to found an inquiry as to damages. Accordingly the appeal was allowed and the action dismissed. The plaintiffs appealed.

Sir Robert Finlay, K.C., Martelli, K.C., and *A. F. Topham*, for the appellants.
A. J. Walter, K.C., and *Kerly, K.C.*, for the respondents.

The House took time for consideration.

Mar. 23, 1915. The following opinions were read.

LORD DUNEDIN. —At the request of my noble and learned friend LORD PARKER OF WADDINGTON, I am about to read his judgment, and I have to state that the **LORD CHANCELLOR** agrees with it.

LORD PARKER OF WADDINGTON. The action in which this appeal arises is what is known as a passing-off action, and having regard to the arguments

which have been addressed to your Lordships, I think it well to say a few words as to the principle on which such actions are founded. This principle is stated by TURNER, L.J., in *Burgess* v. *Burgess* (1) (3 De G.M. & G. at pp. 904, 905), and by LORD HALSBURY in *Reddaway* v. *Banham* (2), ([1896] A.C. at p. 204), in the proposition that nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the right to pass off his goods as the goods of somebody else. I prefer the former statement, for whatever doubts may be suggested in the earlier authorities, it has long been settled that actual passing off of the defendant's goods for the plaintiff's need not be proved as a condition precedent to relief in equity either by way of an injunction or an inquiry as to profits or damages: *Edelsten* v. *Edelsten* (3) and *Iron-Ox Remedy Co., Ltd.* v. *Co-operative Wholesale Society, Ltd.* (4). Nor need the representation be fraudulently made. It is enough that it has in fact been made, whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits to the period subsequent to the date at which he becomes aware of the true facts. The representation is in fact treated as the invasion of a right giving rise at any rate to nominal damages, the inquiry being granted at the plaintiff's risk if he might probably have suffered more than nominal damages. The view taken by the common law courts was somewhat different. The plaintiff's remedy is said to have been in the nature of an action for deceit, but it only resembled the action for deceit in the fact that the misrepresentation relied on must have been fraudulently made. In all other respects it differed from an action for deceit. For example, the plaintiff was not the party deceived, and even if it were necessary to prove that someone had been deceived, nominal damage could be obtained though no actual damage was proved. Thus in *Blofeld* v. *Payne* (5) the defendants had sold their own hones in the plaintiff's wrappers as and for the plaintiff's, but there was no evidence that any purchasers had been actually deceived. Further, though special damage was alleged in the declaration, no actual damage was proved. On motion for a non-suit it was held in the King's Bench that the plaintiff was entitled to nominal damages. The action was, in fact, treated as one founded on the invasion of a right.

The proposition that no one has a right to represent his goods as the goods of somebody else must, I think, as has been assumed in this case, involve as a corollary the further proposition that no one who has in his hands the goods of another of a particular class or quality has a right to represent these goods to be the goods of that other of a different quality or belonging to a different class. Possibly, therefore, the principle ought to be restated as follows: "A. cannot, without infringing the rights of B., represent goods which are not B.'s goods or B.'s goods of a particular class or quality to be B.'s goods or B.'s goods of that particular class or quality." The wrong for which the relief is sought in a passing-off action consists in every case of a representation of this nature. The basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.

There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question, property in what? Some authorities say property in the mark, name, or get-up improperly used by the defendant. Others say property in the business or goodwill likely to be injured by the misrepresentation. LORD HERSCHELL, in *Reddaway* v. *Banham* (2) expressly dissents from the former view, and if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view. In the first place, cases of misrepresentation by the use of a mark, name, or get-up do not exhaust all possible cases of misrepresentation. If A. says falsely, "These goods I am selling are B.'s goods," there is no mark, name, or get-up infringed unless it be B.'s name, and if he falsely says, "These are B.'s goods of a particular quality," where the goods are in fact B.'s goods, there is no name that is infringed at all. Further, it is extremely difficult to see how a man can be said to have property in descriptive words, such as "camel hair" in the case of *Reddaway* v. *Banham* (2) where every trader is entitled to use the words, provided he only uses them in such a way as not to be calculated to deceive. Even in the case of what are sometimes referred to as common law trade marks the property, if any, of the so-called owner is in its nature transitory, and only exists so long as the mark is distinctive of his own goods in the eyes of the public or a class of the public. Indeed, the necessity of proving this distinctiveness in each case as a step in the proof of the false representation relied on was one of the evils sought to be remedied by the Trade Marks Registration Act, 1875, repealed by Patents, Designs and Trade Marks Act, 1883, which confers a real right of property on the owner of a registered mark. I had to consider the matter in the case of *Burberrys* v. *Cording & Co., Ltd.* (6) and I came to the same conclusion.

The facts of this case may be stated as follows: The appellants are dealers in footballs, and supply both the trade and the public. They have for some years described their footballs as "Orb" footballs, and there can be no doubt that the word "Orb" is distinctive of their goods of this description. In 1910 they catalogued and were selling three varieties—the "Special Bramble Pattern Orb," the "Improved 1910 Orb," and the "Improved 1910 Rugby Orb." In 1911 they were cataloguing and selling also three varieties—the "Special Bramble Pattern Orb," the "Improved Orb," and the "Improved Rugby Orb." All these balls are referred to as "improved and strengthened balls" placed on the market in this year. All the 1910 and 1911 varieties were moulded, as opposed to sewn footballs. For the year 1912 they catalogued an "Improved Sewn Orb" football, stating that this ball was a "great improvement on the old moulded ball," but not otherwise referring to moulded balls. The facts were that in 1910 complaints had been made of the moulded balls, and towards the end of that year the appellants, in consequence, ceased to manufacture them, and began to manufacture the ball subsequently catalogued as the "Improved Sewn Orb." They also withdrew from sale such part of their stock of moulded balls as they thought to be unsatisfactory. The moulded balls so withdrawn appear to have consisted partly of the 1910 and partly of the 1911 ball. The moulded balls catalogued and sold in 1911 consisted of that part of the stock which they thought was free from the defects complained of. In 1912 they determined to put their "Improved Sewn Orb" on the market instead of moulded balls, and in April or May, 1912, they sold the balls they considered defective to Mellis, Schein & Co., who are waste rubber merchants, one lot being sold as old moulded balls and the other as new moulded balls. Unfortunately, they did nothing to prevent these balls being put on the market as "Orb" footballs, and Messrs. Mellis, Schein and Co. appear to have sold them to the respondents. Mr. Parker, the respondents' manager, instructed Mr. Webber to advertise these balls for the firm's August sales. Mr. Webber cut out of the appellant's 1912 catalogue the description there contained

A of the plaintiff's "Improved Sewn Orb," and gave it to Mr. Glasspole to work upon as the basis of an advertisement for the balls in question, and Mr. Glasspole, working on this basis, produced the advertisements. The question your Lordships have to decide is whether these advertisments in fact represent that the balls purchased by the respondents from the waste rubber manufacturers were the same balls as those referred to in the appellants' 1912 catalogue and being B sold by the appellants as the "Improved Sewn Orbs." In order to arrive at a conclusion on this point it is necessary to compare these advertisements with the appellants' 1912 catalogue. In that catalogue they refer to the "Improved Sewn Orb" as made under the patent No. 15,168—the real number should be 15,163, but this is not very material. The ball is referred to as "a great improvement on the old moulded ball," which means, of course, any moulded ball C theretofore sold by them. It is also stated to be "undoubtedly the best ball on the market for schools and junior clubs." The catalogue contains a picture of the ball stamped not only with the word "Orb," but with the words "specially tested," and the ball is said after repeated tests to have been passed by certain clubs. The price is stated to be 10s. 6d. Turning now to the respondents' advertisements, the first is an advertisement of the "Improved Orb" football, and this D ball is stated to have been made under the patent No. 15,168, a statement which was entirely untrue. It is stated to be the best on the market for schools and junior clubs. It is stated to have been passed by all the clubs referred to in the appellants' catalogue, and the advertisement contains precisely the same picture as appeared in the appellants' 1912 catalogue, with the same stamp. The defendants' price is stated to be 4s. 9d., in contrast with the "usual price" of 10s. 6d. E The second advertisement is of the "Celebrated Orb" football, stated to be "specially tested." It is stated to be a "serviceable ball" for schools and junior clubs, and to have been passed by all the clubs referred to in the plaintiffs' catalogue. Its price is stated as 4s. 9d., as opposed to the usual price of 10s. 6d. The advertisement contains precisely the same picture as appeared in the appellants' 1912 catalogue with the same stamp. In the third advertisement there F appear in large letters the words "10s. 6d. football for 4s. 9d. Gamage's Bargain," and in smaller letters, "We have secured the whole stock of the Orb footballs illustrated here, and in accordance with our rule we offer our customers the benefit of this fortunate purchase, thus enabling you to get a 10s. 6d. football for 4s. 9d.—a bargain indeed." Again the illustration is that which appears in the appellants' 1912 catalogue, and is similarly stamped. The advertisement then G refers to the ball advertised for sale as "the Improved Orb football, Patent No. 15,168," stating that it "is a great improvement on the old moulded ball," and proceeds, "after repeated tests this ball has been passed by the Football Association and the Amateur Football Association," being two of the clubs referred to in the appellants' 1912 catalogue.

It appears to me to be quite certain that anyone comparing any of these H advertisements with the catalogue, or anyone with a knowledge of the catalogue and seeing the advertisements, would be led to conclude that the respondents were offering for sale at 4s. 9d. the identical ball catalogued by the appellants in their 1912 catalogue at 10s. 6d. Indeed, I find it difficult to imagine that the advertisements were not deliberately framed so as to convey this impression. The respondents' counsel sought to justify the advertisements on the ground that I the statements therein contained were only a repetition of what the appellants had themselves said in former catalogues of the moulded ball described as the "Improved 1910 Orb," or the "Improved Orb," but this, unfortunately, is not so. No ball had been theretofore catalogued by the plaintiffs as made under patent No. 15,168. No ball had in any preceding catalogue of the plaintiffs been illustrated as stamped with the words "Specially tested." Even when we come to the words "better than the old moulded ball," I can find no justification for their use in the advertisements. The appellants in their catalogue were contrasting the new sewn variety with the old moulded variety theretofore sold by them.

Even if the respondents say that they intended to contrast one moulded ball with another their statement would be untrue, for the balls they were selling were old moulded balls of the 1910 and 1911 varieties. But, after all, the question whether any particular statement was true or otherwise is not a pertinent question; the really pertinent question is whether the advertisements as a whole were calculated to deceive, and it seems to me that they were so calculated.

It was also contended that the question whether the advertisements were calculated to deceive was not one which your Lordships could yourselves determine by considering the purport of the advertisements themselves, having regard to the surrounding circumstances, but was one which your Lordships were bound to determine upon evidence directed to the question itself. I do not take this view of the law. There may, of course, be cases of so doubtful a nature that a judge cannot properly come to a conclusion without evidence directed to the point, but there can be no doubt that in a passing-off action the question whether the matter complained of is calculated to deceive, in other words, whether it amounts to a misrepresentation, is a matter for the judge, who, looking at the documents and evidence before him, comes to his own conclusion, and, to use the words of LORD MACNAGHTEN in *Payton & Co.* v. *Snelling, Lampard & Co.* (7) ([1901] A.C. at p. 311), "must not surrender his own independent judgment to any witness whatever."

If, however, any evidence is required, your Lordships have in this case the evidence of Mr. Ritson, who was actually misled by the advertisement in question into thinking that the balls advertised were the "Improved Sewn Orbs" mentioned in the appellants' 1912 catalogue. Mr. Ritson was a retail dealer, and had already stocked some of the appellants' 1912 balls, and was in possession of this catalogue. Seeing one of the respondents' advertisements, he thought they were selling the same ball for 4s. 9d., and as he had given the appellants their wholesale price of 8s. 4d. for the balls stocked by him, and, therefore, could not afford to sell below this price, he was naturally alarmed, and wrote a letter of complaint to them.

In my opinion, therefore, the misrepresentation on which the appellants rely may be taken as fully established. Further, the misrepresentation so established was, in my opinion, of such a nature as to give rise to a strong probability of actual damage to the appellants in both their retail and wholesale trade. I refrain, however, from amplifying this point so as not to prejudice any question which may arise on any inquiry as to damages which your Lordships may direct. It is sufficient to say that the misrepresentation being established, and being in its nature calculated to produce damage, the appellants are primâ facie entitled both to an injunction and to an inquiry as to damage, the inquiry, of course, being at their own risk in respect of costs. The respondents, however, seek to displace this primâ facie right to relief on the part of the plaintiffs under the following circumstances. Immediately after the appellants' attention was called to the advertisements in question, Mr. Cox, their manager, had an interview with Mr. Parker. Mr. Parker treated the matter somewhat lightly, and did not offer any undertaking or make any proposal which Mr. Cox could reasonably accept. This occurred on Aug. 29, 1912, and on Aug. 30 the appellants issued their writ in this action. The appellants at the issue of the writ, and, indeed, subsequently, at any rate till after the close of the pleadings, were not aware that the balls advertised by the respondents, were the balls which they had sold to the waste rubber merchants. This is, in my opinion, only material with regard to the frame of the writ and the statement of claim, and cannot affect the appellants' right to relief. On Aug. 31 Mr. Parker, having apparently consulted his solicitors, wrote to the appellants the letter of that date, which in effect contains a promise not to advertise the respondents' balls as made under patent No. 15,168 or as "specially tested." Inasmuch as the gist of the appellants' complaint was not any particular statement in the advertisements, but a misrepresentation suggested by the advertisements as a whole, this offer seems to me totally in

adequate, and the appellants, in my opinion, were justified in continuing the action. Upon an interlocutory motion the respondents gave an undertaking which might have been adequate, but it was only given until the trial. In their defence they state that they undertake perpetually in the words of the undertaking given on the interlocutory motion, but they do not offer this undertaking to the court, nor do they offer to submit to an inquiry as to damages or to pay the costs. In my opinion, therefore, nothing that took place after Aug. 29, 1912, can operate to displace the appellants' primâ facie right to relief.

Some discussion took place before your Lordships as to the subsequent advertisements issued by the respondents, it being admitted that these advertisements were not such that, taken alone, would have given rise to a right of action on the part of the appellants. This may well be so, but taken in connection with the previous advertisements, I cannot help thinking that SARGANT, J., was right in his conclusion that they were hardly consistent with fair or honest trade. The effect of a misleading advertisement is a continuing effect, and it might reasonably be expected that a fair and honest trader, having his attention called to the fact that his advertisements were misleading, would do all in his power to counteract their effect. There is nothing in the subsequent advertisements pointing to a desire on the part of the respondents to undo the harm they had done by their first advertisements. Indeed, I am not sure that the subsequent advertisements are not so framed as to strengthen a belief induced by the first that the respondents were selling for 4s. 9d., or some less price, the same ball as the appellants had catalogued at 10s. 6d., whereas, under the circumstances, they ought in common fairness to have been so framed as to counteract such belief.

My conclusion, therefore, is that the appeal ought to be allowed and the judgment of SARGANT, J., restored.

LORD ATKINSON.—I have had the pleasure and advantage of reading the opinion that has just been delivered. I concur in it entirely and have nothing to add.

LORD SUMNER.—I concur. I am in entire agreement with the statement of the law just made by my noble and learned friend, LORD PARKER OF WADDINGTON and I should not trouble your Lordships with any observations except out of respect for the Court of Appeal and in order to explain why I venture to differ from their conclusion.

The Court of Appeal seem to have thought that there was little resemblance between the respondents' first advertisements and the appellants' catalogue. They attached capital importance to the word "sewn," which was absent in the one and present in the other, and, as I gather, little or none to the identical picture of the football. All comparisons of pictures or designs must be matters of individual opinion, in which argument helps but little, and each must judge for himself. I differ from them, as do your Lordships, in thinking that the advertisement, to which this picture gives point, is calculated, and in no small degree through the picture itself, to confuse in the public mind that which the respondents had to sell with that which the appellants advertised in their catalogue of 1912 in association with that picture. Further, on Aug. 30 the witness Ritson, whose evidence was accepted by SARGANT, J., and indeed was not contradicted, already knew the respondents' advertisement, the appellants' catalogue containing the picture and description of their 1912 football, and the ball itself, of which he had bought one or more specimens. I think the fair effect of his evidence is that he regarded the advertisement as putting forward such distinguishing characteristics of the appellants' 1912 ball and the appellants' specific description of it as led him, a person in the trade, to take the ball offered by the respondents to be the appellants' 1912 ball. If he did not specifically say what he considered those distinguishing characteristics to be, it was only because he was not particularly questioned about it.

From this initial difference of opinion most, if not all, the other differences follow. The writ, instead of being blameworthy as hastily directed to an erroneous supposition of the facts, appears to have been necessary in order to vindicate the appellants' rights. The difference of time, albeit only some twenty-four hours, between the issue of the writ and the receipt of Messrs. Gamage's letter of regret, gives the appellants an advantage of which they should not be deprived. When it was issued they had no assurance at all that the respondents would not continue the course of action to which they had rightly objected, and the interview with Messrs. Gamage's manager on Aug. 30 had not encouraged any hope that they would not. What might fairly be required of the respondents in regard to subsequent advertisements was not that they should "advertise their penitence," but that, in their own interests as well as in those of the appellants and the public, they should recognise that the effect even of an evening newspaper is not exhausted on the day of its publication, and that persons familiar with the advertisements issued before the writ might well continue to be misled by those issued after it, unless the latter series contained, as they did not, some disclaimer or correction of the former. I agree with SARGANT, J., in thinking that this suffices to support a claim for an injunction under the circumstances. Though the respondents gave no new offence they took their chance of profiting by the offence already given to the continuing detriment of the appellants. Though they were careful to do no new mischief they left the old mischief to work. As to the interim injunction, it protected the appellants only until trial, and would have fallen to the ground if they had abandoned the action. The disclaimer in the defence is less efficacious than an offer to undertake to the court, and the respondents took their own course in this regard at their peril. I think, therefore, that nothing occurred to disentitle the appellants to an injunction, which was strictly the appropriate remedy, and that the evidence of the effect of the advertisements on the trade, slight though it is, suffices to justify an inquiry as to damages. The costs of such inquiry and the measure of damages to be applied are, of course, not in any way governed by your Lordships' decision. It cannot be affirmed that no damage, or even that only nominal damage, has been sustained by a series of misleading advertisements in widely circulated newspapers at the beginning of the football season. Again, I think that Mr. Ritson's evidence supports this view. It is true that, although a good deal of time had elapsed before the trial came on, the appellants had only been able to collect an inconsiderable amount of evidence relating to actual damage, but that is not sufficient to deprive them of the usual inquiry at their own risk as to costs. The improbability of their proving much is not the same thing as the legal certainty that they can prove nothing.

LORD PARMOOR.—I concur in the opinion of LORD PARKER, and I only express my opinion out of respect to the Court of Appeal. The decision in this case depends upon the questions of fact, and I agree in the conclusions of SARGANT, J. No person has a right to offer for sale, or sell, goods of another trader of an inferior or different class, under conditions calculated to represent such goods as goods of the same trader of a superior and distinctive class. If any person offers to sell, or sells, the goods under such a representation, he commits an actionable wrong quite irrespective of motive or fraud. The plaintiff who establishes a case of this character is entitled to an injunction and, if necessary, to an inquiry into damages.

There is no satisfactory evidence that the respondents sold footballs of an inferior or different class as though they were the goods of the appellants of a superior and distinctive class. The real issue is, did the respondents in offering for sale the footballs described in the advertisements, to which objection is taken, make representations calculated to lead to the belief that these footballs were the "Improved Sewn Orb Football," Patent No. 15,168, of the appellants, as advertised in the appellants' catalogue for 1912. The appellants issued their catalogue

for 1912, and included therein the Improved Sewn Orb Football, Patent No. 15,168. In August, 1912, the respondents advertised in certain papers the Improved Orb Football, Patent No. 15,168. It is not necessary to compare in detail the terms of the advertisements with the terms of the catalogue, since it is admitted that the catalogue of the appellants was used as the basis from which to draw up the advertisements. This is said to have been a mistake. The court has to decide whether, apart from any sinister motive, the advertisements, or any of them, are reasonably calculated to deceive the public. In order to form a conclusion each advertisement must be considered as a whole in its entirety. I agree with the argument of counsel for the respondents that it is important to see whether the distinctive features associated with the superior class of goods of the appellants have been taken by the respondents in their advertisements. Taking this test, I think that the advertisements are calculated to represent that the respondents were offering for sale the same footballs as the appellants had catalogued in the catalogue for 1912. The advertisement which appeared in the "Regiment" of Aug. 31, 1912, carries the representation further than any other, but the series of advertisements attached to the case all point in the same direction. This advertisement contains the words, "The Improved Orb Football (Patent No. 15,168) is a great deal better than the old moulded form," and these words, taken in connection with the whole get-up of the advertisement, appear to me to suggest in plain terms that the football offered for sale by the respondents is the same article as the football of the appellants catalogued in the appellants' catalogue for 1912. After an interview between the respective managers of the appellants and respondents, the appellants issued their writ. Subsequently thereto the respondents wrote a letter which is set out in the statement of defence. The Court of Appeal treated this letter as contemporaneous with the issue of the writ, but I accept the view of SARGANT, J., and the letter, in my opinion, does not affect the right to a perpetual injunction, if, at the date of the issue of the writ, the appellants were entitled to such injunction.

It was argued on behalf of the respondents that there was no evidence beyond a comparison of the documents to show that the conduct of the respondents was calculated to deceive any member of the public. I think that there was some relevant oral evidence, but there is no necessity for such evidence if the court is satisfied, on the comparison of the documents before it, which it is for the court to construe, that the respondents did issue an advertisement calculated to represent that they were offering for sale the "Improved Sewn Orb Footballs" of the appellants included in their catalogue for 1912, whereas in fact the footballs so offered for sale were of a different and inferior class. Subsequently to the issue of the writ the respondents issued further advertisements. These advertisements, taken in connection with those already issued, appear to me, so far as they are relevant, to aggravate the original offence, and there is evidence that they deceived one of the witnesses, Ritson.

The amount of damages recoverable from the respondents is not before your Lordships, but I desire to express my concurrence with the view of SARGANT, J., that a tort having been committed, the plaintiffs are entitled to such damages as naturally flow from their unlawful act, and that there is no artificial limitation in the case of a passing-off action. I agree that the appeal should be allowed with costs.

Solicitors: *Lawrance, Webster, Messer, & Nicholls: Ward, Perks & Terry.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

JEFFERSON *v.* PASKELL

[COURT OF APPEAL (Swinfen Eady, Phillimore and Pickford, L.JJ.), October 14, 15 and 29, 1915]

[Reported [1916] 1 K.B. 57; 85 L.J.K.B. 398; 113 L.T. 1189; 32 T.L.R. 69]

Breach of Promise—Defence—Plaintiff unfit to marry at date fixed by reason of ill-health—Onus on plaintiff of proving that she became in good health within reasonable time—Honest and reasonable belief in plaintiff's unfitness to marry.

In an action for breach of promise of marriage the defendant alleged that the plaintiff was unfit to marry because she had contracted tuberculosis before the date fixed for the marriage and was still suffering from that disease at the commencement of the action. The plaintiff admitted that she was physically unfit to marry on the date fixed, but denied that her illness was tuberculosis.

Held: (i) the burden of proof was, in the first instance, on the plaintiff to prove that she was fit to marry on the date fixed or within a reasonable time thereafter; on this burden being discharged by primâ facie evidence of her fitness the onus passed to the defendant to prove his allegations; (ii) it was no defence to an action for breach of promise of marriage that the defendant honestly and reasonably believed that the plaintiff was so ill as to be unfit to marry.

Semble: mental or physical infirmity supervening after the promise, or first coming to the defendant's knowledge after the promise, may, in certain cases, justify a refusal to marry and afford a defence to an action for breach of promise.

Notes. Considered: *Bedford* v. *Cowtan*, [1916] 1 K.B. 980. Referred to: *Cohen* v. *Sellar*, [1926] All E.R.Rep. 812.

As to breach of promise, see 19 HALSBURY'S LAWS (3rd Edn.) 769–774; and for cases see 27 DIGEST (Repl.) 29 et seq.

Cases referred to:

(1) *Baddeley* v. *Mortlock* (1816), Holt, N.P. 151, N.P.; 27 Digest (Repl.) 30, *72*.

(2) *Hall* v. *Wright* (1859), E.B. & E. 765; 29 L.J.Q.B. 43; 1 L.T. 230; 6 Jur.N.S. 193; 8 W.R. 160; 120 E.R. 695, Ex. Ch.; 27 Digest (Repl.) 31, *84*.

Also referred to in argument:

Baker v. *Cartwright* (1861), 10 C.B.N.S. 124; 30 L.J.C.P. 364; 7 Jur.N.S. 1247; 142 E.R. 397; 27 Digest (Repl.) 32, *86*.

Atchinson v. *Baker* (1796), Peake, Add. Cas. 103; 27 Digest (Repl.) 31, *83*.

Liddell v. *Easton's Trustees*, [1907] S.C. 154; 44 Sc.L.R. 140; 14 S.L.T. 479; 27 Digest (Repl.) 32, **47*.

Allen v. *Baker* (1882), 41 Am. Rep. 444.

Bloomer v. *Bernstein* (1874), L.R. 9 C.P. 588; 43 L.J.C.P. 375; 31 L.T. 306; 23 W.R. 238; 39 Digest 570, *1757*.

Morgan v. *Bain* (1874), L.R. 10 C.P. 15; 44 L.J.C.P. 47; 31 L.T. 616; 23 W.R. 239; 39 Digest 570, *1754*.

Foulkes v. *Sellway* (1800), 3 Esp. 236, N.P.; 27 Digest (Repl.) 31, *80*.

Jones v. *Spencer* (1897), 77 L.T. 536; 14 T.L.R. 41, H.L.; 30 Digest (Repl.) 287, *579*.

Application for judgment or a new trial in an action tried before BRAY, J., and a special jury.

The action was brought by Lillian Ida Jefferson, against Ernest C. Paskell, to recover damages for breach of promise of marriage. By his defence the defendant

pleaded that before the date fixed for the intended marriage the defendant discovered that during March, 1913, the plaintiff had contracted the disease of tuberculosis, and was so ill that she was not able to be married, and was advised by her medical advisers that she could not marry. The defendant further said that the disease was an infectious disease, and the defendant could not have married the plaintiff without serious risk of himself contracting the disease; the plaintiff was not at any material time in a fit state of health to have children; she had continued to suffer from the disease from March 27, 1913 (or thereabouts) until the commencement of the action; and by reason of these facts the defendant became entitled to, and did validly rescind the contract of marriage, and thereafter ceased to be bound to marry the plaintiff. At the trial the defendant obtained leave to raise by way of amendment a further defence that he honestly and on reasonable grounds believed the plaintiff to be in such a condition as to be unfit for marriage.

The action was tried by BRAY, J., and a special jury in November, 1914, when questions were left to the jury, which with the answers thereto were as follows: (i) Was the plaintiff suffering from tuberculosis (a) between Mar. 28 and April 15, 1913?—Answer: The evidence the jury have heard is not sufficient to satisfy them that the plaintiff was suffering from tuberculosis between Mar. 28 to April 15. (b) On Sept. 12?—Answer: No. (ii) Was the plaintiff on Sept. 12 in such a condition as to be unfit for marriage within a reasonable time after that day?—Answer: No. (iii) Did the defendant on the said day honestly and on reasonable grounds believe her to be in such a condition as to be unfit for marriage within a reasonable time after Sept. 12?—Answer: No. (iv) Did he refuse to marry her on that ground?—Answer: No. (v) What damages do you find?—£500. BRAY, J., gave judgment for the plaintiff for £500. The defendant appealed, and asked for judgment, or in the alternative for a new trial, upon the grounds of misdirection and that the verdict was against the weight of the evidence. The passages in the learned judge's summing-up to the jury which were relied upon as being a misdirection were the following: The learned judge at the commencement of his summing-up to the jury said:

> "The promise is admitted, and of course it is perfectly clear that there was a promise. It is also quite clear that there was a refusal to marry. The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract. He says that the lady's health was such that she was unfit to be married, and there is no doubt that if it be proved that her health was in fact in such a condition that she could not be married within a reasonable time, the defendant would be entitled to refuse to marry her."

Later the learned judge said:

> "Now I must say something about the particular issues which you have to decide. Was the plaintiff suffering from tuberculosis (a) between Mar. 28 and April 15? (b) on Sept. 12, 1913? The first part I have asked at the request of the defendant's counsel, but to my mind the material question is on Sept. 12, because that is when the breach, if there was a breach, took place. You have heard the evidence of the doctors. I must tell you with regard to this that the onus of proof is on the defendant. He has to prove this, and therefore if the evidence leaves you in doubt as to whether she was suffering or not you must say 'No,' or, if you like to put it in that way, 'We are not satisfied,' you can put it in that way; but the plaintiff is entitled to have your verdict upon that point in her favour unless the defendant has satisfied you of what he alleges—namely, that she was suffering from tuberculosis."

And further on he said:

> "The next question is this: Was the plaintiff on Sept. 12 in such a condition as to be unfit for marriage within a reasonable time after that day? There, again, it is for the defendant to satisfy you that she was unfit to be married

within a reasonable time after that day. Of course that depends to a great extent upon the view you take as to whether she was suffering from tuberculosis. Of course, if you thought she was substantially suffering from tuberculosis on Sept. 12, then you would probably think that she was unfit for marriage."

McCall, K.C., and *H. St. J. Field* for the defendant.
Marshall-Hall, K.C., and *H. Maddocks* for the plaintiff.

Oct. 29. The following judgments were read.

SWINFEN EADY, L.J.—The defendant on this appeal asks for judgment or a new trial, the plaintiff having obtained a verdict and judgment for £500 damages. The action is for breach of promise of marriage. [His Lordship stated the facts as above set out and continued:] The defendant complains of misdirection, and that the verdict was against the weight of the evidence; he also complains of insufficient direction, that the jury did not have such assistance from the judge as they were entitled to; and he relies especially upon the fact that in dealing with the X-ray examination of the plaintiff the judge did not in his summing-up refer to the fact that Dr. Harman Brown was present on behalf of the plaintiff, but was not called at the trial. The misdirection complained of is that the judge wrongly ruled that the breach of contract was in September. It was contended that he ought either to have left the date to the jury, or to have ruled that the date was either April 14, when the letter to the father was written, or in May, when the contents of it were communicated to the plaintiff, or July 29, the last interview with the plaintiff, when the defendant certainly refused to marry the plaintiff. The further misdirection complained of is that the judge told the jury that the burden of proof was on the defendant. The judge said (in an early part of his summing-up): "The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract." And again, later on in his summing-up he said this: [His Lordship read the second passage of BRAY, J.'s summing-up set out above.]

In considering this case, the main contention on the one side and on the other must always be borne in mind. It being common ground that on the actual date fixed for the marriage (April 9, 1913) the plaintiff was unwell, and that it was quite obvious that the wedding must be postponed on that account, the defendant alleges that she was then suffering from tuberculosis, that he produced medical evidence to that effect, and that she had not recovered from this disease by September, and therefore certainly not by July. The plaintiff's case, on the other hand, is that she was suffering in April from the effects of a chill caught perhaps on Mar. 27; that she had an attack of pleurisy, but not tuberculosis, that she never suffered from tuberculosis; that she was well by May 27, 1913, when examined by Dr. Fligg; that in July, 1913, when she met the defendant on his return from America, she was in complete health; that the certificate given by Dr. Fligg on Aug. 12, 1913, was completely true; that she was then in good health; and that the contention that two or three months previously she had been in consumption was quite unfounded. Those were the principal contentions of the respective parties.

The plaintiff's pleading contains by implication (Ord. 19, r. 14) an allegation that she is and always has been ready and willing to marry the defendant. The defendant meets this by alleging (para. 3 of the defence) that on Mar. 27, 1913 (before the date fixed for the wedding), he

"discovered, as the fact was, that . . . the plaintiff had contracted the disease of tuberculosis, [and] the plaintiff continued to suffer from the said disease from Mar. 27, 1913 (or thereabouts) until the commencement of this action":

and in para. 5 of his defence he pleads that by reason of the facts mentioned in para. 3 the plaintiff was never ready and willing to marry the defendant. The

plaintiff having given general evidence of her good health within a short time after the date fixed for the wedding, the burden of proving that she was then suffering from the disease of tuberculosis rested upon the defendant, who alleged it. The defendant alleging and the plaintiff denying the existence of the disease, the burden was not upon her of proving the negative, but upon the defendant to prove his allegation: Ei qui affirmat non ei qui negat incumbit probatio. This is the burden of proof to which the judge referred in his summing up. It is true that the judge did not point out to the jury that in the first instance the burden was upon the plaintiff to prove that she was ready, in the sense of being in a state of bodily fitness, and no longer prevented, by the state of her health, as she admittedly was on April 9, yet this burden was primâ facie discharged by the plaintiff's appearance at the trial apparently in good health, and by the medical evidence called on her behalf, and the real and substantial question between the parties was whether the plaintiff was suffering from tuberculosis, as alleged by the defendant, and the burden of proving this was upon the defendant, who alleged it. The point as to the burden of proof in the first instance is, in the present case, an academic one.

With regard to the other alleged misdirection, namely, the judge ruling that the breach was in September, instead of either leaving it to the jury or holding it to have been on April 14 or in July, it is manifest that the letter of April 14 did not then amount to a breach, as it was not written to the plaintiff and did not come to her knowledge until after she had been in the sanatorium about five weeks. No point was made at the trial as to whether the breach was in July or September; the jury negatived that the plaintiff was suffering from tuberculosis on Sept. 12, 1913, and there was no evidence of any change in the plaintiff's condition between July and September. There was evidence that in July the defendant absolutely refused to marry the plaintiff, but no question of whether there was a breach in July is raised by the pleadings; the plaintiff alleges a refusal by the letter of Sept. 12, and the defendant does not dispute this, but sets up a rescission in April, which was not substantiated. Nor do I find from the shorthand notes that the judge was asked to leave to the jury any question of a breach in July, although at one time when Dr. Thurnham was in the witness-box the judge said that one question for the jury would be whether the refusal at the end of July was justified.

Under these circumstances I am of opinion that no substantial wrong or miscarriage has been occasioned by the judge directing the jury that there was no breach before Sept. 12, and a new trial ought not to be ordered on that account.

The defendant by amendment raised a further point, by way of defence, that he honestly and on reasonable grounds believed the plaintiff to be unfit for marriage. The jury negatived this in fact, and the defendant says that the verdict of the jury on this point is against the weight of evidence. In my opinion this point, even if the jury had found in the defendant's favour, would be no defence in law. If the plaintiff was not in fact unfit for marriage, the fact that the defendant honestly and on reasonable grounds believed that she was unfit might affect the amount of the damages, but would not affect the plaintiff's right to recover. And no complaint is made by the defendant that the damages are excessive. The case of *Baddeley* v. *Mortlock* (1) is in point. It was an action for breach of promise brought by a man against a woman. The woman, having heard of charges being made against the man of dishonesty and perjury, said that unless he vindicated himself she would not marry him, and upon his omitting to do so broke off the match. It appears from the judgment that the mere belief that the charges were true was no defence in law. GIBBS, C.J., said (Holt, N.P. at p. 152):

> "She must show that the plaintiff is a man of bad character. . . . Without proof that the charges were founded, she is not absolved from her contract. But it affects the damages."

The plaintiff recovered a verdict for one shilling damages.

[His Lordship then dealt with the point about the X-ray examination, and also with the contention that the verdict was against the weight of evidence. There was medical evidence each way, and the contention could not, in his opinion, be supported.]

The other matters complained of in the summing up are of minor importance, and I am satisfied that no substantial wrong or injustice has been occasioned to the defendant by any of the matters complained of. In my opinion the appeal fails and should be dismissed.

PHILLIMORE, L.J.—The plaintiff, a young woman of twenty-two, brings this action for breach of promise of marriage against the defendant, a man of thirty-nine. In her statement of claim she alleges an engagement in 1912, and the fixing of the day of marriage, first for Mar. 28, and then for April 9, 1913, and the breach of which she complains is that the man did not marry her then or within a reasonable time thereafter. She also states, but apparently rather as evidence or confirmation of the breach than as in itself a breach, a positive refusal by letter on Sept. 12. In his defence the man admits the engagement in 1912, though not so early in the year, and the fixing of the date of marriage for April 9. He proceeds to state that by letter dated April 14 he refused to marry the woman, and he justifies his refusal by saying that she had contracted tuberculosis. He further pleads that she was never ready and willing to marry him.

The jury had the advantage of seeing the woman and judging of her appearance at the trial in July, 1914. The Lord Justice has stated the questions put to the jury and their answers. I will deal first with the questions 3 and 4, which were put in consequence of an amended defence which the man was allowed to raise at the trial, to the effect that he honestly believed her to be unfit for marriage within a reasonable time; and it is best in the first instance to determine upon its validity. I am of opinion that it is not a valid defence. A contract of marriage is in this respect like any other contract. The justification for the refusal to carry it out must be found in the actual facts, and not on belief or opinion, however reasonable or honest, as to what the facts are. If instead of want of health the question had been one of want of chastity, it will be very apparent that the objective truth, and not the subjective belief, would have to be looked for. This being so, it is unnecessary to inquire whether the answers of the jury to the two questions 3 and 4 were or were not justified by the evidence.

Another point lies in limine. It was contended by counsel for the woman that ill-health is not a justification for refusal to perform the promise to marry, and for this the case of *Hall* v. *Wright* (2) was cited. This case has been much observed upon, but it is unnecessary to consider its weight, because it has no bearing upon the one before us. In *Hall* v. *Wright* (2) the man pleaded his supervening ill-health as his justification for refusal. The woman was willing to marry him notwithstanding. Whether the decision was that in no case could a party rely on his or her own ill-health as a justification, or whether, as some have thought, the case turned upon a point of pleading or upon the insufficiency of the degree of ill-health pleaded, it has no bearing upon a case where the ill-health is that of the insisting party. On principle it would seem that there must be some cases of mental or physical infirmity (as it has been decided that there are cases of moral infirmity) which, supervening after the promise or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry. The matter is therefore clear by considering questions and answers 1 and 2. It is contended for the man that the answers are unreasonable and that the verdict is against the weight of evidence and should be set aside. It is further contended that there was misdirection. After consideration and reading the medical evidence again, I do not think that the balance is so strongly the other way that, if the jury was properly directed, the verdict could be set aside.

There is more difficulty about the misdirection. Two complaints are made: (i) That the date of the breach was material, and the judge assumed the date most favourable to the woman, whereas he ought to have taken another date, or at least have left it to the jury. (ii) That, whenever he dealt with the burden of proof, he put it upon the man. There are certainly points in the handling of the case by the learned judge which are not satisfactory and which put difficulty in the way of the woman keeping her verdict. We have to see if they are sufficient to entitle the man to a new trial. As to (i), the woman in her statement of claim gave, as already stated, no precise date for the breach, stating it merely as a refusal to marry within a reasonable time after Mar. 28 or April 9. The man put the breach when his solicitor's letters of April 14 would be received. The judge intimated most strongly his opinion that the true date was Sept. 12, and though, upon the insistence of the man's counsel, he put question 1 with alternative dates, he gave no such alternative for question 2. There are four possible dates, April 15, an early day in May, July 29, and Sept. 12. I agree that April 15 as an exact date may be ruled out. The letter was not to her, and for reasons of kindness to her it was not intended to reach her then. But it was intended to reach her in time, and it did reach her early in May. The date in May on which she had knowledge of the letter of April 14 is important. If there was no breach in May there almost certainly was on July 29, and it was wrong to suggest that the breach did not take place until Sept. 12. But though the judge did once intimate that the July date might be the right one, neither side asked him to put the July date, and there was no evidence that the state of the woman's health materially differed from July 29 to Sept. 12. The two dates, therefore, to be discussed were early May and Sept. 12, and unfortunately the judge never left to the jury the question which was the right one.

Upon the other question the learned judge directed the jury that the burden of proof that the woman was unfit for marriage on Sept. 12, which is the date he takes, was on the man. In this he is in my view wrong. In every contract the party who seeks to recover damages for the breach must prove that he or she was ready and willing to perform it. Now admittedly on the date fixed for the marriage, that was April 9, the woman was not ready—she was not fit. The burden of proof was upon her to show that she would be fit within a reasonable time or that she actually became fit before the breach. There was no burden upon the man to show that she was unfit. But when the woman admitted that she was not fit on April 9 she admitted no more. She did not admit that she had a permanent or even a prolonged illness. The man, if he relied on her having tuberculosis or any other permanent or prolonged illness, had to prove it, and the learned judge rightly laid the onus on him so far, and the question was rightly put as to tuberculosis, Are you satisfied that she had it? If she did have tuberculosis in April or in September, then all she has to prove is that from whatever illness she had in April either she would recover in a reasonable time, or did actually recover before breach. And if it was not tuberculosis in April, if for instance it was pneumonia or even pleurisy, there is no serious question that she had recovered by the end of July. The jury were rightly directed upon question 1, and if their verdict on this question was right, the misdirection upon question 2 becomes unimportant, nor does it matter which was the date of the breach. The misdirections, therefore, both as to date of breach and as to burden of proof, come within Ord. 39, r. 6, no "substantial wrong or miscarriage has been thereby occasioned," and do not compel us to grant a new trial. If she had not tuberculosis in April, she had only an illness which would not prevent her marrying within a reasonable time. It matters not whether the breach was in April or May or July or September. If it was either of the two former, she was not in a state of health which justified the man in thinking that she would not be fit to marry within a reasonable time. If it was either of the two latter, she had recovered and so plainly recovered (tuberculosis being out of the way) as to make the burden of proof an academical question. Upon the whole, though, as I have

said, there were in my opinion misdirections, they were not of sufficient importance to have affected the verdict, and we ought not to grant a new trial.

PICKFORD, L.J.—This was an action for breach of promise of marriage in which judgment was given for the plaintiff. The defendant by his appeal asks for judgment or a new trial, but in substance his application is for a new trial upon the grounds of misdirection and of the verdict being against the weight of evidence.

The defence set up to this action by the defendant was that the plaintiff was suffering from tuberculosis on Mar. 27, 1913, and from that date continuously until the commencement of the action. He also, by amendment during the trial, alleged as a defence that he reasonably believed her to be so suffering, and was on that ground exonerated from his promise. The questions put to the jury and their answers have already been stated, and I need not repeat them. I do not think that, strictly speaking, the right questions were put to the jury, but if the first finding stands, this is of no consequence, as the only suggested defence was tuberculosis, and there is no ground for contending that if she were not suffering from that disease in March and April, 1913, she ever suffered from it at all. With regard to the defence raised by amendment, the plaintiff contended that it was no defence of a breach of promise to marry that the defendant reasonably believed that the plaintiff was so ill as to be unfit to marry, if in fact that belief was wrong. I am of opinion that this contention is correct, and that such reasonable but unfounded belief affords no defence. The plaintiff also contended, that even if she were suffering from tuberculosis, that afforded no defence, while the defendant's contention seemed to me to go so far as to allege that if a woman had ever suffered from that disease she could never enforce a promise to marry. I am not prepared, as at present advised, to accept a contention so wide as the defendant's, but I think there may be tuberculosis existing to such an extent, and of such a nature as to make the woman unfit for marriage, and therefore to afford a defence.

It remains, therefore, to be seen whether the jury's answer to the first question can be supported. The defendant alleged the breach of the promise to have taken place on April 14, the plaintiff on Sept. 12. I am not satisfied that either of these was the correct date, but if the first answer is correct the date becomes immaterial. The defendant objects to this finding, first, on the ground of misdirection, and the misdirections alleged are, in substance, that the learned judge was wrong in directing the jury that the onus of proving that the plaintiff was suffering from tuberculosis and unfit for marriage was upon the defendant, and that he misled them by insufficient and incorrect directions as to the evidence. The passages as to the onus of proof to which objection was chiefly taken are those read by SWINFEN EADY, L.J. I think that the plaintiff in an action of breach of promise, as in any other action of breach of contract, must prove that she is ready and willing to perform the contract, and an allegation to that effect was always contained in the older and more precise pleadings, and is now, according to Ord. 19, r. 14, to be implied. "Ready" includes, in my opinion, not being unfit by reason of illness. But very slight evidence is sufficient to discharge such an onus in the absence of contradiction, such as that she was following the ordinary pursuits of life. This case is not quite so simple, as the plaintiff was, on the date fixed for the marriage, admittedly unfit to carry out the contract by reason of illness. The obligation on the defendant then became one to marry her in a reasonable time after that date, and I think there was the obligation upon her to show that a reasonable time had elapsed, and that she was ready and willing. But again I do not think that much evidence was necessary to enable her to discharge that onus, and I think she discharged it. She showed that she began almost at once to improve in health, and continued to do so, that in May and onwards she was following the ordinary avocations of life, and that the doctor who attended her considered her in good health. This would, unless displaced by evidence given on behalf of the defendant, entitle her to succeed on that question,

and it was therefore necessary for the defendant to give such evidence and displace that given for the plaintiff. This he undertook to do by showing that she was in March and April suffering from tuberculosis, and therefore, although apparently well, was not really so, and was unfit for marriage. Unless he proved this, there was nothing to displace the case made by the plaintiff. This was the state of the evidence upon which the learned judge was directing the jury, and therefore, though I am not satisfied that his direction as to the onus of proof was strictly correct, I think it not unfairly represented the matters to be considered by the jury, and that even if it were not strictly correct they were not misled, and there was no miscarriage of justice in consequence of its incorrectness.

With regard to his direction as to the evidence, I think a judge is entitled to give the jury his views of the evidence, and is not obliged to detail to them every part of it, or every view which each party wishes them to take, so long as he does not mislead them as to the matters they have to consider, or the evidence in the light of which they must consider them. I cannot see that the learned judge has done so in this case. Perhaps after so lengthy a trial he might have discussed the medical evidence in somewhat more detail, but I can see no reason for saying that the jury were in any way misled. I think there is no objection to the finding on the ground of misdirection.

Then, if the jury were properly directed, I do not think the verdict can be disturbed on the ground that it was against the weight of evidence. I do not think it necessary to go through the evidence. I think there was material upon which the jury could reasonably come to their conclusion, and it is material to notice that on this point the learned judge, who, like the jury, saw and heard the witnesses, agreed with the verdict. I do not, therefore, think that the first finding of the jury should be disturbed, and in that case it is unnecessary to consider the rest of the case; but I think it right to say that, if it were necessary to consider it, I have great doubt whether the third and fourth answers could be supported on the evidence. In my opinion the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Maddocks & Colson*, for *Band, Hatton & Co.*, Coventry; *Field, Roscoe & Co.*, for *Ansell & Sherwin*, Birmingham.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BENTLEY. PUBLIC TRUSTEE *v.* BENTLEY

[CHANCERY DIVISION (Astbury, J.), July 10, 28, 1914]

[Reported [1914] 2 Ch. 456; 84 L.J.Ch. 54; 111 L.T. 1097]

Public Trustee—Annuity—Life annuity—Income fee—Incidence—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 9, *s.* 15—*Public Trustee (Fees) Order*, 1912 (*S.R. & O.* 1912 *No.* 417), *r.* 1, *Schedule* (*Division* 3).

The Public Trustee must charge the income fee payable to him in respect of life annuities bequeathed by a will against those annuities, and not take it out of residue.

Notes. The Public Trustee (Fees) Order, 1912, has been revoked. See now the Public Trustee (Fees) Order, 1957 (S.I. 1957, No. 485), which introduced a simplified system of charging fees. The system of charging fees in the Public Trustee Office has been amended by the Public Trustee (Fees) Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 1177).

Considered: *Re Hulton, Midland Bank Executor and Trustee Co.* v. *Thompson*, [1936] 2 All E.R. 207. Not Followed: *Re Riddell, Public Trustee* v. *Riddell*, [1936] 2 All E.R. 1600. Considered: *Re Wells, Public Trustee* v. *Wells*, [1940] 2 All E.R. 68.

As to the public trustee, see 33 HALSBURY'S LAWS (2nd Edn.) 336 et seq.; and for cases see 43 DIGEST 1033 et seq. For the Trustee Act, 1906, ss. 9, 15, see 26 HALSBURY'S STATUTES (2nd Edn.), 40, 45.

Originating Summons.

A testatrix by her will, dated April 16, 1910, after appointing executors and trustees and bequeathing certain pecuniary and specific legacies, bequeathed four life annuities, together amounting to £310 a year, and continued:

"And I authorise my trustees to provide for the payment of the said annuities either by appropriating for that purpose a fund which shall consist of stocks, funds, shares, or securities hereinafter authorised as investments and of which the annual income at the time of appropriation shall be sufficient to answer such annuities, with power in case of the income of the appropriated fund at any time proving insufficient to resort to the capital fund for payment of such annuities, and so that upon the death of each of the said annuitants a proportionate part of the capital of the same fund or so much thereof as shall not have been resorted to as aforesaid shall in any case revert to and form part of my residuary estate, or by purchasing like annuities in the names of the annuitants respectively or in the names of my trustees from the Government or any public company to be applied accordingly. And until the said annuities respectively shall be provided for in one or other of the modes aforesaid I direct that the same shall be paid out of the income of my residuary estate. But I declare that when and so soon as any such annuity shall have been so provided for such provision shall be a complete satisfaction of the trusts to provide for the same annuity which shall thereafter cease to be charged upon either the income or the capital of my residuary estate. . . . I further direct that all duties payable in respect of the pecuniary or specific legacies aforesaid or in respect of any of the annuities aforesaid shall be paid out of my residuary personal estate."

The testatrix then devised her residuary real and personal estate to her trustees on trust for sale and conversion and directed them out of the proceeds to pay her funeral and "testamentary expenses," debts, and legacies and "make provision for payment of the said annuities" and pay the legacy and other duty on legacies of annuities bequeathed free of duty and to invest the residue in stocks, funds, shares, or securities therein mentioned and to hold the same on the trust for

certain residuary legatees, two shares being settled and one being given absolutely. The testatrix died on Oct. 28, 1912, and on Feb. 8, 1913, administration with the will annexed was granted to the Public Trustee, the executors having renounced and disclaimed. In November, 1913, the Public Trustee appropriated investments producing £310 4s. 10d. gross income to answer the four annuities which admittedly had to bear their own income tax. He had partly distributed the third share of residue given absolutely, and the balance of that share was now distributable. In the events which had happened he now held the other two third shares, producing about £156 gross income, in trust for the defendant Clement Bailey for life, with remainders over. The Public Trustee issued this summons on May 1, 1914, to determine (inter alia) whether the £2 per cent. income fee payable to him in respect of the annuities ought to be borne by those annuities or by the income or capital of the residue. The Public Trustee as from Dec. 1, 1913, had commuted the income fee on the annuities at £56 and charged that sum in equal shares to the income of the three shares of residue, but this was done without the assent of the defendant Bentley. However, the Public Trustee now asserted he was ready to re-adjust that according to any decision the court might give.

The Public Trustee Act, 1906, provides as follows:

"9 (1). There shall be charged in respect of the duties of the public trustee such fees, whether by way of percentage or otherwise, as the Treasury with the sanction of the Lord Chancellor may fix, and such fees shall be collected and accounted for by such persons, and in such manner, and shall be paid to such account, as the Treasury direct. (2) Any expenses which might be retained or paid out of the trust property if the public trustee were a private trustee shall be so retained or paid, and the fees shall be retained or paid in the like manner as and in addition to such expenses. . . . (5) The incidence of the fees and expenses under this section as between capital and income shall be determined by the public trustee."

"15. In this Act, unless the context otherwise requires, . . . the expression 'trust property' shall include all property in the possession or under the control wholly or partly of the public trustee by virtue of any trust: . . . the expression 'expenses' includes costs and charges. . . ."

The Public Trustee (Fees) Order, 1912, provides as follows:

"1. In this Order and in the Schedule hereto (unless the context otherwise requires) . . . (c) The expression 'income of the trust property' includes any income arising under the trust."

Division 3 of the Schedule provides:

"Income fees in respect of the duties of the public trustee, acting in any of the capacities mentioned under Division 2 [i.e., as ordinary trustee or executor or administrator, etc.]: Upon the annual income of the trust property (where that income is not less than £2), a fee at the rate of £2 per cent. in respect of that income up to £500," with modifications for higher amounts.

Percy Wheeler for the Public Trustee.

Frank Russell, K.C., and *A. M. Bigg* for Clement Bentley, the life tenant of two-thirds of the residue.

John Beaumont for the remaindermen.

Beddall for the annuitants.

ASTBURY, J. I have no authority to guide me in this case, but, primâ facie, I should have thought that the income fee, from its very name, ought to come out of the pocket of the person receiving the income. It is really a fee to recoup the public trustee for seeing to the investments and paying the income to the life tenant of residue or the annuitants, as the case may be. I think the fair

thing is to pay the income fee attributable to the annuities out of those annuities and the income fee attributable to the balance of the income out of that balance, and I so decide. The matter must be re-adjusted on that footing as from the testatrix's death, as my decision applies equally to the period before appropriation as to the period after appropriation. It is admitted by everyone that the commutation cannot stand, and the public trustee is ready to re-adjust that matter. I think this is the fairest decision I can give in the absence of anything further to guide me.

Solicitors: *G. & G. Keith*; *Duffield, Bruty, & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

THEATRE DE LUXE (HALIFAX), LTD. *v.* GLEDHILL

[King's Bench Division (Lush, Rowlatt and Atkin, JJ.), December 16, 1914]

[Reported [1915] 2 K.B. 49; 84 L.J.K.B. 649; 112 L.T. 519; 79 J.P. 238; 31 T.L.R. 138; 13 L.G.R. 541; 24 Cox, C.C. 614]

Cinematograph—Licence—Condition—Restriction as to age of children allowed to enter theatre—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2 (1).

By s. 2 (1) of the Cinematograph Act, 1909: "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid [i.e., cinematograph exhibitions] on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine." The appellants were granted a licence subject to the following conditions: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m."

Held (Atkin, J., dissenting): there being no connection between the cinematograph exhibition and the ground on which the condition was imposed, e.g., the health and welfare of children generally, the condition was ultra vires.

Notes. Distinguished: *Ellis* v. *North Metropolitan Theatres*, [1915] 2 K.B. 61; *R.* v. *Burnley Justices, Ex parte Longmore*, [1916–17] All E.R.Rep. 346. Considered: *Stott* v. *Gamble*, [1916–17] All E.R.Rep. 724; *Ellis* v. *Dubowski*, [1921] All E.R.Rep. 272. Distinguished: *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.*, [1947] 1 All E.R. 498. Referred to: *Ex parte Stott* (1915), 32 T.L.R. 84; *Harman* v. *Butt*, [1944] 1 All E.R. 558.

As to cinematograph entertainments, see 32 Halsbury's Laws (2nd Edn.) 72 et seq.; and for cases see 42 Digest 919 et seq. For the Cinematograph Act, 1909, s. 2, see 25 Halsbury's Statutes (2nd Edn.) 40.

Case referred to:

(1) *L.C.C.* v. *Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445; 80 L.J.K.B. 141; 103 L.T. 760; 75 J.P. 53; 27 T.L.R. 141; 9 L.G.R. 79, D.C.; 42 Digest 921, *164*.

Also referred to in argument:

Rossi v. *Edinburgh Corpn.*, [1905] A.C. 21; 38 Digest (Repl.) 180, *449.

Macdonald v. *Lochrane* (1887), 51 J.P. 629; 3 T.L.R. 464, D.C.; 38 Digest (Repl.) 170, *60*.

Fielding v. *Morley Corpn.*, [1899] 1 Ch. 1; 67 L.J.Ch. 611; 79 L.T. 231; 47 W.R. 295, C.A.; affirmed, [1900] A.C. 133; 69 L.J.Ch. 314; 82 L.T. 29; 48 W.R. 545, H.L.; 42 Digest 604, *52*.

Scott v. *Pilliner*, [1904] 2 K.B. 855; 73 L.J.K.B. 998; 91 L.T. 658; 68 J.P. 518; 53 W.R. 284; 20 T.L.R. 662; 2 L.G.R. 1018; 20 Cox, C.C. 731, D.C.; 25 Digest 436, *333*.

Ex parte Richards (1904), 68 J.P. 536; 20 T.L.R. 669; sub nom. *R.* v. *Ilkestone Licensing Justices*, 68 J.P.Jo. 352, D.C.; 42 Digest 920, *153*.

Groh v. *Hesketh*, [1907] 2 K.B. 232; 76 L.J.K.B. 787; 97 L.T. 129; 71 J.P. 339; 23 T.L.R. 501, D.C.; affirmed, [1908] 1 K.B. 654; 77 L.J.K.B. 481; 98 L.T. 263; 72 J.P. 114; 24 T.L.R. 269; 52 Sol. Jo. 239, C.A.; 30 Digest (Repl.) 80, *614*.

R. v. *Beesley, Ex parte Hodson*, [1912] 3 K.B. 583; 77 J.P. 19; sub nom. *R.* v. *Birmingham Licensing Justices, Ex parte Hodson*, 82 L.J.K.B. 23; 29 T.L.R. 9, D.C.; 30 Digest (Repl.) 31, *209*.

Teale v. *Williams*, post; [1914] 3 K.B. 395; 83 L.J.K.B. 1413; 111 L.T. 258; 78 J.P. 383; 12 L.G.R. 958; 24 Cox, C.C. 283, D.C.; 42 Digest 842, *3*.

Case Stated by justices of the peace in and for the county borough of Halifax.

At a court of summary jurisdiction sitting at Halifax on June 26, 1914, the respondent, James William Gledhill, chief inspector of police at Halifax, preferred an information against the appellants, Theatre de Luxe (Halifax), Ltd., charging that, on June 2, 1914, at Halifax, the appellants, being the occupiers of certain premises known as the Theatre de Luxe situate in Northgate, Halifax, did unlawfully allow the premises to be used for the exhibition of pictures or other optical effects by means of a cinematograph for the purposes of which inflammable films were used in contravention of a certain condition subject to which the licence relating to the premises had been granted under the provisions of the Cinematograph Act, 1909. The following facts were proved or admitted: The appellants were, on June 2, 1914, the occupiers of the premises known as the Theatre de Luxe, Northgate, Halifax. The licence under the Cinematograph Act, 1909, in respect of the premises which had been granted by the justices for the borough of Halifax was current on June 2, 1914. The licence had been granted to the appellants by the justices under s. 5 of the Cinematograph Act, 1909, the justices having had the powers of granting licences delegated to them as the licensing authority by the Halifax County Borough Council. The condition in question was as follows:

> "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m."

On June 2, 1914, two children under the age of ten years—Lilian Raisbeck, aged five years, and Phyllis Carter, aged two years and five months—were on the appellants' licensed premises at ten minutes past nine when pictures were being shown in the theatre, and the appellants had allowed the children to be on their licensed premises at such time. The justices found as a fact that the appellants had allowed their licensed premises to be used in contravention of the condition subject to which the licence for the premises had been granted under the Cinematograph Act, 1909.

It was contended on behalf of the appellants that, notwithstanding the matters proved as aforesaid, the appellants ought not to be convicted of the offence charged against them in the information on the ground that the condition was illegal as being ultra vires, and one which the licensing authority had no power to impose, in that it was (i) unreasonable; (ii) neither clear, positive, nor definite; (iii) in restraint of trade; and (iv) beyond the powers given by the Cinematograph Act, 1909, the preamble of which indicated that the licensing authority in imposing conditions is limited to such conditions as concern the public safety only. It was

contended on behalf of the respondent that, under s. 2 of the Cinematograph Act, 1909, the licensing authority had full discretion to impose any reasonable condition they might think desirable in the public interest; that they were not limited to conditions relating only to public safety; and that the conditions which the appellants were charged with contravening was a reasonable condition having regard to the health and well-being of young children in the borough of Halifax.

The justices were of opinion that the respondent's contentions were correct, and that the condition was neither unreasonable nor ultra vires, and they accordingly convicted the appellants of the offence charged. The appellants now appealed.

Tindal Atkinson, K.C., and *Gingell* for the appellants.
Montgomery, K.C., and *Bruce Williamson* for the respondent.

LUSH, J., stated the facts, and continued: The question that was raised before the justices and the question that is raised here is whether the condition is or is not ultra vires. It was not disputed by counsel for the respondent that, if the condition is ultra vires, then, although the licence was given and accepted with that condition, the person summoned is entitled to take advantage of the contention that it is ultra vires; and, if it is ultra vires, then, of course, the conviction is bad and cannot be sustained. The question, therefore, is whether that condition was or was not within the power of the local authority to impose. The Cinematograph Act, 1909, has this title, "An Act to make better provision for securing safety at Cinematograph and other Exhibitions," and by s. 1 it is provided that the Act shall only operate in a case of cinematograph apparatus with inflammable films; and there is no doubt, as counsel for the respondent said, that there is very considerable room for argument that the terms and conditions which the licensing authority have power to impose by s. 2 are terms and conditions for giving proper effect to the disclosed object of the statute, which is to make provision for safety and nothing else. However, that question we are not at liberty to consider, because it has been dealt with and decided by the Divisional Court in *L.C.C.* v. *Bermondsey Bioscope Co., Ltd.* (1), where the court came to the conclusion that the power to impose conditions was not limited to matters of safety; therefore, that decision, which binds us, decides that is not a proper limitation to place on the powers of the licensing authority under that section. But the court, though it held that this limitation about safety does not apply, does not appear to me to have laid down or to have attempted to lay down any sort of test as to what limit still may be placed on the powers of the licensing authority to impose terms and conditions. The condition was one against opening on Sundays, Good Friday and Christmas Day, and it was pointed out that that condition was only a condition which compelled the licensee to obey the existing law because it was forbidden to open such places on Sunday by the Sunday Observance Act. There was no limitation in terms, and PICKFORD, J., says in the course of his judgment that the conditions must be reasonable. No doubt they must, and counsel for the respondent does not dispute it.

The question, therefore, is: Is this a reasonable condition, having regard to the subject-matter of the Act? One has to look not only at the terms of the condition, but one is entitled to look at the contention by the respondent before the justices, when it was said that this was a reasonable condition having regard to the health and the well-being of young children in the borough of Halifax. Again, counsel for the respondent has conceded that the condition in question must be reasonable having regard to the use of the licensed premises, or it must be a reasonable condition having regard to the subject-matter of the licence, and if this condition was reasonable having regard to the subject-matter of the licence, which was the use of these premises for cinematograph exhibitions, it would be very difficult for us to say that it was in excess of the power of the licensing authority: I quite agree that one ought to be slow to fetter a power vested in a local authority by the express terms of a statute. But when one comes to consider the ground on which this is

said to be a reasonable condition, it seems to me reasonably clear that the licensing authority has imposed this condition not because the cinematograph exhibition of itself requires, for the safety and condition of the children, that they should be controlled by the condition, but that the condition is reasonable, if reasonable at all, not because of anything connected with cinematograph exhibitions, but because it is desirable for the health and well-being of small children that they should not be in any place of entertainment after certain hours, and certainly not be there unless accompanied by a parent or guardian. That is the only ground on which, it seems to me, it can be said to be reasonable. Is there any ground for imposing that condition in the giving of the licence? I am of opinion that there is no connection at all, though it may be highly desirable that young children should not be in places of public entertainment after certain hours. It is as true of other places of entertainment as of this, and I can see no connection between the cinematograph exhibitions, which alone the licensing authority ought to have considered when they imposed it, and the condition which relates to the age of children.

That being so, I must come to the conclusion that this condition was not intra vires of the licensing authority, and that the conviction ought to be quashed.

ROWLATT, J.—I am of the same opinion. The appellants were convicted under s. 3 of the Cinematograph Act, 1909, of allowing their premises to be used in contravention of a condition of restriction on or subject to which the licence has been granted, and they say that the condition was not a valid one, not within the competence of the council to impose, and not reasonable. In order to see what conditions may be imposed by the licensing authority, it is necessary to look at the Act. By s. 2, power is given to grant licences to such persons as the county council think fit to use the premises specified in the licence for the purpose of a cinematograph on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, the council may determine. [HIS LORDSHIP read s. 3, and continued:] When s. 3 says, "if the occupier . . . allows those premises to be used," it is clearly referring to a user on behalf of the occupier by himself or by his subordinates. It does not mean used from the point of view of one of the public who may come in to enjoy the entertainment afforded there; and when the statute speaks of restrictions or conditions which must not be contravened in the user, it is, to my way of thinking, dealing with conditions and restrictions which affect the user of the premises by the licensee. Under the circumstances, one can at once think of a great many restrictions and conditions which might be imposed on the user of the premises by the licensee. It has been held that we are not confined to restrictions or conditions in the interests of safety from fire, or, indeed, safety at all. There are many others; there is public decency and there is public order, and the protection of persons employed. These considerations would bring in time and periods of opening—an indefinite list of restrictions, it might be imagined, that might be imposed with regard to the opening of an establishment of this kind. But this seems to me to be travelling into an entirely different region. It is only nominally a condition affecting the user of the place by the management of it. It is really affecting the user of it by a section of the public. It is not saying that no children shall enter and limiting the theatre to adults. I do not say whether that would be right or wrong, but it is accepting the position that children of any age may come in accompanied or unaccompanied by grown-up people up to nine o'clock, but after nine o'clock no child shall be there at all if under ten years of age, and if over ten and under fourteen he must be accompanied by a parent or guardian. It is obvious, looking at it apart from what appears in the Case, that the licensing authority here was addressing itself to a social question entirely independent of the management of this place as a picture theatre, a very broad and important question on which one may have strong opinions; and if the council could enter into it, one would not say that the conclusion that they had come to was unreasonable if they are the judges whether children under ten years of age should go to cinemas after nine o'clock. If they

are the judges of that, it is very difficult to say that they were unreasonable. But it seems to me that, under this Act, they are not the judges of that question of public policy.

We were pressed, during the argument on behalf of the respondent, that justices have, in the exercise of their powers of granting off-licences, a right to say: "We will not give this off-licence except upon the terms of an undertaking that the premises are not open until eleven o'clock, because we want to keep out women." They are entitled to say that, but it seems to me that the subject-matter is entirely different when you grant an authority power to limit the consumption of liquor in people's own homes; you do ipso facto clothe them with an authority of that sort. I think that is a different class of case. There is one other reason which was not noticed in argument. I suppose the condition refers to the premises when used under this licence. If it is wider than that, it must be bad, because the owner of premises like this is not bound to use them for a cinema. He can use them for a concert or for a Scripture lecture, and to say that the condition should then apply and that children should not be on the premises except under this condition would, of course, be hopelessly bad. I agree that the appeal must be allowed.

ATKIN, J.—I have considerable doubt in this case, because I can see that the contention of the respondent does give power to a public authority to interfere very seriously with what is now, no doubt, a very substantial public industry. But at the same time I myself perceive an insuperable difficulty in seeing what limitation you can impose on the powers given to the public authority under the terms of s. 2 of the Cinematograph Act, 1909. The terms of s. 2 are quite unrestricted. [HIS LORDSHIP read sub-s. (1), and continued:] It is to be noticed that these powers are given in the first instance to a large representative body, the county council, and it is provided by s. 5 that the council may delegate its powers to committees of the council or to district councils, with or without any restrictions or conditions, as they think fit.

The question as to the limitation of these powers arose soon after the Act was passed, in 1910, in the *Bermondsey Case* (1), and in that case the contention on behalf of the company was that the powers of the county council were limited to making such regulations as were necessary for the safety of the premises. That contention was negatived by the court in terms. The powers of the county council are not limited to making regulations for the purpose of public safety. In order to arrive at that result, the court appears to me to have laid down what the powers were. LORD ALVERSTONE, C.J., says this ([1911] 1 K.B. at p. 451):

> "The language of s. 2 (1) seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable."

And PICKFORD, J., says (ibid. at p. 453):

> "If that enactment stood alone, I do not see how it could be denied that, subject to the regulations of the Secretary of State, the county council might impose such conditions, so long as they were not unreasonable, as they thought fit."

He goes on to say that it does not stand alone, because of the power which appears to limit it as to public safety, and then he proceeds as follows:

> "I do not think that that argument is sound. Section 1 expressly limits the power of the Secretary of State to make regulations 'for securing safety,' whereas there is no such limitation imposed upon the power of the county council under s. 2. It may well be that the Legislature thought that, in addition to regulations which are specially directed to securing safety, it would

be a further means of securing safety to give to the county council a free power to impose such terms, conditions, and restrictions as they thought right."

It appears to me that the Divisional Court in that case did adopt the larger view of the powers of the county council that are contended for by the respondent in this case and that we are bound by that decision. It is not that that court lays down the power without any restrictions at all, because it provides that the regulations should be reasonable, and it was contended by the respondent, and, in my view, it was right, that there should be at any rate these limitations on the exercise of the powers of the county council—namely, that they should be reasonable and must be regulations and restrictions in relation to the exercise of the powers granted under the licence, and they must be regulations devised in relation to the public interest. If those three conditions are complied with, it appears to me that there is no other fetter on the discretion given to the licensing authority. I have felt the greatest difficulty in seeing what limitations you can impose if they fall short of those that I have mentioned; and I, for my part, see the greatest difficulty in saying that you may close the cinematograph entertainment to the public at eleven o'clock unless that is justified on the principles of the general interest of the public. The power is not exercised by them because they think that the entertainment would be more disorderly in the house if it went on till twelve o'clock than if it closed at eleven, but because it is in the public interest generally that entertainments should come to an end at eleven o'clock. For many reasons that may occur to one, they have power to say that it shall not begin till two o'clock in the afternoon. I imagine that they are entitled to say that, because they are entitled to say that they do not think that it is in the interest of the public at large that there should be entertainments of this kind in the morning, just as it is open to the licensing justices to say that the sale of drink shall not take place before a particular hour in the morning. I think that they are entitled to fix their hours in relation to the public interest, and, if they take into account the interest of a very substantial section of the public, they are entitled to do so.

I think, therefore, that they are entitled, in the exercise of those powers, to take into account the public interest so far as children are affected, and it appears to me that they are justified in saying that, for this class of entertainment, children shall not be present at all after nine o'clock unless they are attended by a parent or guardian who can form a decision as to the nature of the entertainment and prevent the child from roaming at large if it wishes to do so, or from coming into contact with persons who are undesirable. It appears to me that this provision, which cannot be said to be unreasonable under the circumstances, is one which is within the scope of the licensing authority, and, therefore, my own opinion is that this conviction was proper. But my brothers think otherwise, and the appeal must be allowed.

Appeal allowed. Conviction quashed.

Solicitors: *Nicholls, Herbert & Co.*, for *Arthur Willey*, Leeds; *Sharpe, Pritchard & Co.*, for *Percy Saunders*, Halifax.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

PERKINS *v.* JEFFERY

[KING'S BENCH DIVISION (Lord Reading, C.J., Avory and Sankey, JJ.), April 30, May 14, 1915]

[Reported [1915] 2 K.B. 702; 84 L.J.K.B. 1554; 113 L.T. 456; 79 J.P. 425; 31 T.L.R. 444; 25 Cox, C.C. 59]

Criminal Law—Evidence—Cross-examination of prisoner as to character—Cross-examination as to previous offences—Evidence of commission of other offences—Rebuttal of defence of mistake or accident.

The respondent was charged under s. 4 of the Vagrancy Act, 1824, with having, on July 16, 1914, unlawfully and wilfully exposed his person to a young woman in Small Heath Park, a place of public resort, with intent to insult her. On the complainant identifying him as the man who had so acted, he replied: "I think you have made a mistake," to which she replied that she had not; and in her evidence the complainant stated that she had seen the respondent about two months before. The respondent gave evidence on his own behalf, putting his character in issue, and in cross-examination he was asked the question: "Do you deny exposing yourself to the same young lady in Small Heath Park in the first or second week in May last?", and he replied: "I do deny it." The justices ruled that the question was inadmissible and ought not to have been put, on the ground that it was not relevant to the issue they had to determine and was contrary to s. 1 of the Criminal Evidence Act, 1898. To rebut the respondent's denial, it was proposed to recall the complainant to prove that the respondent had been guilty of the same conduct to her at the same place and hour on the previous May 16, and also to call witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour. The justices refused to hear this evidence.

Held: the question put to the respondent in cross-examination, and the evidence of the complainant tendered to rebut his denial, and directed to show that he had been guilty of the same conduct to her at the same place and the same hour on a day two months previously, were admissible and relevant to each of the issues (i) that the complainant was not mistaken in her identification of the respondent, (ii) that the act of the respondent was done wilfully and not accidentally, and (iii) that it was done with intent to insult her; but the evidence tendered tending to show similar acts on other occasions ought not to be admitted unless and until the defence of accident or mistake, or absence of intention to insult, was definitely put forward, and the other occasions were sufficiently proximate to the alleged offence to show a systematic course of conduct.

Notes. Considered: *R.* v. *Armstrong*, [1922] All E.R.Rep. 153; *Harris* v. *D.P.P.*, [1952] 1 All E.R. 1044. Referred: *R.* v. *Smith*, post, p. 262; *R.* v. *Thompson*, [1917] 2 K.B. 630; *R.* v. *Porter* (1935), 25 Cr. App. Rep. 59; *R.* v. *Straffen*, [1952] 2 All E.R. 657.

As to evidence in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 436 et seq.; and for cases see 14 DIGEST (Repl.) 401 et seq.

Cases referred to:

(1) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

(2) *R.* v. *Ollis*, [1900] 2 Q.B. 758; 69 L.J.Q.B. 918; 83 L.T. 251; 64 J.P. 518; 49 W.R. 76; 16 T.L.R. 477; 44 Sol. Jo. 593; 19 Cox, C.C. 554, C.C.R.; 14 Digest (Repl.) 422, *4104*.

(3) *R.* v. *Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, *4091*.

(4) *R.* v. *Boyle and Merchant*, post, [1914] 3 K.B. 339; 83 L.J.K.B. 1801; 111 L.T. 638; 24 Cox, C.C. 406; 10 Cr. App. Rep. 180; sub nom. *R.* v. *Boyle*, *R.* v. *Merchant*, 78 J.P. 390; 30 T.L.R. 521; 58 Sol. Jo. 673, C.C.A.; 14 Digest 437, *4237*.

(5) *R.* v. *Christie*, [1914] A.C. 545; sub nom. *D.P.P.* v. *Christie*, ante, p. 63; 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 30 T.L.R. 471; 58 Sol. Jo. 515; 24 Cox, C.C. 249; 10 Cr. App. Rep. 141, H.L.; 14 Digest (Repl.) 405, *3962*.

Also referred to in argument:

R. v. *Ball*, *R.* v. *Ball*, [1911] A.C. 47; 75 J.P. 180; sub nom. *D.P.P.* v. *Ball* (*No. 2*), 80 L.J.K.B. 691; 103 L.T. 738; 55 Sol. Jo. 139; 22 Cox, C.C. 366; 6 Cr. App. Rep. 31, H.L.; 14 Digest (Repl.) 426, *4138*.

R. v. *Shellaker*, [1914] 1 K.B. 414; 83 L.J.K.B. 413; 110 L.T. 351; 78 J.P. 159; 30 T.L.R. 194; 24 Cox, C.C. 86; 9 Cr. App. Rep. 240, C.C.A.; 14 Digest (Repl.) 432, *4191*.

R. v. *Francis* (1874), L.R. 2 C.C.R. 128; 43 L.J.M.C. 97; 30 L.T. 503; 38 J.P. 469; 22 W.R. 663; 12 Cox, C.C. 612, C.C.R.; 14 Digest (Repl.) 437, *4244*.

R. v. *Wyatt*, [1904] 1 K.B. 188; 73 L.J.K.B. 15; 68 J.P. 31; 52 W.R. 285; 20 T.L.R. 68; 48 Sol. Jo. 85; 20 Cox, C.C. 462, C.C.R.; 14 Digest (Repl.) 439, *4258*.

R. v. *Rodley*, [1913] 3 K.B. 468; 82 L.J.K.B. 1070; 109 L.T. 476; 77 J.P. 465; 29 T.L.R. 700; 58 Sol. Jo. 51; 23 Cox, C.C. 574; 9 Cr. App. Rep. 69, C.C.A.; 14 Digest (Repl.) 422, *4109*.

Case Stated by justices for the city of Birmingham.

At a court of summary jurisdiction sitting at Birmingham on July 21, 1914, the appellant, George Perkins, preferred a charge against the respondent, Clarence Jeffrey, under s. 4 of the Vagrancy Act, 1824, of having, on July 16, unlawfully, wilfully, openly, lewdly, and obscenely exposed his person in a certain place of public resort, to wit, Small Heath Park, Birmingham, with intent then and there to insult a certain female named Kathleen Turnor. On the hearing of the charge Kathleen Turnor was called as a witness for the prosecution. Among other statements in her evidence she said that, on July 16, 1914, she was boating on the pool in Small Heath Park by herself: she saw the respondent at the edge of the pool and he exposed his private parts to her. She complained to the boatman, John Taylor, who went to the respondent and said "Is this the man?" She replied that it was, and the respondent said, "I think you have made a mistake there." She replied, "I have not." She further said that she had seen the respondent in the early part of May, 1914. On this statement she was not cross-examined. John Taylor, another witness for the prosecution, among other statements in his evidence, said: "I have seen [the respondent] by the pool several times during May." When arrested by the appellant, the respondent said: "They have made a mistake; they have got the wrong man." The respondent gave evidence on oath on his own behalf. In cross-examination, among other statements, he said: "I do not remember seeing her [Kathleen Turnor] in first or second week in May, 1914." He was then asked, also in cross-examination: "Do you deny exposing yourself to the same young lady in Small Heath Park in the first or second week in May last?" The respondent replied: "I do deny it," but, acting under advice, the justices ruled that this question should not have been put, on the grounds that it was not relevant to the issue they had to determine on the charge before them, and was contrary to the provisions of s. 1 of the Criminal Evidence Act, 1898. The appellant's solicitor also intimated that to rebut the respondent's denial, as stated above, he desired to recall Kathleen Turnor to prove that the respondent had been guilty of the same conduct to her at the same place and at the same hour on May 16, 1914,

and also that he desired to call other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour. Acting on the advice given to them, the justices refused to hear such evidence on the charge preferred before them.

The justices determined and found as a fact that there was not sufficient evidence given by or on behalf of the appellant to satisfy them that the respondent was guilty of the offence charged, and they therefore discharged him. If they were wrong in refusing to admit the question put to the respondent in cross-examination, or the evidence proposed to be given in rebuttal, they asked that the case should be remitted to them for rehearing. If they were right in their refusal, then their decision was to stand.

Norman Birkett for the appellant.
C. Doughty for the respondent.

Cur. adv. vult.

May 14, 1915. **AVORY, J.,** read the following judgment of the court.—The respondent was charged, under s. 4 of the Vagrancy Act, 1824, with having exposed his person in a place of public resort with intent to insult a female named Kathleen Turnor.

The questions submitted to this court on the Special Case Stated by the justices are: First, whether the respondent, giving evidence on his own behalf, could be asked in cross-examination if he had exposed himself to the same young woman at the same place in the month of May, 1914; secondly, whether evidence was admissible on the part of the complainant that he had so exposed himself in the month of May; and, thirdly, whether evidence was admissible on the part of the complainant that the respondent had on other occasions indecently exposed himself with intent to insult females at the same place and about the same hour. The justices refused to admit the question in cross-examination, or the other evidence, on the ground that it was not relevant to the issue, and was contrary to the provisions of the Criminal Evidence Act, 1898. With regard to the question in cross-examination, it appears now, by the notes of the evidence which have been supplied on the re-statement of the Case, that the respondent giving evidence-in-chief put his character in issue, and the question, therefore, might have been admitted on that ground alone; but, in view of a rehearing of the Case, it is necessary to consider whether this and the other evidence tendered was admissible as being relevant to the issue.

The Criminal Evidence Act, 1898, does not exclude any question in cross-examination which may tend to criminate the accused of the offence charged, nor any evidence which is admissible to show that he is guilty of the offence charged. On the hearing of the charge in the present case, the complainant had to prove, first, that the respondent had exposed himself; secondly, that he had done so wilfully and not accidentally; and, thirdly, that he had done it with intent to insult her. In our opinion, the question in cross-examination and the evidence of the complainant directed to show that he had done the same thing at the same place and to the same woman were admissible and relevant to each of these issues for the purpose of showing that she was not mistaken in her identification; that it was done wilfully and not accidentally; and that it was done with intent to insult her. The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to any issue before the court: see *Makin* v. *A.-G. for New South Wales* (1) ([1894] A.C. at p. 65), and *R.* v. *Ollis* (2), and the judgment of CHANNELL, J. ([1900] 2 Q.B. at p. 781). It is suggested that the defence raised in this case was one of identity, and that this was the only issue before the court; but, in our opinion, the statement of the respondent when arrested, "They have made a mistake, they have got the wrong man," would not preclude him from raising the other defences that the act was

not wilful and not done with intent to insult the complainant; and it must be borne in mind that, in criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up. In the present case, we think the cross-examination did suggest a possible defence on the ground that the act was not wilful or with intent to insult a female.

With regard to the evidence tendered of other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with the intent to insult females on other occasions at the same place and about the same hour, the question is more difficult. The dates of the other occasions are not before the court, and, unless it appeared clearly that the defence that the act was done wilfully or with intent to insult a female was going to be relied on, and that the other occasions were sufficiently approximate to the alleged offence to show a systematic course of conduct, we think the evidence should not be admitted. *R.* v. *Bond* (3), and particularly the judgment of BRAY, J. ([1906] 2 K.B. at p. 418), is an authority which would justify the admission of such evidence: see also STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (8th Edn.), art. 12:

> "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant."

But it is, we think, open to doubt whether evidence is admissible to prove a "system or course of conduct," unless it is relevant to negative accident or mistake, or to prove a particular intention: see the judgment of LORD READING, C.J., in *R.* v. *Boyle and Merchant* (4) ([1914] 3 K.B. at p. 347), where he said this:

> "We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible."

Having regard to what was said in the House of Lords in *D.P.P.* v. *Christie* (5), as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury out of proportion to its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or absence of intention to insult, is definitely put forward.

The Case will be remitted to the justices for re-hearing with this opinion of the court.

Solicitors: *Capron & Co.*, for *J. E. Hill*, Birmingham; *Judge & Priestley*, for *Philip Baker & Co.*, Birmingham.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

BRITISH DOMINIONS GENERAL INSURANCE CO., LTD. *v.* DUDER AND OTHERS

[COURT OF APPEAL (Buckley, Pickford and Bankes, L.JJ.), March 16, 17, 30, 1915]

[Reported [1915] 2 K.B. 394; 84 L.J.K.B. 1401; 113 L.T. 210; 31 T.L.R. 361; 13 Asp.M.L.C. 84; 20 Com. Cas. 270]

Insurance—Reinsurance—Compromise between insured and insurers of original policy—Right of reinsurers to benefit of compromise—Insurers entitled only to indemnity for amount paid by them under compromise, plus proportion of expenses of obtaining it.

The plaintiffs insured the *K.*, valued at £20,500, to the extent of £1,500 against total and/or constructive total loss only, and reinsured the risk with the defendants. The reinsurance policy did not contain the clause "to pay as may be paid thereon." During the currency of the policies, the *K.* stranded. Her owner gave notice of abandonment and alleged that she was a constructive total loss. The plaintiffs refused to accept the notice of abandonment and the owner brought an action against them which was compromised by the plaintiffs paying the owner 66 per cent. of the loss. The reinsurers were asked to agree to this compromise, but refused on the ground that there was no constructive total loss in fact. In an action by the plaintiffs against the reinsurers under the reinsurance policy, it was found that there was a constructive total loss in fact and that the reinsurers were liable to the plaintiffs for the full amount of the reinsurance subject to the benefit of any rights they might have had in respect of the abandonment of the *K.* if no compromise had been effected. On appeal,

Held: a contract of reinsurance was a contract of indemnity only and the reinsurers were entitled to the benefit of the compromise made by the plaintiffs with the owner; therefore, the plaintiffs could only recover from the reinsurers 66 per cent. of the loss though they were entitled to add to that claim a proper proportion of the expense of obtaining the compromise.

Uzielli v. *Boston Marine Insurance Co.* (1) (1884), 15 Q.B.D. 11, discussed.

Judgment of BAILHACHE, J., [1914] 3 K.B. 835, reversed.

Notes. Distinguished: *British Union and National Insurance Co.* v. *Rawson*, [1916] 2 Ch. 476. Considered: *Firemen's Fund Insurance Co.* v. *Western Australian Insurance Co. and Atlantic Insurance Co.*, [1927] All E.R.Rep. 514; *Versicherungs Und Transport A.G. Daugava* v. *Henderson*, *Versicherungs Und Transport A.G. Daugava* v. Campbell (1934), 39 Com. Cas. 154. Referred to: *Norwich Union Fire Insurance Society* v. *Colonial Mutual Fire Insurance Co.*, [1922] All E.R.Rep. 513.

As to who can avail himself under a marine policy, see 22 HALSBURY'S LAWS (3rd Edn.) 95 et seq.; and for cases see 29 DIGEST 117 et seq.

Cases referred to:

(1) *Uzielli* v. *Boston Marine Insurance Co.* (1884), 15 Q.B.D. 11; 54 L.J.Q.B. 142; 52 L.T. 787; 33 W.R. 293; 1 T.L.R. 49; 5 Asp.M.L.C. 405, C.A.; 29 Digest 117, *712*.

(2) *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest 52, *156*.

(3) *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333; 51 L.J.Q.B. 548; 47 L.T. 277; 31 W.R. 65; 4 Asp.M.L.C. 576, H.L.; 29 Digest 291, *2375*.

(4) *Re Eddystone Marine Insurance Co., Ex parte Western Insurance Co.*, [1892] 2 Ch. 423; 61 L.J.Ch. 362; 66 L.T. 370; 40 W.R. 441; 8 T.L.R. 393; 36 Sol. Jo. 308; 7 Asp.M.L.C. 107; 29 Digest 117, *712*.

(5) *Re Law Guarantee Trust Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, post; [1914] 2 Ch. 617; 84 L.J.Ch. 1; 111 L.T. 817; 30 T.L.R. 616; 58 Sol. Jo. 704, C.A.; 26 Digest (Repl.) 11, *13*.

(6) *Nelson* v. *Empress Assurance Corpn., Ltd.*, [1905] 2 K.B. 281; 74 L.J.K.B. 699; 93 L.T. 62; 53 W.R. 648; 21 T.L.R. 555; 10 Asp.M.L.C. 68; 10 Com. Cas. 237, C.A.; 29 Digest 48, *105.*

(7) *Mackenzie* v. *Whitworth* (1875), 1 Ex.D. 36; 45 L.J.Q.B. 233; 33 L.T. 655; 24 W.R. 287; 3 Asp.M.L.C. 81, C.A.; 29 Digest 93, *506.*

(8) *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K.B. 376; 72 L.J.K.B. 195; 80 L.T. 362; 9 Asp.M.L.C. 390; 8 Com. Cas. 108; 29 Digest 120, *731.*

Also referred to in argument:

Chippendale v. *Holt* (1895), 65 L.J.Q.B. 104; 73 L.T. 472; 44 W.R. 128; 12 T.L.R. 50; 40 Sol. Jo. 99; 8 Asp.M.L.C. 78; 1 Com. Cas. 197; 29 Digest 118, *719.*

Appeal by the defendants from a judgment of BAILHACHE, J.

The facts are set out in the judgment of BUCKLEY, L.J.

Maurice Hill, K.C., and *F. D. MacKinnon, K.C.*, for the defendants.

Adair Roche, K.C., and *R. A. Wright* for the plaintiffs.

Cur. adv. vult.

March 30, 1915. The following judgments were read.

BUCKLEY, L.J.—On Dec. 31, 1912, the plaintiffs were original underwriters to the extent of £1,500, on the hull and machinery of the steamship *Katina* valued at £20,500. On Jan. 23, 1913, the plaintiffs, by two policies of that date, the one for £850 and the other for £650 reinsured against the risk of total and/or constructive total loss only of her hull and machinery £20,500 or v.o.p., or (that is) value as in original policy. The ship stranded on May 23, 1913, off Hartland Point, and three days later the owners gave notice of abandonment. The plaintiffs contended that the ship was not a constructive total loss. The owners brought an action against the plaintiffs, and in the result, that action was compromised as between those parties on the terms that the plaintiffs paid the owners 66 per cent. of liability on the footing of a constructive total loss. The defendants were invited to come into that compromise, but declined to do so. They said that the plaintiffs must act as uninsured, and that they, the defendants, did not admit that the ship was a constructive total loss. On Feb. 12, 1914, the plaintiffs, by their solicitors, wrote to the defendants a letter in the plainest terms to the effect that they had satisfied themselves that the vessel was in fact a constructive total loss, and that a settlement at 66 per cent. was very beneficial to the underwriters; and asking the defendants to come into the compromise, and stating that, if they did not do so, the plaintiffs would then prosecute their action against the defendants, claiming a constructive total loss on the reinsurance policies strictly in accordance with their full rights on the policies, which, they said, entitled them to claim 100 per cent. on establishing in fact that there was a constructive total loss. The defendants adhered to the position which they had taken up, and refused to admit that the vessel was a constructive total loss. Thereupon the plaintiffs paid the 66 per cent., and now sue the defendants on the reinsurance policies.

In this action they have proved that there was in fact a constructive total loss; and on that there is now no dispute. The question is whether the plaintiffs are entitled to 100 per cent. or 66 per cent. against the defendants. The learned judge has decided this in favour of the plaintiffs, holding that they are entitled to recover 100 per cent. The question is whether this is right. On the one side it is said that a contract of reinsurance is a contract of indemnity, and that it is a contract of indemnity only; that the plaintiffs have in fact only had to pay 66 per cent. and cannot recover more against the defendants. On the other side it is contended that the defendants were offered an opportunity of coming into the compromise; that they refused to do so, alleging that they were liable for nothing, because (as they contended) there was not a constructive total loss;

whereupon (it is contended) they cannot now have the benefit of the compromise, which was obtained not in any way for them, but as a compromise of the question of constructive total loss, which has now been determined against them.

A contract of insurance and a contract of reinsurance are independent of each other. But a contract of reinsurance is a contract which insures the thing originally insured—namely, the ship. The reinsurer has an insurable interest in the ship by virtue of his original contract of insurance. The thing insured, however, is the ship, and not the interest of the reinsurer in the ship by reason of his contract of insurance upon the ship. In *Uzielli* v. *Boston Marine Insurance Co.* (1), a case I find it very difficult to understand, the Court of Appeal affirmed that, by reason of the total loss which had occurred, the original underwriter was entitled to recover from the reinsuring underwriter up to £1,000, being 100 per cent. on the amount named in the policy of reinsurance, notwithstanding that the original underwriter had settled with the owners for 88 per cent. The judgment of BRETT, M.R., goes to, first, a decision that no more than the £1,000 could be recovered, because, although the reinsurers had an insurable interest exceeding their share in the value of the ship by reason of the sue and labour clause, yet the policy of reinsurance was only for £1,000, and they could recover no more; and, secondly, that the sue and labour clause was not available for the benefit of the reinsurers. He left the first point at a stage at which he seems to have assumed that up to the £1,000 the reinsurers could recover without saying why; and then on the second point he went on to hold that they could not recover more. I cannot find that he gives any reason why the difference between the 88 per cent. and the 100 per cent. could be recovered. COTTON, L.J., says it is true: "They are liable to this extent"—that is, £1,000—"by reason of the total loss which has occurred"; but I cannot find any reasoning which leads to this conclusion. His reasoning seems to be only a summary of that of the Master of the Rolls. LINDLEY, L.J.'s judgment is rested on "pay as may be paid thereon." I cannot think that this case is an authority for the proposition that, on a contract of reinsurance there can be recovered more than an indemnity—that the reinsurer can make a profit out of the reinsurance. In *Castellain* v. *Preston* (2) I find a principle laid down in the following passages:

"The contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified": per BRETT, L.J., 11 Q.B.D. at p. 386.

"If there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is": per COTTON, L.J., ibid. at p. 395.

"Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind": per BOWEN, L.J., ibid. at p. 397.

In *Burnand* v. *Rodocanachi* (3) I find LORD BLACKBURN saying (7 App. Cas. at p. 339):

"The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes

the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

In these passages I find a principle stated. The use of all authorities is to ascertain from them the legal principles which they affirm. In *Uzielli* v. *Boston Marine Insurance Co.* (1), having read the case more than once, I cannot find a principle. I must guide myself, therefore, by *Castellain* v. *Preston* (2) rather than by *Uzielli* v. *Boston Marine Insurance Co.* (1). BAILHACHE, J., rested his judgment on the proposition that the indemnity afforded by reinsurance is against liability, and not against discharge of liability. I am not able to assent to this proposition, if it means, as by the context it must have meant, that, if the liability be discharged by payment of a less amount, the assured by reinsurance can recover against the reinsuring underwriter the amount of the liability, although exceeding the amount paid for its discharge. There are cases such as *Re Eddystone Marine Insurance Co.* (4) and *Re the Law Guarantee Trust Society, Ltd.* (5), in which it would seem, until they are further considered, that the assured by way of reinsurance is recovering more than the amount he has to pay on the original insurance. They are cases, however, in which the assured by way of bankruptcy or liquidation seems to discharge his liability by payment of a dividend to the original assured. This, however, is not the fact. Notwithstanding the payment of a dividend, the liability to the full extent remains; and out of further assets, if any, it must in law be discharged. When the estate pays only 10s. in the pound, and recovers 20s. in the pound, it is not recovering in excess of a sum for which it has compromised its liability. The liability is not compromised at less than 20s. in the pound. The liability is still 20s. in the pound, and the right to recover a like sum against the reinsuring underwriter is an asset of the estate; and its proceeds must go according to the law of bankruptcy or liquidation to all the creditors in administration.

I regret to have to come to the conclusion that the defendants, who would have nothing to do with the compromise, are, nevertheless, entitled to the benefit of it. But it seems to me that, as matter of legal right, the plaintiffs cannot, even in such a state of facts as this, make a profit out of the reinsurance. For these reasons I think that the appeal must be allowed. The plaintiffs are, however, entitled to indemnity, and this is not necessarily confined to the 66 per cent. They are entitled to such further sum, if any, as is required to give them an indemnity. The costs, for instance, of obtaining the compromise at 66 per cent. should be added to the 66 per cent. I shall be prepared to hear anything that may be said as to the proper terms of an inquiry to ascertain what such further sum should be.

PICKFORD, L.J., stated the facts, and continued: The question of constructive total loss was decided against the defendants by BAILHACHE, J., and they accept that part of his decision, but they appeal against so much of it as decides that they are liable to pay 100 per cent. of the loss. There is no direct authority on the subject, and the question does not often arise, because the reinsurers generally join in the compromise; but in this case they decided to try to escape liability altogether, on the ground of there being no constructive total loss, and if they failed on that ground, to claim the benefit of the compromise in which they refused to join. BAILHACHE, J., has decided that they cannot claim this benefit, and the question is whether this conclusion is in accordance with the principles of marine insurance.

A contract of marine insurance is a contract of indemnity, and a contract of reinsurance is also a contract of indemnity, though it is a contract independent of the original contract of insurance, and so not within the third party rules

relating to indemnity decided in *Nelson* v. *Empress Assurance Corpn., Ltd.* (6). BAILHACHE, J., accepts the principle that a contract of reinsurance is a contract of indemnity; but he says that it is a contract of indemnity against liability, and that he sees no more reason why a reinsurer should pay less by reason of a compromise made with the assured for the benefit of the original assured and not of the reinsurer, than in the case where the original underwriter becomes bankrupt and pays a small dividend or none. The reference in these last words is to *Re Eddystone Marine Insurance Co.* (4), and *Re Law Guarantee Trust Society, Ltd.* (5). It does not seem to me that those cases stand at all on the same footing as this. They proceed on the ground that the reinsurer has to pay the original insurer his liability, whether he has discharged it or not, and that it is immaterial to him what the original insurer does with the money. But there is no diminution of the liability; the original insurer, though bankrupt, is still liable for the full amount; if assets were to come in in time he could be made to pay; and even in his insolvent state, if the creditor could get judgment, he could be made to pay this particular creditor, if it were not for the bankruptcy laws, which compel an equal distribution of his assets.

In the present case, there is an actual diminution of the liability; and the plaintiffs could never be called on to pay more than 66 per cent. *Uzielli* v. *Boston Marine Insurance Co.* (1) was also relied on by the plaintiffs. The case is very hard to understand, and does not decide the point in this case. The plaintiffs there had paid 88 per cent. for a total loss, and 24 per cent. for suing and labouring; and MATHEW, J., had given judgment against the defendants for 112 per cent. The Court of Appeal held that the suing and labouring clause did not apply to that reinsurance, and gave judgment for 100 per cent. The judgment of BRETT, M.R., does not, in my opinion, touch this point; that of LINDLEY, L.J., seems to me to proceed on the words "to pay as may be paid thereon," which are not in this policy; and the only difficulty is caused by the passage in the judgment of COTTON, L.J. (15 Q.B.D. at p. 18):

> "As to the second point, I agree that the policy is a contract of insurance upon the ship; it is a reinsurance upon the policy issued by the French Company to pay as they shall pay, but to cover a total loss only. The insurance is effected by those who are not owners, but by those who are liable in respect of the ship. What is the extent of the defendants' liability? The original insurers are liable in respect of the loss of the ship; but the defendants' liability on the policy is limited to the extent of £1,000, and that is all which they can be properly called upon to pay on the policy. They are liable to this extent by reason of the total loss which has occurred."

If this means that, on the happening of a total loss, the reinsurers are liable irrespective of whether the original underwriters are liable or not, it is, I think, inconsistent with the doctrine that they only indemnify the original insurers against their liability; and if it only means that they are liable to the extent of the original insurer's liability, it does not deal with the question whether a diminution of that liability enures for the benefit of the reinsurers. It is to be noticed that in that case, the original insurers had in fact paid more than the 100 per cent., and the court does not make it very clear why they gave judgment for more than 88 per cent. The judgment of COTTON, L.J., seems rather to treat the policy there as a valued policy, and it was contended before us that the policies in this case were valued policies, valuing the plaintiff's interest at £850 and £650, and that, therefore, as soon as a total loss happened, £850 and £650 immediately became payable. I do not think this is so. I think they are insurances of £850 and £650 on the plaintiffs' interest in a ship valued at a certain sum, not insurances on a valuation of the plaintiffs' interest. As the policies are in respect of total loss only on a valued ship, the effect under ordinary circumstances is the same as a valued policy, because the original insurer is liable for the whole amount or

none; but this does not seem to me to make them valued so as to exclude a consideration of the real amount of the plaintiffs' liability.

I think these policies are subject to the principles stated in *Castellain* v. *Preston* (2), where BRETT, M.R., says (11 Q.B.D. at p. 389):

> "I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and insurer by reason of the satisfaction of that right."

And BOWEN, L.J., says (ibid. at pp. 401, 402):

> "Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss he must account for the diminution to the underwriters";

and in *Burnand* v. *Rodocanachi* (3), per LORD BLACKBURN (7 App. Cas. at p. 339). It is true that these cases were not concerned with reinsurance, but the principle of indemnity applies to it as much as to original insurance. Here the plaintiffs have obtained a diminution of their liability by compromise, and it seems to me they come within the principles stated by BRETT, M.R., and BOWEN, L.J., in *Castellain* v. *Preston* (2), just as much as if some actual thing diminishing the loss had come into their hands, as mentioned by LORD BLACKBURN.

I think, therefore, that the plaintiffs are not entitled to recover 100 per cent., and that the defendants are entitled to the benefit of the compromise. I do not think it very material whether it be put on the ground that the plaintiffs' liability was reduced by agreement, and that they, therefore, never became liable for more than 66 per cent., or on the ground that their legal liability was 100 per cent., but by virtue of an agreement with the shipowners, they only paid 66 per cent., and that the reinsurers by subrogation became entitled to the benefit of that agreement. I do not, however, think that they are entitled to take the benefit and refuse to contribute to the expense of obtaining it. We were told that there were expenses incurred in obtaining the compromise, but were not told what they were. *Nelson* v. *Empress Assurance Corpn., Ltd.* (6) shows that they are not to be measured in the same way as costs of a third party under Ord. 16, r. 48; and, indeed, in this case it is not clear that the costs of the action brought against the plaintiffs by the shipowners were expenses of obtaining the compromise, as it seems that the plaintiffs might have secured the same terms without an action. There must, therefore, be an inquiry as to the expenses of obtaining the compromise, unless the parties come to an agreement about them.

BANKES, L.J.—The only question raised by this appeal is whether the plaintiffs are entitled to recover from the defendants the whole, or only a portion, of the amounts of two policies of reinsurance both dated Jan. 23, 1913. [HIS LORDSHIP stated the facts, and continued:] The plaintiffs' counsel complained bitterly of the conduct of the defendants in refusing to come into the compromise; and he pointed out that, as a result, not only had the plaintiffs to accept the compromise at their own risk, but they had to bring the present action at considerable cost to themselves in order to establish as against the defendants the facts that the vessel was a constructive total loss. It would be most unfair, he contended, that the defendants should be allowed any benefit where they had so unreasonably refused to shoulder any portion of the burden. From a business point of view I quite sympathise with the complaint, but I am unable to give it the legal

effect for which the plaintiffs contend, or which BAILHACHE, J., appears to some extent to have attributed to it.

In my opinion, it is not possible, without losing sight altogether of the root principle of insurance law that the contract of insurance is a contract of indemnity, to accept the plaintiffs' contention that they are entitled to ignore the compromise, and claim the full amount of the reinsurance policies. I find the rule laid down in very plain terms by LORD BLACKBURN in *Burnand* v. *Rodocanachi* (3). He says (7 App. Cas. at p. 339):

> "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

BAILHACHE, J., founds his judgment in the present case mainly on two considerations. First, that the plaintiffs bought the compromise, as he expressed it, and under the circumstances bought for their own advantage, and not for the joint benefit of themselves and of the defendants, and, consequently, that the defendants are not entitled to any benefit from it; secondly, that the contract of reinsurance is a contract of indemnity against liability, and not against discharge of liability. There is, no doubt, truth in both propositions, but, with respect to the learned judge, the propositions are only partially true. If the simile of a purchase is employed because a price was paid, it cannot, I think, be denied that it is a kind of purchase which does not put the purchaser into the shoes of the vendor so as to enable him to take advantage of the vendor's contract and to sue on it. In speaking of the contract of reinsurance as an indemnity against liability, and not against the discharge of liability, no account is taken of the fact that in the present case, before the liability was discharged, it was reduced in amount by agreement between the parties. In discussing the rights of these parties, I think that it is useful to consider what the position would be in a case where a reinsurer pays the original underwriter the full amount of his liability, and the latter, by some compromise with the original assured, afterwards reduces his liability to a less sum than he had received from his reinsurer. In such a case, on the authority of such cases as *Castellain* v. *Preston* (2), in my opinion, the reinsurer would be entitled by the doctrine of subrogation to be paid back the difference between what he had paid to the original underwriter and what the latter paid to his assured, and this because the contract of reinsurance is a contract of indemnity which, in the case referred to, can only be given effect to by invoking the aid of the doctrine of subrogation. In my opinion, unless there is something special in the present contract excluding the operation of the principle of indemnity, the same result must follow whether the compromise precedes or follows the payment by the reinsurer; and the conduct of the reinsurer, however unreasonable, with reference to the compromise, cannot, in my opinion, alter the character of the contract into which the parties originally entered.

It was contended for the plaintiffs that in the present case, the contract was a special one. It was said that the policy was a valued policy, and, there having been a constructional total loss of the vessel, the subject-matter of the insurance, the defendants must pay their agreed proportion of the agreed value of the vessel. I do not agree with this contention. It is true that, as between the defendants and the original assured, the value of the subject-matter of the insurance was agreed, and it is also true that as between the defendants and the plaintiffs, the latter had agreed to reinsure a certain proportion of the former's liability in respect of that agreed value; but that does not, in my opinion, in the events which

happened, exclude the principle of indemnity. The effect of the compromise may be variously stated. It may be said that, the claim of the original assured having been compromised, there was no payment by the original assured of any agreed fixed proportion of the agreed value. It may, perhaps, be said that the result of what happened was that a lower value was substituted for the one originally inserted in the policy, or that the original liability was reduced by agreement. Whatever view is taken of the compromise, the plaintiffs cannot, in my opinion, after the compromise, successfully contend that the reinsurance policies were valued policies in the sense that the plaintiffs' claim was "conclusively quantified," to use counsel for the plaintiffs' phrase, in the policies merely because it was established that the vessel, the value of which was agreed, was a constructive total loss. To use the language of LORD SELBORNE in *Burnand* v. *Rodocanachi* (3) (7 App. Cas. at p. 335), the law does not justify the use of the estoppel founded on the valuation for any such purpose.

No case was cited to us which, in my opinion, supported the plaintiffs' contention. *Mackenzie* v. *Whitworth* (7) was cited to us for the plaintiffs as supporting their contention. I do not so read that case. So far as it has any bearing on the question, I think that it tells against the plaintiffs. In that case, the question was whether in a policy which was really a policy of reinsurance, though not so expressed, the description of the subject-matter of the insurance was sufficient. The description was "on goods" merely, the goods being cotton shipped by a New Orleans firm of Tatman & Co., insured by New York underwriters and reinsured by them with the defendants. BLACKBURN, J., speaks of the interest of the original insurer in these words. He says (1 Ex.D. at p. 44):

> "The assured here had a direct interest in the safe arrival of the cotton. . . . It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against."

It is plain, from what the learned judge said (ibid. at p. 42), that he was dealing with a case in which the original insurer had been called on to pay the full amount of the damage sustained, and the point which is raised in this appeal was not, therefore, before the court. The language of the learned judge is, in my opinion, important as indicating the nature of the interest of the plaintiffs, and the character of the contract of reinsurance.

Uzielli v. *Boston Marine Insurance Co.* (1) was referred to and relied on. It is generally accepted that this case on some points is very difficult of explanation. So far as it can be regarded as any authority in the present case, I think it is important to consider the arguments presented to the court. The underwriters, who were reinsured by the plaintiffs, compromised the claim of the original assured at 88 per cent, but a considerable sum had been expended in getting the vessel off. The plaintiffs thereupon, as stated in the report, became liable as reinsurers to pay their proportion of the 88 per cent., and a proportion of the expenses, less the proceeds of the sale, which sums altogether amounted to a loss of 112 per cent. MATHEW, J., held that there had been a constructive total loss, and that the underwriters had expended more than 100 per cent. in the efforts to save the vessel, and he gave judgment for the full 112 per cent., although the policy was a policy for £1,000 only. On the appeal the defendants contended that their liability ought to be limited to the 88 per cent., and that they ought not to be held liable under the sue and labour clause. The plaintiffs contended that, by the terms of the policy, the defendants were liable to pay what the plaintiffs were liable to pay under the sue and labour clause. The point which is taken in the present case was not taken in that case. On the contrary, it appears to

me to have been assumed that, but for the point under the sue and labour clause, the claim would have been limited to the 88 per cent. BRETT, M.R., deals with the question in this way. He says that the interest of the plaintiffs as reinsurers is the loss which they might or would suffer under the policy on which they themselves were liable. He points out that this loss might be more than the share in the full value of the ship because of the liability under the sue and labour clause, and, though he holds that the claim must be limited to the amount of the policy—viz., £1,000—he apparently treats the 12 per cent., representing the difference between the 88 per cent. and the 100 per cent., as recoverable because of the position of the plaintiffs under the policy on which they were themselves liable, and the terms of the policy under which the plaintiffs were claiming from the defendants. I share the difficulty experienced by other judges more experienced in these matters than myself, in finding a satisfactory explanation of why the 12 per cent. was allowed: see per BIGHAM, J., in *Western Assurance Co. of Toronto* v. *Poole* (8) ([1903] 1 K.B. at pp. 386-388). But, on the other hand, I do not find any trace of the point which we have to decide in this appeal having been taken, or of any intention on the part of the court to decide it.

A third case that was relied on was *Nelson* v. *Empress Assurance Corpn., Ltd.* (6). That case turned on the question whether the third party procedure should be applied as between an original insurer and his reinsurer. The Court of Appeal decided that it ought not in the particular case before it, MATHEW, L.J., observing that the attempt to apply the third party procedure was quite a novel departure which would lead to great inconvenience owing to the two contracts being independent contracts often covering different risks, and he said that he was not prepared to create a precedent. It is true that he said also that the contract of reinsurance could not be treated as a contract of indemnity within the meaning of Ord. 16, r. 48. It seems clear from what immediately follows this statement in the judgment, that the lord justice had not the present case in his mind when he made the statement; and even if the statement be accepted as correct in the narrow sense in which it was used, I do not think that it is any authority in support of the plaintiffs' contention. I need not refer in detail to *Re Law Guarantee Trust Society, Ltd., Liverpool Mortgage Insurance Co.'s Case* (5) which proceeded, in my opinion, on an entirely different principle, and I see no reason at all to suppose that SCRUTTON, J., had the point which we are considering in his mind when he used the language to which we have been referred ([1914] 2 Ch. at p. 650).

The conclusion to which I have come is that the present case is covered entirely by the principles laid down in the judgment in *Castellain* v. *Preston* (2) and that the present appeal should be allowed.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.; Thomas Cooper & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

EMBIRICOS *v.* SYDNEY REID & CO.

[KING'S BENCH DIVISION (Scrutton, J.), March 30, 31, April 4, 1914]

[Reported [1914] 3 K.B. 45; 83 L.J.K.B. 1348; 111 L.T. 291; 30 T.L.R. 451; 12 Asp.M.L.C. 513; 19 Com. Cas. 263]

Shipping—Charterparty—Exception clause—Restraint of princes—Right of charterers to refuse to carry out charterparty.

By a charterparty made between the plaintiff, the owner of a Greek steamer, and the defendants, as charterers, a steamer was chartered to sail from Leghorn to the Sea of Azof and load grain. The charterparty contained an exception of restraint of princes. The steamer arrived at her loading port on Oct. 1, 1912, and on the following day loaded part of her cargo. Loading was stopped by the defendants because, in view of the imminence of war breaking out between Turkey and Greece, the Turkish government was arresting and detaining all Greek vessels arriving at the Dardanelles. War was declared on Oct. 18, but from Oct. 16 to Oct. 24, the Turkish government unexpectedly allowed Greek ships to pass through the Dardanelles. The lay days under the charterparty expired on Oct. 22. On Oct. 21 the defendants purported to cancel the charter, but the plaintiff refused to accept the cancellation. The steamer was detained in the Black Sea until the end of the war. In an action by the plaintiff for damages for breach of the charterparty,

Held: at the time of the breach alleged, an excepted peril prevented the carrying out of the charter by the steamer proceeding on her voyage, and, as there was a likelihood that this restraint would continue so long as to defeat the object of the adventure, the defendants were justified in cancelling the charter, notwithstanding that the restraint was unexpectedly removed for a short period, and, therefore, there was no breach of the charter by the charterers.

Notes. Considered: *G. W. Grace & Co.* v. *General Steam Navigation Co.*, [1950] 1 All E.R. 201. Referred to: *Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.*, *Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; *Anglo-Northern Trading Co., Ltd.* v. *Emlyn Jones and Williams*, [1917] 2 K.B. 78; *Countess of Warwick Steamship Co.* v. *Le Nickel Société Anonyme*, [1918] 1 K.B. 372; *Heilgers & Co.* v. *Cambrian Steam Navigation Co.* (1917), 33 T.L.R. 348; *Watts, Watts & Co., Ltd.* v. *Mitsui & Co., Ltd.*, [1916–17] All E.R.Rep. 501; *Bank Line, Ltd.* v. *Arthur Capel & Co.*, [1918–19] All E.R.Rep. 504; *Soc. Anon. Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.* (1924), 29 Com. Cas. 284, *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*, [1925] All E.R.Rep. 530; *Kulukundis* v. *Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242; *Universal Cargo Carriers Corpn.* v. *Citati*; [1957] 2 All E.R. 70.

As to the frustration of a charterparty, see 30 HALSBURY'S LAWS (2nd Edn.) 289–291; and for cases see 41 DIGEST 407 et seq.

Cases referred to:

(1) *Barrie* v. *Peruvian Corpn., Ltd.* (1896), 13 T.L.R. 101; 2 Com. Cas. 50; 41 Digest 408, *2537*.

(2) *Re Newman and Dale Steamship Co. and British and South American Steamship Co.*, [1903] 1 K.B. 262; 72 L.J.K.B. 110; 87 L.T. 614; 9 Asp.M.L.C. 351; 8 Com. Cas. 87; 41 Digest 408, *2538*.

(3) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 41 Digest 411, *2558*.

(4) *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp.M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, *3501*.

(5) *Jackson* v. *Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 41 Digest 330, *1859*.

(6) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, *3471*.

(7) *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 46 W.R. 78; 13 T.L.R. 501; 8 Asp.M.L.C. 315; 2 Com. Cas. 238, H.L.; 29 Digest 47, *93*.

(8) *The Savona*, [1900] P. 252; 69 L.J.P. 95; 49 W.R. 303; 41 Digest 481, *3140*.

Action tried by SCRUTTON, J., in the Commercial Court.

The plaintiff claimed damages for breach of a charterparty. The facts are set out in the judgment.

Leck, K.C., and *Raeburn* for the plaintiff, the shipowner.

Roche, K.C., and *Mackinnon* for the defendants, the charterers.

Cur. adv. vult.

April 4, 1914. **SCRUTTON, J.**, read the following judgment. One Embiricos, the owner of the Greek steamer *Andriana*, sues Sydney Reid & Co., the charterers of that vessel, for £11,500 damages for failing to load a cargo in the steamer whereby she was detained in the Black Sea by the Græco-Turkish War, and a Turkish embargo in the Dardanelles preceding it. The charterers reply in substance that the war and embargo prevented the performance of the charter within any time in contemplation of the parties as reasonable. The facts were as follows: By a charterparty dated Sept. 11, 1912, the *Andriana* was to sail from Leghorn to Kertch and then to a loading place in the Sea of Azof as ordered and there load grain, ten working days to be allowed the charterers for bringing the cargo alongside, with liberty to detain the steamer on demurrage fifteen running days. Arrests and restraints of princes, rulers and peoples were excepted. Clause 10 of the charterparty ran thus:

> "If the nation under whose flag the steamer sails shall be at war, whereby the free navigation of the steamer is endangered, or in case of blockade or prohibition of export of grain and seed from the loading port, this contract shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise, previous to cargo being shipped."

The marginal clause ran thus:

> "Should the Dardanelles be closed on steamer's arrival with no immediate prospect of opening, this contract to be mutually cancelled."

The vessel passed through the Dardanelles into the Black Sea on Sept. 28, 1912, and on Sept. 30 and onwards, in view of the imminent probability of war, the Turkish Government arrested and detained all Greek vessels arriving at the Dardanelles. The *Andriana* arrived at her loading port, Temriuk, on Oct. 1, and on Oct. 2 received some cargo, 110 tons. On that day the loading stopped and on the same day the plaintiff telegraphed to the captain: "Owing to probable war you must not leave Azof before receiving my orders." On Oct. 7 the charterers wrote a letter to the captain of the steamer:

> "We beg to notify you that owing to subsequent events having occurred, steamer is not in a position to carry out charter, besides being uninsurable. Shippers meantime cannot continue loading, and decline responsibility."

War was declared between Turkey and Greece on Oct. 18, 1912. Meanwhile, on Oct. 16, the Turkish Government allowed Greek vessels laden to pass through the Dardanelles till Oct. 20, and then till Oct. 24. As the *Andriana's* lay days did not expire till Oct. 22, up to which date the charterers could bring cargo alongside, and Temriuk was three to four days from Constantinople, the *Andriana*

could not have availed herself of this permission if the charterers had insisted on their rights under the charter to bring cargo up to and including Oct. 22. On Oct. 21 the charterers purported to cancel the charter, and the shipowner refused to accept the cancellation. Somewhat unexpectedly the Turkish Government allowed another seven days from Nov. 12 to 19 for Greek-laden vessels to pass the Dardanelles, and if the *Andriana* had been loaded in her lay days, or in her fifteen demurrage days, which expired on Nov. 6, she could have passed the Dardanelles then. There was, however, no reason to believe up to Oct. 16 that the Turkish Government would let Greek vessels pass through the Dardanelles, or, after Oct. 24 up to Nov. 11, that they would let them pass again. In fact, the *Andriana* was detained in the Black Sea till the close of the war. Her proposed cargo of grain was perishable, and would have been seriously injured by prolonged detention in a hold.

It was not really argued before me that either cl. 10 or the marginal clause excused the charterers. Clause 10 did not, for cargo had been shipped before the war. The marginal clause did not, for the Dardanelles were not closed on steamer's arrival on Sept. 28. Arguments were addressed to me on the point whether the exception clause was available to protect the charterers. If this were the only point, I think I should be bound, as a judge of first instance, by the decisions of MATHEW, J., in *Barrie* v. *Peruvian Corpn., Ltd.* (1) and of BIGHAM, J., in *Re Newman and Dale Steamship Co.* (2). The clause in the latter charter is, I think, indistinguishable from this charter while the exception "fire from any cause on land" in this charter seems to point to charterers' obligations rather than shipowners' duties. But I do not think the point is whether the exceptions apply to the charterers. It is probably true that "restraints of princes" did not prevent the doing of anything the charterers had to perform, but did they prevent the shipowner carrying out his part of the contract for such a time that the charterers need not be called on to do their part, because, even if they did it, there was no reasonable probability of the adventure proceeding? Were the charterers bound to put a valuable cargo into a ship's hold subject to the shipowner's claim for full freight, if the state of things was such that there was no reasonable probability of the shipowner being able to proceed on the voyage and overcome the restraints of princes then existing? The breach alleged in the statement of claim was the purported cancellation of the charter on Oct. 21. At that time there was war existing between Greece and Turkey, and, in my opinion, there was no reasonable probability that Turkey would allow Greek ships to pass through the Dardanelles again during the war. This view, in my opinion, is supported by the decision and reasons in *Geipel* v. *Smith* (3) and *Nobel's Explosives Co.* v. *Jenkins & Co.* (4). In the former case, the blockade of Hamburg in the Franco-German war was held to excuse a shipowner from loading coal at Newcastle in order to proceed to Hamburg if the blockade was raised. COCKBURN, C.J., said (L.R. 7 Q.B. at p. 411):

> "It is contended by the plaintiffs that the contract is divisible into two parts, and that the defendants ought to have performed the first part, which was practicable, in order to be in a position to perform the second, which was not. But the answer of the defendants is that the contract is one entire contract, and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance. And it is perfectly obvious that this is so; for what good would it have been to the shipper that the shipowner should go to the spout and take in the coals if he could not proceed with the cargo to Hamburg? None whatever. It is an entire contract, and anything that applies to make the performance of one part impossible must be taken to apply to the whole; and it is admitted that the defendants could not have got to their port of destination. The true way of looking at this case, as it appears to me, is this: It was an entire contract, and there was an insuperable obstacle in the performance of it in toto;

and the defendants were therefore justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it was useless."

So in *Nobel's Explosives Co.* v. *Jenkins* (4) the probability of capture of the cargo somewhere on the thousand miles of sea between Hong Kong and Yokohama was held by MATHEW, J., to justify the shipowner in refusing altogether to proceed beyond Hong Kong.

Counsel for the shipowner argued that the well-known doctrine of frustration of the commercial adventure by unreasonable delay laid down in *Jackson* v. *Union Marine Insurance Co.* (5) did not apply if the shipowner had cargo on board, so that the contract was part executed. This, which was a favourite argument of the late WALTON, J., and based by him on some expressions of LORD BLACKBURN in *Dahl* v. *Nelson, Donkin & Co.* (6) (6 App. Cas. at p. 53), was addressed by him unsuccessfully to MATHEW, J. in *Nobel Explosives Co.* v. *Jenkins* (4). It seemed to me to fail to recognise that in *Jackson* v. *Union Marine Insurance Co.* (5) the charter was not executory but part executed, as the ship was proceeding under the charter to her port of loading, and it received its deathblow in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (7), where the vessel had a cargo on board and yet the charter was held by the House of Lords to be avoided and the freight lost by such delay as frustrated the adventure.

I hold, therefore, that, at the time of the breach alleged, October 21, an excepted peril, restraint of princes, prevented the charter being carried out by the vessel's proceeding on her voyage, and was, in the language of LUSH, J., in *Geipel* v. *Smith* (3) (L.R. 7 Q.B. at p. 414)

> "likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this."

If there is such a likelihood and probability, the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event, and proceeded in the performance of an adventure which at the time seemed hopelessly destroyed. As LORD GORELL said in *The Savona* (8) ([1900] P. at p. 259):

> "I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach has to be considered,"

and the whole of his subsequent remarks are valuable on this point. Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called on to make up their minds. For these reasons, I have come to the conclusion that there was no breach of contract by the charterers in not loading their cargo in this Greek ship; and there must, therefore, be judgment for the charterers on the question of liability.

Solicitors: *Holman, Birdwood & Co.*; *W. & W. Stocken.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

A

R. *v.* HUMPHRYS. Ex Parte WARD

[KING'S BENCH DIVISION (Bankes, Lush and Avory, JJ.), July 30, 1914]

[Reported [1914] 3 K.B. 1237; 84 L.J.K.B. 187; 30 T.L.R. 698; 111 L.T. 1110; 79 J.P. 67; 24 Cox, C.C. 455]

B

Bastardy—Affiliation proceedings—Jurisdiction of justices—Child born abroad Return of mother to England—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict.*, *c.* 65), *s.* 3.

The fact that a bastard child was born out of England does not, if the parents are resident in England, bar proceedings under the Bastardy Laws Amend-

C ment Act, 1872, in England.

R. v. *Blane* (1) (1849), 13 Q.B. 769, distinguished.

Notes. The Bastardy Laws Amendment Act, 1872, has been repealed by the Affiliation Proceedings Act, 1957. For s. 3 of the 1872 Act, see now s. 1 of the 1957 Act.

Distinguished: *Tetan* v. *O'Dea*, [1950] 2 All E.R. 695; *R.* v. *Wilson*, *Ex parte*

D *Pereira*, [1952] 2 All E.R. 706. Referred to: *Forsyth* v. *Forsyth*, [1947] 1 All E.R. 406.

As to affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 110 et seq.; and for cases see 3 DIGEST (Repl.) 441 et seq. For the Affiliation Proceedings Act, 1957, s. 1, see 37 HALSBURY'S STATUTES (2nd Edn.) 36.

E Cases referred to:

(1) *R.* v. *Blane* (1849), 13 Q.B. 769; 3 New Mag. Cas. 168; 3 New Sess. Cas. 597; 18 L.J.M.C. 216; 13 L.T.O.S. 257; 13 J.P. 825; 13 Jur. 854; 116 E.R. 1458; 3 Digest (Repl.) 442, *337*.

(2) *Marshall* v. *Murgatroyd* (1870), L.R. 6 Q.B. 31; 40 L.J.M.C. 7; 23 L.T. 393; 35 J.P. 153; 19 W.R. 72; 3 Digest (Repl.) 441, *336*.

F Also referred to in argument:

Hampton v. *Rickard* (1874), 43 L.J.M.C. 133; 30 L.T. 636; 38 J.P. 646; 3 Digest (Repl.) 441, *335*.

R. v. *Lightfoot* (1856), 6 E. & B. 822; 25 L.J.M.C. 115; 27 L.T.O.S. 235; 20 J.P. 677; 2 Jur.N.S. 786; 4 W.R. 655; 119 E.R. 1070; 3 Digest (Repl.) 451, *406*.

G

Rule Nisi calling on William John Humphrys and others, justices of the city of Hereford, to show cause why a writ of certiorari should not issue to remove into the High Court an order made by the justices on June 8, 1914, whereby it was adjudged that George Henry Ward was the putative father of a certain bastard child of one Caroline Frances Jenkins, and whereby it was ordered that George

H Ward should pay Caroline Jenkins the sum of 5s. per week until the child should attain the age of sixteen years or should die.

The rule was obtained at the instance of Ward on the ground that the justices had no jurisdiction to make the order, the child in question having been born in New South Wales. In the affidavits of George Ward and his solicitor, the facts were set out as follows: On April 27, 1914, Ward was served with a bastardy summons

I issued on the application of Caroline Jenkins. The summons came on for hearing before justices for the city of Hereford on May 11, 1914. At the hearing, the complainant Jenkins appeared and gave evidence on oath that her bastard child, the subject of the summons, was born in New South Wales, and produced the certificate of birth of the child. The applicant's solicitor submitted that the justices had no jurisdiction to adjudicate on the case, and the justices adjourned the hearing. On June 8, 1914, the solicitor again appeared on behalf of the applicant. It was admitted by the solicitor then appearing for the complainant and again sworn by the complainant that the bastard child was born in New South Wales. The

applicant's solicitor submitted that the justices had no jurisdiction to adjudicate on the case and referred the justices to *R.* v. *Blane* (1), but the justices overruled his objection and adjudged that the applicant was the father of the bastard child. It appeared before the justices, though it was not on affidavit, that the complainant and applicant were resident in England, that in 1912 the complainant went to Australia, where she was informed by a doctor that she had been pregnant for some months, that the bastard child was born in Sydney, New South Wales, on May 18, 1913, and the complainant afterwards returned to England and took proceedings against the applicant.

The Bastardy Laws Amendment Act, 1872, provides:

> "3. Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child . . . make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

Rowsell showed cause against the rule.
S. R. C. Bosanquet in support of the rule.

BANKES, J.—This was a rule obtained on an affidavit sworn by Mr. Matthews, the solicitor who appeared for the applicant, against whom a bastardy summons had been taken out and served on April 27, 1914. On the hearing of that bastardy summons, evidence was given by the complainant in which she stated that the child, the subject of the summons, was born in New South Wales. The affidavit is silent as to any of the facts which were proved before the justices except that one fact. The affidavit says nothing as to whether or not the complainant was a British subject or the applicant. It says nothing as to whether they were domiciled or resident in or out of England, or as to the circumstances under which the complainant left this country, and it says nothing as to where the child was begotten. It relies mainly on the fact that the child was born out of England, and counsel for the applicant obtained a rule on that affidavit by citing to the court *R.* v. *Blane* (1), and he now comes to the court and contents himself with saying that *R.* v. *Blane* (1) is an authority for the proposition that no person can obtain an order under the Bastardy Acts, whatever the circumstances may be, if the child is born out of England. I do not agree with that proposition, nor do I agree that *R.* v. *Blane* (1) decides that point. The facts in *R.* v. *Blane* (1) were that the mother was not a British subject and there was no evidence that she was domiciled in England. The Case states that she was a native of France, and the report in 13 Q.B. 769 states that the principal ground of objection to the order was that the magistrate had no jurisdiction to make it, because the mother of the child was a foreigner by birth and was in France when the child was born. That statement of facts makes it obvious that, in order to ascertain whether that particular child was a bastard or not, the status of the child, according to the French law, would have to be ascertained, and that the status of the child did not depend on the English law.

The Bastardy Laws Amendment Act, 1872, s. 3, says this:

> "Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act"

may apply, and so forth, and, therefore, on an application before the justices for an order it was a condition precedent that the mother should prove that she has

been delivered of a bastard child, and if she is an English subject resident and domiciled in England, and the father is also an English subject resident and domiciled in England, the mere fact that the putative father is the father of the child, and the parties were unmarried, decides the question whether that child is or is not a bastard child. If facts are given in evidence before the justices which indicate that the status of the child is governed by some foreign law, and that the condition precedent of proving that the particular child is a bastard child needs to be decided by some law other than the English law, I quite agree that the particular case would have been brought within the decision of *R.* v. *Blane* (1); but, in the absence of any such evidence, in my opinion it is not the law, nor does *R.* v. *Blane* (1) decide that the mere fact that the child of English parents has been born a bastard outside the limits of England is a bar to the proceedings. Take the case that I put in the course of the argument—supposing that the parents of the child were both domiciled and resident in England, and that, for the mere purpose of concealing her shame, the woman goes to Scotland or to France to be confined and comes straight back and takes out a summons against the putative father, what ground is there for suggesting that the Act does not apply in that case? What law is there which has to be considered except the English law? As far as I can see, none, and it is quite consistent with the facts before us that it is apparent in a case of this kind and in the absence of further evidence, that the rule should not be made absolute.

I wish, now, to say a few words about *R.* v. *Blane* (1). The facts there show that the woman was a single woman and a native of France. The report states that the principal ground of objection was that the mother was a foreigner and was in France at the time the child was born. LORD DENMAN, C.J., in giving judgment, said (13 Q.B. at p. 772):

> "Assuming that the magistrate who made this order has examined the law of France, and ascertained that according to that law the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws"

—meaning, as I understand it, that that is clearly a case in which the status of the child has to be ascertained according to the French law; even assuming that the magistrate has examined the law of France and ascertained that, according to that law, the child was a bastard. With that view one must entirely agree, because, in the case of a statute, such as the Poor Law Amendment Act, 1844, which according to s. 75 of the Act, is confined to England and Wales alone, it is plain that it was not competent for the magistrate to apply any other than the English law for the purpose of deciding the particular facts which were brought before him on that application. Again, COLERIDGE, J., in his judgment, as it seems to me, based his decision entirely on the question that the status of the child has to be ascertained by some foreign law. ERLE, J., in his judgment, said this (13 Q.B. at p. 774):

> "It is quite clear that our statutes relating to bastardy never contemplated the case of a child born a bastard in a foreign country,"

by which I understand born a bastard according to some law other than the English law.

Therefore counsel in support of the rule has failed to satisfy me that this particular case comes within the principle laid down in *R.* v. *Blane* (1), and I think, on the facts at present before us, that there is nothing which prevents the justices from making the order which they in fact made, and, therefore, the rule ought to be discharged.

AVORY, J.—If this case were res integra I should unhesitatingly come to the same conclusion as that which my Lord has already expressed, and particularly in view of the point which I put during the argument—namely, that the Bastardy

Laws Amendment Act, 1872, contemplates that the application may be made by a woman before the birth of the child. In such a case, it is obvious that she may go to the justices in the jurisdiction where she is residing and the justices may then grant a summons. It is true that, before the order is made, she must wait until the birth of the child, but the statute obviously contemplates that the same justices who have granted her the summons before the birth of the child will proceed to adjudicate on that summons after the birth of the child. Taking the case which has been put as an illustration, I cannot believe that the mere fact that a woman has in the meantime gone across the Channel and has returned and the child has been born on the other side of the Channel would deprive the justices of the exercise of the jurisdiction that they originally exercised in granting a summons under the statute; but, speaking for myself, I am unable to say that *R.* v. *Blane* (1) does not decide the very point before us. I agree there is a distinction, and a most important distinction, in the fact that, in that case, the mother was a foreigner. It is true that the report states that the principal ground of objection to the order was that the magistrate had no jurisdiction to make it because the mother of the child was a foreigner by birth and was in France when the child was born. But when I look at the judgments of LORD DENMAN, C.J., and COLERIDGE, J., I must say that I am unable to put the same construction on them that the other members of the court, I am glad to say, are able to put on them. LORD DENMAN said (13 Q.B. at p. 772):

> "Assuming that the magistrate who made this order has examined the law of France, and ascertained that according to that law the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws."

I must say I read that as meaning this: "even if, according to the law of France, the child in that case is a bastard, nevertheless we are of opinion that a child born out of this country is not the subject of our bastardy laws." If he had intended that which my Lord has expressed, it seems to me that he would have said: "Assuming the magistrate who made this order had examined the law of France and had ascertained that according to that law the child was a bastard, we are clearly of opinion that such a child as the one in the present case, born out of this country, is not the subject of our bastardy laws, because it is the child of a foreign mother." It would be quite easy to say that, if that were the real decision. COLERIDGE, J., in his judgment, said (13 Q.B. at p. 773):

> "The legislature in all these statutes is obviously dealing with bastards born in some parish; that is, in this country."

I am unable, therefore, to say that the actual point that is before the court in this case was not the real ground of the decision in *R.* v. *Blane* (1), or that the order was properly made in this case.

LUSH, J.—I can see nothing either in the Poor Law Amendment Act, 1844, or in the Bastardy Laws Amendment Act, 1872, to indicate that unless the child is born in England or Wales, the Act does not apply. Because the mother, who is domiciled and resident in England, goes to Scotland and is confined there and then returns to the place where she was resident before, I can see nothing to suggest that in that case the statute does not apply. I can see, on the other hand, a good deal to indicate that, when the mother is a foreigner and the child is born abroad, the Act could not apply, because the Act of 1872, in s. 3 says

> "any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act"

may make the application and so on. There is a great deal to indicate that, in the case of a foreign mother, where the child is born abroad, the Act would not apply, because, if it did, it would necessitate an inquiry into the status of the

child, the legitimacy or illegitimacy of the child, and for that purpose one would have to consider what the foreign law was on the subject.

In *R.* v. *Blane* (1), the facts were that the mother was a foreign subject and that the child was born abroad, and, therefore, the court was confronted with that very difficulty—namely, that, if the Act applied in that case, it would be necessary for the court to inquire into the status of the child according to the law of the place where the mother was domiciled, and consequently, the court, as I think, dealing with that difficulty, came to the conclusion that the Act did not apply. LORD DENMAN, C.J., and COLERIDGE and ERLE, JJ., agreed that the order must be quashed. It is quite true that, if we look at the judgments, we find in the judgment of LORD DENMAN, and I think in the judgment of COLERIDGE, J., that they would appear to go the whole length of saying that, even if the mother was a British subject, the Act would not apply if the child were born abroad, but it was not necessary for the court to decide that. ERLE, J., does not seem to have considered it or to have dealt with it, and the real question that I think was dealt with and decided in that case was whether the child of a foreign mother born abroad was a bastard child in respect of whom the order could be made under the Poor Law Amendment Act, 1844.

It is necessary, I think, to refer not only to *R.* v. *Blane* (1), but also to *Marshall* v. *Murgatroyd* (2), and it is interesting to observe this, that, in the course of the argument in that case, according to the report in the LAW JOURNAL, LUSH, J., pointed out, when the argument was put forward that the child must be born in England or in Wales in order that the Act should apply, that the Act did not say so. No counsel appeared there for the respondent, and BLACKBURN, J., is reported to have said (40 L.J.M.C. at p. 8):

> "We think that the decision in *R.* v. *Blane* (1) is correct, and that the Act applies only to a child born of a mother in English territory."

But in the report in the LAW REPORTS, that passage is omitted from the judgment, and BLACKBURN, J., there does not say a word about *R.* v. *Blane* (1), and confines his judgment to the facts before the court in *Marshall* v. *Murgatroyd* (2), and says that the child was not born abroad but was born on a British ship.

Those are the two authorities, and the question for us is whether *R.* v. *Blane* (1) concludes this case in which, as I have said, the mother is not a foreign mother but was resident in England and went to Australia, and was confined there and returned to England. I can find nothing in the statute to suggest that, in such a case, the order could not be made under the Act, and I do not think that the decision in *R.* v. *Blane* (1), when properly considered, in the least concludes us in this case, or compels us to say that the mere fact that the child was born abroad prevents an order from being made.

For these reasons, I think the rule should be discharged.

Rule discharged.

Solicitors: *Metcalfe & Sharpe*, for *Thomas A. Matthews*, Hereford; *Andrew, Wood, Purves & Sutton*, for *Corner & Co.*, Hereford.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

C. GROOM, LTD. *v.* BARBER

[KING'S BENCH DIVISION (Atkin, J.), November 17, 18, 1914]

[Reported [1915] 1 K.B. 316; 84 L.J.K.B. 318; 112 L.T. 301; 31 T.L.R. 66; 59 Sol. Jo. 129; 12 Asp.M.L.C. 594; 20 Com. Cas. 71]

Sale of Goods—Contract—C.i.f. contract—"War risk for buyer's account"—Goods not appropriated to contract before tender of documents—Sufficiency of tender.

By a contract of sale on c.i.f. terms, the buyers bought from the seller one hundred bales of cloth. The contract of sale provided that should the goods not arrive from loss of vessel or other unavoidable cause, the tender to the buyers of the insurance policy with the bill of lading should be deemed a good tender of the goods so not arriving. There was also a condition "war risk for buyer's account." Part of the goods were shipped and the shippers took out a policy of insurance which did not cover war risk. The seller tendered the documents including the insurance policy, but on the day after the tender, the ship which was carrying the goods was sunk by enemy action. The buyers refused to accept the tender of the documents as the goods had already been lost.

Held: (i) the condition in the contract of sale "war risk for buyer's account" meant that the war risk was the buyers' concern and there was no obligation on the seller to effect such an insurance at the buyers' expense; (ii) in a c.i.f. contract of sale, tender of the proper documents (ordinarily the bill of lading, the invoice and the policy of insurance) within a reasonable time of shipment was due performance of the contract, and it was immaterial in whom the property of the goods was before tender; the seller's obligation could not depend on whether the goods were lost or not and he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender; accordingly, the buyers were not relieved from their obligations under the contract.

Notes. Distinguished: *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*, *Theodor Schneider & Co.* v. *Burgett and Newsam*, [1915] 2 K.B. 379. Referred to: *Upjohn* v. *Hitchens*, *Upjohn* v. *Ford*, [1918] 1 K.B. 171; *Manbre Saccharine Co., Ltd.* v. *Corn Products Co., Ltd.*, [1918–19] All E.R.Rep. 980; *Diamond Alkali Export Corpn.* v. *Bourgeois*, [1921] All E.R.Rep. 283; *Smyth & Co.* v. *Bailey, Son & Co.*, [1940] 3 All E.R. 60.

As to c.i.f. contracts, see 34 HALSBURY'S LAWS (3rd Edn.) 164 et seq.; and for cases see 39 DIGEST 575 et seq.

Cases referred to:

(1) *Biddell Bros.* v. *E. Clemens Horst Co.*, [1911] 1 K.B. 214; 80 L.J.K.B. 584; 103 L.T. 661; 27 T.L.R. 47; 16 Com. Cas. 8; reversed, [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 12 Asp.M.L.C. 1; 16 Com. Cas. 197, C.A.; reversed sub nom. *E. Clemens Horst Co.* v. *Biddell Bros.*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp.M.L.C. 80; 17 Com. Cas. 55, H.L.; 39 Digest 575, *1801*.

(2) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 39 Digest 560, *1677*.

Also referred to in argument:

Yuill & Co. v. *Robson*, [1908] 1 K.B. 270; 77 L.J.K.B. 259; 98 L.T. 364; 24 T.L.R. 180; 52 Sol. Jo. 192; 11 Asp.M.L.C. 40; 13 Com. Cas. 108, C.A.; 29 Digest 80, *392*.

Award stated in the form of a Special Case.

By a contract in writing dated June 8, 1914, J. F. Barber, a merchant of Mincing Lane, London (hereinafter called "the seller"), sold to C. Groom, Ltd., of No. 36 Gracechurch Street, London (hereinafter called "the buyers"), on the terms of the rules and regulations for the time being in force of the United Kingdom Jute Goods Association, Ltd., and subject to the conditions endorsed on the contract, one hundred bales of Hessian cloth at 18s. 6d. per hundred yards for shipment from Calcutta, one half between June 1 and 30 and the other half between July 1 and 15, 1914, by steamer and/or steamers to London on c.i.f. terms, the latter to be with particular average for gross invoice amount, plus 10 per cent. for payment by cash against documents less any usual rebate. Amongst other things, the contract provided that:

> "(4) Should the goods or any portion thereof not arrive from loss of vessel or other unavoidable cause, the tender to the buyer of the insurance policy with the bill of lading or other document or documents which with the policy will enable the buyer to recover the amount of the insurance from the underwriters shall be deemed a good tender of the goods so not arriving. (5) Ship's name to be declared by the first seller without undue delay, and any declaration so made shall be valid as regards successive buyers if passed on without undue delay, and no vessel to be declared which has already entered at the custom house. (8) . . . Where W.P.A. insurance has been contracted for, average is to be payable on each bale if amounting to 3 per cent. 'war risk for buyer's account.' "

It was admitted by the parties that, on the same day that this contract was made —June 8, 1914—the seller had bought identical goods on identical terms, except as regards price, from Messrs. Becker, Gray & Co., merchants and shippers of London and Calcutta. The goods which came into question in this arbitration were twenty-five of the bales which were to be shipped between July 1 and 15, 1914. On July 5, 1914, Becker, Gray & Co. duly shipped the goods at Calcutta in the steamship *City of Winchester*, and on July 16 took out an insurance policy on the goods which did not cover war risk, or, in other words, which contained the customary free from capture and seizure clause (f.c.s.). The shipping documents were sent to London through the medium of the Hong-Kong and Shanghai Banking Corporation. On Aug. 3, the seller wrote to the buyers calling their attention to the fact that war risk was for their account, and that the risk must be covered by them to protect their own interests. On Aug. 4, the buyers wrote to the seller contending that the seller was responsible for the insurance against war risk. In his reply the seller called the buyers' attention to rule No. (8), endorsed upon the contract, according to which the war risk was for the buyers' account. On Aug. 12, the buyers wrote to the seller with reference to the shipment in question and requested to be informed as to the boat the goods were coming by and when they left Calcutta, as the goods would have to be covered against war risk, and the buyers would not get the documents till the boat was nearly in this country. The buyers' letter continued: "Please let us have this information to-morrow so that we can get them covered." On Aug. 14, the seller replied that he so far had no advice of the name of the steamer carrying the goods. On Aug. 20, the seller received information regarding the name of the steamer carrying the goods, the information being contained in an invoice received by him from Becker, Gray & Co. Within about an hour of the receipt of this invoice the seller dispatched a similar invoice to the buyers. On Aug. 21, at 2.27 p.m., the loss of the steamer *City of Winchester* was posted at Lloyd's, she having been captured on Aug. 6 by a German cruiser and subsequently sunk. It was not contended that any earlier information was received in London regarding such loss. The invoice was the only document which the buyers received from the seller. The parties admitted that it was to be presumed from the delivery of an invoice that the seller was in a position to deliver the documents under the contract. On Aug. 22 the buyers wrote to the seller returning the invoice because the *City of Winchester* had been captured

on Aug. 6, and stated that, although the buyers had asked previously for the name of the steamer, the seller's invoice received on Aug. 21 gave the first advice. Under the circumstances the buyers refused to accept any responsibility in the matter. The policy which the seller was in a position to tender to the buyers, together with the bills of lading, was the usual form of Lloyd's policy, and it contained the free from capture and seizure clause.

The matter was thereupon referred to arbitration under the terms of the contract, the seller claiming that he was entitled to be paid at the maturity of the shippers' draft—namely, Nov. 23, 1914—the sum of £441 2s., or such sum at an earlier date less the usual rebate, whilst the buyers contended that they were entitled to refuse the documents and regard the contract as unfulfilled. The umpire found that the buyers were responsible for war risk and awarded £441 2s. to the seller. On appeal to the appeal committee, the buyers contended that: (1) (a) It was the duty of the seller to insure against risks of war. (b) There was no proper presentation of documents to the buyers unless the seller tendered or was in a position to tender a policy or policies of insurance which would enable the buyers to recover against the insurer for the loss of the goods. (c) The documents tendered, or which the seller was in a position to tender, were not a good tender under cl. (4) of the contract. (2) (a) No property in the goods passed to the buyers because no goods in a deliverable state were unconditionally appropriated to the contract by the seller with the consent of the buyers. (b) When the seller invoiced the goods to the buyers and tendered, or was in a position to tender, the documents and purported to appropriate the goods to the contract they had ceased to exist; and, as a consequence, (c) Unless the seller tendered, or was in a position to tender, documents which entitled the buyers to receive the goods or obtain a complete indemnity for the loss of them the buyers were not bound to pay the price. The buyers' contention that there was undue delay by the seller in declaring the ship's name was withdrawn in the course of the hearing. The statement on behalf of the buyers that they could not have insured against the war risk until the name of the vessel was known was contrary to the experience of the committee and could not be upheld. As regards the first contention, the committee decided, as a question of fact, that the insurance policy referred to in cl. (4) of the conditions was by the custom of the trade a policy which contained the free from capture and seizure clause, and that the tender of such a policy was a sufficient tender within the meaning of the contract, and that there was no custom of the trade and it had never been the practice for a seller to effect any war risk insurance for buyer's account, and that the tender of a war risk policy had never in practice been made by merchants or others doing business in jute goods. The committee further decided that the legal interpretation of the contract was that the war risk was upon the buyers, and that the buyers had no right to claim from the seller the delivery of a policy covering the war risk. As regards the second contention, the committee was of opinion that the seller fulfilled his obligation under the contract by intimating to the buyer that he was in a position to deliver the documents deliverable under the contract, and that it was the buyer's obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state was not a sufficient ground to relieve the buyers from their obligation under the contract. Consequently, the committee awarded and decided that the buyers were to pay to the seller £441 2s. on the twenty-third day of November, one thousand nine hundred and fourteen. In case the matters in question should be referred to the court for its decision, and it should be decided that the documents which the seller was in a position to tender were insufficient owing to there being no insurance against war perils or that there had not been a valid appropriation of the goods to the contract, then the committee decided that the buyers are entitled to recover nothing from the seller.

Maurice Hill, K.C. (*L. F. C. Darby* with him), for the buyers.
Mackinnon for the sellers.

ATKIN, J., stated the facts and contentions, and continued: I think it is an incident of a c.i.f. contract as stated by HAMILTON, J., in his judgment in *Biddell Bros. v. E. Clemens Horst Co.* (1) that a seller under a contract of sale has, among other things, to arrange for an insurance on the terms current in the trade which will be available for the benefit of the buyer. I am satisfied that, at the time this contract was made, the terms current in the trade were terms which would exclude war risk—in other words, that the terms of the policy would contain the f.c.s. clause. I am, therefore, of opinion that, apart from the special terms of the contract, a policy in such terms would in fact be in order. The finding of the appeal committee in that respect makes that matter quite certain. But this contract contains the words: "War risk for buyer's account." This is said to mean that the seller must, by virtue of the contract, take out a policy covering the war risk, but that he may charge the buyer with the expense of it. The contention amounts to this: that at all times, in times of peace, a war risk policy ought to be taken out at the expense of the buyer. I am perfectly satisfied myself that no seller or buyer ever contemplated such a thing being done, and that, if a buyer was charged with such a policy in ordinary times of peace, he would be the very first person to object. To my mind, those words mean that war risk is the buyer's concern; if the buyer wants to cover a war risk he must take the necessary steps himself. The words may mean that, in the proper course of business, the buyer is entitled to ask the seller to take out a policy of insurance against war risk, at the buyer's expense, at the time when he is taking out the other policy. I do not decide that it does mean that, but it may do so. If it does, I am quite satisfied that, in this case, the buyers never did in fact request the seller to take out a war risk policy on those terms, because, when they did make their request, the buyers never intended themselves to pay the cost. They merely intimated that the seller was under the obligation to take out the policy at the seller's expense. Under those circumstances, I am satisfied that, on this point, the contention of the buyers fails, that the award is perfectly right, and that the policy was in order.

The next question is one of general interest on contracts on c.i.f. terms. It is contended that the seller cannot tender documents representing goods which were lost at the time of the tender because, at the time of the loss, there had been no goods appropriated to the contract so as to have passed the property to the buyer. It is said that, as the goods tendered were non-existent, the documents were not in order. The appeal committee dealt or, at any rate, appeared to have dealt, with the point in their award. They say:

> "As regards the second contention, the committee is of opinion that the seller fulfilled his obligation under the contract by intimating to the buyers that he was in a position to deliver the documents deliverable under the contract, and that it was the buyers' obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state is not a sufficient ground to relieve the buyers from their obligations under the contract."

I am not sure that this finding quite fully deals with the point as to the property not being in the buyers at the time of the loss. It was contended on the part of the buyers that in a c.i.f. contract, the seller's duty is so to act as to pass the property to the buyer, either on shipment or, at any rate, in case of loss, at some time before the loss. It is said that if this is not done, the seller cannot make a valid delivery under the contract, inasmuch as there are no goods in existence which can be said to be the buyer's goods, or which can be so appropriated as to become the buyer's goods. The committee have not dealt with the question of fact whether there was any appropriation in fact of goods to this contract by or on behalf of the seller. In the view that I hold, the question is immaterial, but, if it had become material, I should have had to refer the Case back to the arbitrators for a finding. On the evidence as disclosed in the Case there does

not appear to have been any appropriation, and I shall assume that there was none.

What is the meaning of a contract for the sale of goods on c.i.f. terms? I think the answer has been given authoritatively in the judgment of HAMILTON, J., in *Biddell Bros.* v. *E. Clemens Horst Co.* (1). He says ([1911] 1 K.B. at p. 220):

> "The meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to the authorities upon the subject. A seller under a contract of sale containing such terms has first to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by BLACKBURN, J., in *Ireland* v. *Livingston* (2) (L.R. 5 H.L. at p. 406) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage."

In my opinion the result is that the contract of the seller is performed by delivery to the buyer, in reasonable time from the agreed date of shipment, documents which are ordinarily the bill of lading, the invoice, and policy of insurance, which will entitle him to recover on the policy the value of the goods lost by a peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It, therefore, becomes immaterial whether before the date of the tender of the documents the property in the goods was vested in the seller, the buyer, or some third person. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender; nor need he have obtained any right to deal with the bill of lading until the moment of tender. If it were otherwise, the shipper of goods in bulk or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms. The seller's obligation cannot depend on whether the goods are lost or not, and, if there is no loss, and the property has to pass to the buyer before delivery of the documents, at what stage of the transaction must it pass? Unless it be at the time of shipment, I can see no reason for fixing on any other time than on delivery of documents, and, if it be the law that a tender of documents is ineffectual unless in fact at the moment of shipment the property actually passed to the ultimate buyer, it appears to me that business operations would be very seriously embarrassed. I do not think that the above is inconsistent with the judgment of KENNEDY, L.J., in *Biddell Bros.* v. *E. Clemens Horst Co.* (1). Difficult questions arise as to time when, in performance of a contract on c.i.f. terms, the property passes to the buyer. But the question when in fact the property passes is distinct from the question whether the seller undertakes, as a term of the contract, that the property shall pass at a given time, and the lord justice is only dealing with the former question. After the decision of the House of Lords in *Biddell Bros.* v. *E. Clemens Horst Co.* (1), I do not think it necessary to consider former cases. The object of the courts in construing commercial contracts is to try to give effect to the intention of both the contracting parties, and not to impose on business men terms which they never contemplated. If old forms are now used to express different meanings from those read into them in earlier days, the courts should be prompt to recognise the altered use if they are satisfied that there is in fact a change. I do not say that a contract on c.i.f. terms means to-day anything different to what it ever meant, but if the courts at other times have rightly imputed to the contract a

different meaning to what I have suggested in my judgment, the true meaning of the words is now altered. I am further of opinion that, in this particular contract, the meaning which I have said is the true meaning of a c.i.f. contract is explicitly stated in cl. (4). [HIS LORDSHIP read cl. (4), and continued:] The amount of the insurance means, in my opinion, the amount of the insurance if the loss is such as was agreed in the contract of sale to be covered, and in this case I think there was a good tender in the terms of this clause. The result is that the award of the arbitrators in favour of the seller must stand, and that the buyers must pay the cost of this hearing.

Judgment for the seller.

Solicitors: *Druces & Attlee*; *B. A. Woolf & Co.*

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

WYNN *v.* CONWAY CORPORATION

[KING'S BENCH DIVISION (Joyce, J.), March 20, 1914]

[Reported [1914] 2 Ch. 705; 84 L.J.Ch. 203; 111 L.T. 1016; 78 J.P. 380; 30 T.L.R. 418; 58 Sol. Jo. 432; [1914] W.N. 142]

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.J.), July 17, 1914]

[Reported [1914] 2 Ch. 705; 84 L.J.Ch. 203; 111 L.T. 1016; 78 J.P. 380; 30 T.L.R. 666; 59 Sol. Jo. 43; 13 L.G.R. 137]

Landlord and Tenant—Lease—Covenant for renewal—"Every eleven years of the said term"—Every first eleven years of each renewed term.

A lease for twenty-one years contained a covenant for renewal in the following terms: "And the said lessors covenant with the lessee that they the lessors will at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of £7 10s. for a fine for the said premises that then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained and so often as every eleven years of the said term shall expire the lessors will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid and paying such fine of £7 10s. on the day or time hereinbefore limited or appointed."

Held: the words in the covenant "every eleven years of the said term" meant every first eleven years of the term and, therefore, the covenant conferred a perpetual right of renewal at the end of every successive period of eleven years.

Hare v. *Burges* (1) followed.

Notes. Distinguished: *Re Greenwood's Agreement, Parkins* v. *Greenwood*, [1950] 1 All E.R. 436.

As to covenants for renewal of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 625 et seq.; and for cases see 31 DIGEST (Repl.) 66 et seq.

Cases referred to:

(1) *Hare* v. *Burges* (1857), 4 K. & J. 45; 27 L.J.Ch. 86; 30 L.T.O.S. 255; 22 J.P. 84; 3 Jur.N.S. 1294; 6 W.R. 144; 70 E.R. 19; 31 Digest (Repl.) 80, *2333*.

(2) *Rochford* v. *Hackman* (1852), 9 Hare, 475; 21 L.J.Ch. 511; 19 L.T.O.S. 5; 16 Jur. 212; 68 E.R. 597; 44 Digest 548, *3657*.

(3) *Swinburne* v. *Milburn* (1884), 9 App. Cas. 844; 54 L.J.Q.B. 6; 52 L.T. 222; 33 W.R. 325, H.L.; 31 Digest 76, *2302*.

Also referred to in argument:

Baynham v. *Guy's Hospital* (1796), 3 Ves. 295; 30 E.R. 1019; 31 Digest (Repl.) 80, *2328*.

Moore v. *Foley* (1801), 6 Ves. 233; 31 E.R. 1027; 31 Digest (Repl.) 80, *2329*.

Sadlier v. *Biggs* (1853), 4 H.L.Cas. 435; 22 L.T.O.S. 69; 10 E.R. 531, H.L.; 31 Digest (Repl.) 81, *2338*.

Browne v. *Tighe* (1834), 8 Bli.N.S. 272; 2 Ch. & Fin. 396; 5 E.R. 944, H.L.; 31 Digest (Repl.) 81, *2342*.

Atkinson v. *Pillsworth* (1787), 1 Ridg. Parl. Rep. 449; Vern. & Scr. 157; 31 Digest (Repl.) 80, **796*.

Palmer v. *Hamilton* (1793), 2 Ridg. Parl. Rep. 535; 31 Digest (Repl.) 80, **797*.

Sheppard v. *Doolan* (1842), 3 Dru. & War. 1.

Chambers v. *Gauszen* (1844), 2 Jo. & Lat. 99; 31 Digest (Repl.) 80, **798*.

North-Eastern Rail. Co. v. *Lord Hastings*, [1900] A.C. 260; 69 L.J.Ch. 516; 82 L.T. 429; 16 T.L.R. 325, H.L.; 30 Digest (Repl.) 476, *1187*.

Action.

By an indenture of lease made in 1824, the defendant corporation demised certain hereditaments and premises to a lessee, his executors, administrators, and assigns for twenty-one years from Sept. 29, 1824, at a rent of 8s. per annum. The lease contained a covenant for a renewal thereof at the expiration of the first eleven years of the term in the terms of the covenant for renewal hereinafter stated. In 1832 the lessee died, and a fresh lease was granted to his executor in 1835 containing a similar covenant for renewal. Subsequent renewals of the lease were from time to time made by the corporation to the executor, and after his death to the plaintiff in this action, each containing a similar covenant for renewal. By a lease dated Aug. 5, 1901, and made between the defendant corporation and the plaintiff, the premises were granted to the plaintiff for twenty-one years from Sept. 29, 1901, at the yearly rent of 8s. and subject to the covenants on the part of the plaintiff and conditions therein contained. In that lease, the corporation entered into a covenant for renewal with the plaintiff in the following terms:

"And the said lessors covenant with the lessee that they the lessors will at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of £7 10s. for a fine for the said premises that then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained and so often as every eleven years of the said term shall expire the lessors will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid

and paying such fine of £7 10s. on the day or time hereinbefore limited or appointed."

On Sept. 28, 1912, the plaintiff paid to the corporation the sum of £7 10s., and offered to surrender the last-mentioned lease on the grant to him of a new lease in accordance with the covenant. On the refusal of the corporation to grant such new lease of the premises, the plaintiff commenced this action against the corporation for specific performance of the covenant.

Macmorran, K.C., and *J. Tanner* for the plaintiff.
Hughes, K.C., and *J. M. Gover* for the defendant corporation.

Cur. adv. vult.

Mar. 20, 1914. **JOYCE, J.**—In this case the question is as to the true construction of a covenant for renewal in a lease from the defendant corporation to the plaintiff for a term of twenty-one years from Michaelmas, 1901. The plaintiff or his predecessors in title have been lessees of the corporation for a great number of years under a series of leases for twenty-one years, each lease being in the same form and containing such a covenant as is now in question in the same terms at a rent of 8s. per annum, and such leases have been regularly renewed at the end of the first eleven years of the term on payment of a fine of £7 10s. The later leases from 1824 (an important date, because prior to any of the Municipal Corporation Acts) are produced. The subsisting lease is dated in August, 1901, and is for twenty-one years from Sept. 29 of that year, so the first eleven years of the term expired on Sept. 29, 1912, whereupon the present dispute arose.

The covenant for renewal is in these terms:

"And the said lessors covenant with the lessee that they the lessors will at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of £7 10s. for a fine for the said premises that then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained."

Pausing here, it must be admitted that the covenant so far as I have read, having regard to the well-known authorities, would not have the effect of conferring a perpetual right of renewal. If the portion I have read had been followed by the words "including this present covenant," or by other words plainly indicating that the right of renewal was to be perpetual, then the result would have been different. In *Hare* v. *Burges* (1), LORD HATHERLEY, the then Vice-Chancellor, expressed his opinion as to the principle on which such covenants as the one which I have to consider ought to be construed. He says (4 K. & J. at p. 53):

"As regards the first and main question, I must hold that the covenant in the original lease is in effect a covenant for perpetual renewal. Mr. Batten argued, that this question must never depend upon mere inference; that, in the absence of words indisputably pointing to a perpetual renewal, words so strong that it is impossible to adopt any other construction, the court, although it may find in the instrument words apparently pointing to perpetual renewal, will not adopt that construction, if any other can by possibility be put upon the terms of the covenant."

That was the argument.

"To that view I cannot accede. It seems to me, that the true rule of construction in a case like this is that referred to by TURNER, L.J., as

Vice-Chancellor in *Rochford* v. *Hackman* (2) (9 Hare at p. 483), where he says that some effect must if possible be given to all the words of an instrument; and if the court sees no effect which can be given to certain words, unless they be construed in a particular manner, then, whatever mere presumption may stand in the way, it will construe them in that manner. The court is not at liberty to do violence to the words of the instrument, in order to carry into effect what is merely a presumption. So, in a case like the present, giving full weight to the argument, that there is a presumption against construing a covenant so as to amount to a covenant for a perpetual renewal, that primâ facie a lessor shall not be taken to have intended to enter into such a covenant, still there may be in the instrument expressions indicative of such an intention; and, if there be, the court will not force the construction, but will give effect to what appears to have been the lessor's intention."

LORD SELBORNE, always a very safe guide, in *Swinburne* v. *Milburn* (3) (9 App. Cas. at p. 850) says:

"I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a kind of perpetual renewal in cases of this kind; but those authorities certainly do impose upon anyone claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted."

In the present case, the covenant in question, after the portion I have read, proceeds in quite general terms: "and so often as every eleven years"—the words "so often as" and "every" involving in themselves the idea of recurrence or repetition—"of the said term shall expire, the lessors will grant and demise"—I suppose it is "demise," but it is a very odd word—"unto the lessee such new lease of the said premises upon the surrender of the old lease as aforesaid." Perhaps it is not quite clear whether the words "as aforesaid" refer to the surrender or quality, or describe such new lease, so that the meaning would be "such new lease as aforesaid upon surrender of the old lease." I think the term "the old lease" means the old or the subsisting lease for the time being, and it appears to me that the phrase "the said term," if "said" really means anything where it occurs in collocation with the words "so often as every eleven years," &c., means simply the term of twenty-one years, or the term granted, or the then subsisting term. "Every eleven years of the said term" must mean every first eleven years of the term. There are not two or three periods of eleven years in any one term of twenty-one years; or, in other words, it comes to this, that the meaning is, "so often as every successive period of eleven years shall expire." I take the fair and proper meaning of the words used, having due regard to the context, to be that, so often as every first eleven years of the term of twenty-one years (that is, the subsisting term of twenty-one years or the term of twenty-one years last granted) shall expire, the lessors will grant a similar new lease on the surrender of the old lease, and so on toties quoties. If the words I have been discussing, which must have some meaning, do not mean what I have indicated as my view, I am unable to see what rational meaning is to be given to them. The defendant corporation's struggle to escape from the conclusion I have arrived at by insisting that the phrase "the said term" means, and only can mean, the particular new term of twenty-one years from Sept. 29, 1912, for the granting of which term the earlier part of the covenant provides, and that these words, "so often," &c., operate on one single occasion only—that is, at the expiration of the first eleven years from 1912, or, in other words, in 1923, and at no other time. I am perfectly certain that this was not in fact the intention of the parties, nor can I bring myself to think that it is a fair or proper construction of the words used, having regard to the phrases "so often as," "every eleven years," and "the old lease," &c. If it had been intended by the words I am considering simply to provide for one new lease of twenty-one

years from Sept. 29, 1923, and on no other occasion, that intention would have been easily expressed in very much plainer language, and would have been very differently expressed.

I think I shall be following WOOD, V.-C., in *Hare* v. *Burges* (1), and not acting at variance with the opinion expressed by LORD SELBORNE in *Swinburne* v. *Milburn* (3), if I hold, as I do, that the effect of the covenant in the present case is to confer on the lessee a perpetual right of renewal at the expiration of every succeeding period of eleven years (because that is what it comes to), on payment of the fine of £7 10s.

The defendant corporation appealed.

Hughes, K.C., and *J. M. Gover* for the defendant corporation.
Macmorran, K.C., and *J. Tanner* for the plaintiff.

LORD COZENS-HARDY, M.R.—This is an appeal from a decision of JOYCE, J., who has held that the plaintiff is entitled to a grant of a lease for twenty-one years, and also to perpetual renewal on certain terms. I entirely agree, not only with the decision of JOYCE, J., but for the reason he has assigned, and I have some hesitation in saying anything more than that I agree with his judgment. But after the argument that has been addressed I will say how the matter strikes me. We have heard that for ninety years a lease has been granted by the defendant corporation to the plaintiff and his predecessors on the same terms. I do not mention that as enabling us to interpret the true construction of this covenant, but at least we can say that it is not an absurd construction to say that it is a covenant for perpetual renewal. The date of the first grant is important, because it takes the case out of the Municipal Corporations Act. The last renewal was in August, 1901, and was for a term of twenty-one years from Michaelmas, 1901. The covenant is as follows: [HIS LORDSHIP read the covenant, and continued:] The important words are "so often as every eleven years of the said term shall expire" and so on. It is said that there cannot be more than one eleven years in a term of twenty-one years, so it is argued on behalf of the defendant corporation that you must disregard those words, and that you cannot give effect to them, because of the presumption against the right to perpetual renewal. I think the decision in *Hare* v. *Burges* (1) applies here, and that it is impossible to accept the defendant corporation's construction. I think the fair construction of the covenant is to interpret it as meaning that as often as a term of twenty-one years is in existence, there will be at the end of the first eleven years of that term a right to renewal for a further twenty-one years. I think, therefore, that this appeal fails, and must be dismissed with costs.

SWINFEN EADY, L.J.—I agree both with the decision and with the reasons of JOYCE, J.

PICKFORD, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Jaques & Co.*, for *W. Thornton Jones*, Bangor; *Dunkerton & Son*, for *Picton, Jones & Roberts*, Pwllheli.

Reported by JOHN L. DENISON *and* R. C. CARRINGTON, ESQS., *Barristers-at-Law.*]

R. *v.* SCHAMA. R. *v.* ABRAMOVITCH

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Bray, Avory, Lush and Atkin, JJ.), November 30, 1914]

[Reported 84 L.J.K.B. 396; 112 L.T. 480; 79 J.P. 184; 31 T.L.R. 88; 59 Sol. Jo. 288; 24 Cox, C.C. 591; 11 Cr. App. Rep. 45]

Criminal Law—Receiving stolen property—Direction to jury—Consideration of explanation of accused—Burden of proof.

On a charge of receiving property recently stolen, after the prosecution have proved possession by the accused and that the property has been recently stolen, the jury should be directed that they may, not that they must, if no reasonable explanation is given, find a verdict of guilty. But if an explanation is given which may be true, it is for the jury to say, having regard to all the evidence, whether the accused is guilty or not. If the jury, though not convinced of the truth of an explanation, think that it may reasonably be true, the accused is entitled to be acquitted, because the prosecution have not discharged the burden of proof which rests on them of satisfying the jury, beyond reasonable doubt, that the accused is guilty. This burden of proof always rests on the prosecution and never changes.

Notes. Followed: *R.* v. *Aubrey* (1915), 11 Cr. App. Rep. 182; *R.* v. *Millington* (1915), 11 Cr. App. Rep. 86. Explained: *R.* v. *Bailey* (1917), 13 Cr. App. Rep. 27; *R.* v. *Norris* (1917), 86 L.J.K.B. 810. Considered: *R.* v. *Hamilton* (1917) 87 L.J.K.B. 734. Followed: *R.* v. *Badash* (1917), 87 L.J.K.B. 732; *R.* v. *Currell* (1935), 25 Cr. App. Rep. 116. Explained: *R.* v. *Booth* (1946), 175 L.T. 306; *R.* v. *Garth*, [1949] 1 All E.R. 773. Considered: *Cohen* v. *March*, [1951] 2 T.L.R. 402. Referred to: *R.* v. *Saunders* (1919), 14 Cr. App. Rep. 11; *Woolmington* v. *D.P.P.*, [1935] A.C. 426; *Mancini* v. *D.P.P.*, [1941] 3 All E.R. 272; *R.* v. *Meredith*, *R.* v. *Bluston*, *R.* v. *Bramley* (1943), 29 Cr. App. Rep. 40; *R.* v. *Ayes*, 1950] 2 All E.R. 330; *R.* v. *Hepworth*, *R.* v. *Fearnby*, [1955] 2 All E.R. 918.

As to receiving stolen goods, see 10 HALSBURY'S LAWS (3rd Edn.) 809 et seq.; and for cases see 15 DIGEST (Repl.) 1142 et seq.

Cases referred to in argument:

R. v. *Stoddart* (1909), 73 J.P. 348; 25 T.L.R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C.C.A.; 14 Digest (Repl.) 330, *3202*.

R. v. *Hagan* (*alias Smith*) (1913), 9 Cr. App. Rep. 25, C.C.A.; 15 Digest (Repl.) 1092, *10,835*.

R. v. *Crowhurst* (1844), 1 Car. and Kir. 370; 15 Digest (Repl.) 1154, *11,628*.

R. v. *Harmer* (1848), 12 J.P. 252; 2 Cox, C.C. 487; 15 Digest (Repl.) 1154, *11,625*.

R. v. *Smith* (1910), 5 Cr. App. Rep. 77, C.C.A.; 15 Digest (Repl.) 1092, *10,839*.

Appeal against convictions for receiving property knowing it to have been stolen, at the Central Criminal Court, before MR. COMMISSIONER RENTOUL.

The appellants were convicted, with another man named Harris, of receiving sixteen packing cases which contained underclothes and other articles to the value of £320, knowing them to have been stolen. On Sept. 24, 1914, a carman took into his van goods which were consigned to Solomon Stern, Ltd., by the Great Eastern Railway. At 5 p.m. on that day he drove the van containing the goods in question to the premises occupied by one of the appellants. Harris paid £190 and took the goods from the carman, and Harris then sold them to Abramovitch for £213. Abramovitch sold them to Schama, who gave £240 for the goods. There was evidence that Schama on the same afternoon had drawn a considerable

sum from his bank. Schama the next day sold the greater part of the goods to a foreign firm for £322, some of them remaining in his hands.

Travers Humphreys for the appellant Schama.
E. D. Purcell for the appellant Abramovitch.
H. D. Roome for the Crown.

LORD READING, C.J., delivered the following judgment of the court, in which he stated the facts, and continued: Clearly, on these facts the jury, if properly directed, could convict the accused. Counsel for both the appellants admit that there was evidence to go to the jury, and there is really only one question in the case—namely, whether the jury were properly directed before giving their verdict. It is essential that, in cases like the present, there should be a careful and proper direction. Where an accused person is charged with receiving property recently stolen, after the prosecution have proved possession by the accused and that the property has been recently stolen, the jury should be told that they may, not that they must, find the accused guilty, in the absence of any reasonable explanation. But if the explanation given may be true, it is for the jury to say, having regard to the whole of the evidence, whether the accused is guilty or not. If the jury consider that the explanation may reasonably be true, although they are not convinced of its truth, they should acquit the accused, because the Crown has not discharged the burden which rests on it of satisfying the jury, beyond reasonable doubt, that the accused is guilty. That burden always rests on the prosecution and never changes. The court is not making a new pronouncement of law, but is merely re-stating the law with a view to assisting those who have to preside at the trials of similar cases. In the present case, the summing-up must not be too critically dealt with after a long trial and speeches by counsel. But this court has to be satisfied that the right principle of law has been applied. On referring to the passages in the summing-up which have been the subject of criticism, it does appear that it was never put before the jury that, if they were satisfied as to the reasonable truth of the explanation put forward by the appellants, the Crown had not established, beyond reasonable doubt, that the appellants were guilty. This court, looking at the summing-up from a broad point of view, cannot find that principle of law anywhere stated, and the jury might have thought that, directly they were satisfied that the appellants were in possession of the stolen property, it lay on the appellants to prove the truth of their explanation. The direction given in the summing-up would have this effect, and the court cannot say that the direction given was right.

It has been argued on behalf of the Crown that the court should give effect to the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, on the ground that there has been no miscarriage of justice. We have often said that, where there has been misdirection in law, the court will not interfere if it is satisfied that the jury, if properly directed, must have found the same verdict; but if the court thinks that the jury might, but not that they must, have returned the same verdict, the court will give effect to the view which it takes of the summing-up. On the facts of the present case, the court cannot say that the jury on a proper direction must have convicted the appellants, and we, therefore, are of the opinion that the convictions must be quashed.

Appeals allowed.

Solicitors: *Osborn & Osborn*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

Re LAWSON. WARDLEY *v.* BRINGLOE

[CHANCERY DIVISION (Eve, J.), February 18, 1914]

[Reported [1914] 1 Ch. 682; 83 L.J.Ch. 519; 110 L.T. 573; 30 T.L.R. 335; 58 Sol. Jo. 320]

Will—Gift to "my domestic servants"—Companion housekeeper and nurse—Continuous service.

By his will a testator bequeathed the amount of one year's wages free of duty "to each of my domestic servants who shall have been in my service for two years prior to my decease and shall not be under notice to leave, whether given or received." At the testator's death there had been in his service for two years before his death a companion housekeeper, who supervised the maidservants in the house, and a certified male nurse, who did not work exclusively for the testator and did not live in the house, and for a period of four months during the two years before the testator's death was, with the consent of the testator, away on holiday, because of ill-health.

Held: the word "domestic" in the will was used in the sense of "household," and, therefore, both the housekeeper and the nurse were domestic servants; although the service of the nurse was not exclusive this did not make him less a servant of the testator, neither did his absence from the service for four months break the continuity of the relationship of master and servant; accordingly, both servants were entitled to the legacy claimed.

Notes. Considered: *Re King, Jackson* v. *A.-G.*, [1916–17] All E.R.Rep. 786. Applied: *Re Marryat, Westminster Bank, Ltd.* v. *Hobcroft*, [1948] 1 All E.R. 796. Considered: *Re Silverston, West-Cardy* v. *City of London Corpn.*, [1950] 2 All E.R. 475. Referred to: *Re Travers, Hurmson* v. *Carr*, [1916–17] All E.R. Rep. 904; *Re Bedford, National Provincial Bank, Ltd.* v. *Aulton*, [1951] 1 All E.R. 1093.

As to gifts to servants, see 34 HALSBURY'S LAWS (2nd Edn.) 323 et seq.; and for cases see 44 DIGEST 900 et seq.

Cases referred to in argument:

Pearce v. *Lansdowne* (1893), 62 L.J.Q.B. 441; 69 L.T. 316; 57 J.P. 760, D.C.; 34 Digest 37, *132*.

Re Ravensworth, Ravensworth v. *Tindale*, [1905] 2 Ch. 1; 74 L.J.Ch. 353; 92 L.T. 490; 21 T.L.R. 357, C.A.; 44 Digest 903, *7633*.

Townshend v. *Windham* (1706), 2 Vern. 546; 23 E.R. 954; 44 Digest 901, *7611*.

Darlow v. *Edwards* (1862), 1 H. & C. 547; 32 L.J.Ex. 51; 6 L.T. 905; 9 Jur.N.S. 336; 10 W.R. 700; 158 E.R. 1002, Ex. Ch.; 44 Digest 902, *7626*.

Re Earl of Sheffield, Ryde v. *Bristow*, [1911] 2 Ch. 267; 80 L.J.Ch. 521; 105 L.T. 236, C.A.; 44 Digest 903, *7634*.

Adjourned Summons.

Joseph Henry Lawson by his will, dated June 1, 1905, bequeathed

"to each of my domestic servants who shall have been in my service for two years prior to my decease and shall not be under notice to leave, whether given or received, the amount of one year's wages free of duty."

The testator died on April 28, 1912, and the last defendant was a person interested in the residuary estate of the testator. The testator's wife died on Feb. 21, 1907, and, the testator having been found incapable through disease of managing his own affairs, William Fenwick Mill was on July 4, 1907, appointed receiver under s. 116 of the Lunacy Act, 1880. The two first defendants, Lucy Raynor Burgess and William Bringloe, were in the testator's service at the time of his decease, and were not under notice to leave, whether given or received. Lucy R. Burgess

A was engaged in July, 1906, by the testator's wife as housekeeper and companion at a yearly salary of £20, increased in August, 1909, to £40. She entered the service of the testator on Aug. 10, 1906. Her duties were to supervise the maids, to assist Mrs. Lawson in housekeeping, and to act as her companion. She assisted in light housework, and accompanied the testator, who was infirm, when he was walking out of doors. After Mrs. Lawson's death she continued to act as house-
B keeper. Her wages were paid by the receiver quarterly, and she continued her service until after the testator died. William Bringloe, a certified male nurse and masseur, was engaged on Feb. 19, 1907, as male nurse and attendant to the testator, but at first only temporarily and occasionally when required. On Sept. 6, 1907, he was engaged to attend the testator as male nurse and attendant, and was paid £1 1s. per week. He took one or more meals, but did not, as a rule,
C sleep in the house. On Nov. 29, 1910, he was engaged by the receiver at a salary of £2 2s. per week, usually paid every four weeks, to attend the testator twelve hours nightly, from 9 p.m. to 9 a.m., and continued this service without any break until the testator's death, with the exception that from June 26, 1911, to Oct. 23, 1911, by arrangement with the receiver, Bringloe had a holiday. He found that his health was being affected by the long hours and the arduous duties
D in attending the testator. It was understood between Bringloe and the receiver that Bringloe should return to his duties after his holiday. For the whole period during which his regular attendance on the testator continued Bringloe was entitled to undertake other work so long as it did not interfere with the hours of his employment in the testator's service. He undertook other work to a very limited extent during the latter period of his employment. This originating
E summons by the executors raised questions whether Lucy R. Burgess and William Bringloe were entitled according to the true construction of the testator's will to share under the bequest therein to the testator's domestic servants.

Stone for the plaintiff executors.
H. S. Preston for the defendant William Bringloe.
F *Warwick Draper* for the residuary legatee.

EVE, J.—I think Miss Burgess was clearly one of the testator's domestic servants. She not only discharged household duties herself, but she also contributed to the comfort of her employer by relieving him of one of the most arduous and troublesome duties in a household—namely, that of looking after the other
G servants. But this position of authority did not, in my opinion, make her the less a domestic servant, and she is not thereby deprived of her right to a legacy under the terms of the testator's will.

With regard to the defendant William Bringloe the facts are not in dispute. The testator's wife, who died on Feb. 21, 1907, became aware very shortly before her death that the state of her husband's health was such as to necessitate the
H services of an attendant, and Bringloe, a certified male nurse, was engaged by her to look after the testator. After, and very largely in consequence of, her death the mental condition of the testator deteriorated, and in July, 1907, it became necessary to obtain the appointment of a receiver under the Lunacy Act, 1890. Down to that time Bringloe's attendances on the testator had been more or less of an intermittent nature, and, when the receiver was appointed, an arrange-
I ment was come to under which he was engaged to come to the house and be with the testator for a space of some three to five hours every day while the testator's regular attendant was resting. This arrangement was continued until November, 1910, when Bringloe's duties were changed and he became the testator's night attendant. These duties, involving a continuous attendance for twelve hours, he discharged for seven months, and at the end of that time had been brought into a state of health, mental and bodily, which necessitated his asking for a long leave of absence. This was at once granted, and I cannot doubt, if the testator had then been in a condition of health enabling him to express his wishes, that he

would have recognised the causes which had brought about the breakdown of his servant and would have felt bound to contribute to the man's maintenance during the period required for his restoration to health. The receiver was not in a position which justified him in making any such gratuitous contribution, but the leave of absence was granted on the footing that Bringloe was to resume his attendance on the testator when he was better. This he did after a rather prolonged, but not unduly prolonged, interval, and he therefore remained with the testator down to his death in April, 1912.

On these facts two points have been taken on behalf of those interested in the residue as grounds for disallowing Bringloe's claim to a legacy—the one that he was not a domestic servant and the other that, even if he was, he did not fulfil the condition of being in the employment of the testator for two years prior to his decease. I have not accepted the invitation of counsel for Bringloe to consider the various meanings attached to the word "domestic" by the dictionaries he has consulted, because, in my opinion, it is used in this context as the equivalent of the word "household." When one speaks of articles of domestic use and ornament, one means articles of household use and ornament, and in like manner a "domestic servant" is, in my opinion, a household servant as distinguished from an outdoor servant. The first question is, was this man a domestic or household servant? He was obviously a servant and a servant of the testator, and not the less so because he was possessed of qualifications which enabled him when not actually engaged with the testator to add to his income by serving others. I do not think the fact that his services were distributed between the testator and others made him less a servant of the testator. So long as he fulfilled his contract with the testator he was free to occupy his spare time as he pleased; and the contract with the testator was, in my opinion, a contract for domestic service. The relations of the servant with the employer were of the most intimate and domestic character, and the circumstances that he was not at the call of his employer continuously during the whole of each twenty-four hours, and as a general rule did not sleep in the house, cannot in my view so alter the nature of the contract as to make the servant something else than a domestic servant.

Upon the second point counsel for the residuary legatee is no doubt quite right when he says that, in order to comply with the condition attached to the bequest, it is incumbent on the servant to show that his service has been a continuous one for the period named by the testator. He cannot fulfil the condition by proving discontinuous periods of service amounting in the aggregate to two years. But, even so, that does not, I think, involve the necessity of actual daily service for the whole period. It cannot be that if, owing to ill-health or for any other reasonable cause, the servant absents himself for a time and suspends his services with the full authority and consent of the employer that the continuity of the relationship of master and servant is thereby broken. It is true that in this case in the circumstances I have mentioned no payment was made to the servant while his absence continued, but I do not think this element is of itself conclusive, coupled as it was with the arrangement that he was to return to his duties as soon as his health was restored. The result is that, in my opinion, the service of the defendant Bringloe was of such a nature as to qualify him to claim, and I think he is entitled to be paid a legacy as a domestic servant of the testator.

Solicitors: *Arthur Toovey*, for *Bennett & Co.*, Buxton; *Robinson & Bradley*; *Peacock & Goddard*, for *Gaby & Stapylton-Smith*, Hastings.

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

McGREGOR *v.* TELFORD

[King's Bench Division (Lord Reading, C.J., Ridley and Scrutton, JJ.), June 21, 1915]

[Reported [1915] 3 K.B. 237; 84 L.J.K.B. 1902; 113 L.T. 84; 79 J.P. 485; 31 T.L.R. 512; 25 Cox, C.C. 1]

Bastardy—Affiliation order—Jurisdiction of justices to hear second application after dismissal of first—Effect of Criminal Justice Administration Act, 1914 (4 *& 5 Geo.* 5, *c.* 58), *s.* 37 (2).

By s. 37 (2) of the Criminal Justice Administration Act, 1914: "An appeal shall lie to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts from any order made by a court of summary jurisdiction under the enactments relating to bastardy, or from any refusal by a court of summary jurisdiction to make such an order, or from the revocation, revival, or variation by a court of summary jurisdiction of such an order." On Mar. 11, 1915, the respondent, the mother of an illegitimate child, applied to the justices for an affiliation order against the appellant who, she alleged, was the father of her child. After hearing the evidence the justices were not satisfied that the evidence of the mother was sufficiently corroborated in "some material particular" as required by the Bastardy Laws Amendment Act, 1872, s. 4 [now s. 4 of the Affiliation Proceedings Act, 1957] and they dismissed the complaint. On April 15, 1915, a second summons was heard by the justices in which the respondent again complained that the appellant was the father of her child and asked the justices for an affiliation order against him. On this occasion the justices were satisfied with the corroborative evidence, and made an order against the appellant, who, on appeal, contended (i) that the justices had no jurisdiction to hear the second application because the matter was res judicata and (ii) that, although before the Criminal Justice Administration Act, 1914, s. 37(2) [now s. 8(1) of the Affiliation Proceedings Act, 1957] which gave the mother of an illegitimate child the right to appeal against an order of justices refusing to grant an affiliation order, the mother of an illegitimate child had a right to claim a re-hearing in bastardy provided it took place within the prescribed period of twelve months, that right was given because there was no right of appeal in such cases, and, as a right of appeal had now been given by the Act of 1914, the right of a re-hearing had been impliedly taken away by that Act.

Held: the Act of 1914 did not take away the respondent's right to a re-hearing and, therefore, the justices had jurisdiction to hear the second application.

R. v. *Machen* (1) (1849), 14 Q.B.D. 74, explained.

Notes. Section 37 (2) of the Criminal Justice Administration Act, 1914, was repealed by the Magistrates Courts Act, 1952, and re-enacted by s. 83 (4) of that Act. Section 83 (4) of the Act of 1952 was itself repealed by the Affiliation Proceedings Act, 1957, and re-enacted by s. 8 (1) of that Act.

Followed: *R.* v. *Sunderland Justices, Ex parte Hodgkinson*, [1945] 2 All E.R. 175. Referred to: *Kenney* v. *Kenney* (1925), 133 L.T. 400; *R. v. Howard, Ex parte Da Costa*, [1938] 3 All E.R. 241.

As to right to make a second application, see 3 Halsbury's Laws (3rd Edn.) 115, 116; and for cases see 3 Digest (Repl.) 446, 447. For the Affiliation Proceedings Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 36.

Cases referred to:

(1) *R.* v. *Machen* (1849), 14 Q.B.D. 74; 18 L.J.M.C. 218; 117 E.R. 29; sub nom. *Jones* v. *Machen*, 3 New Sess. Cas. 629; 3 Digest (Repl.) 446, *373*.

(2) *R.* v. *Hall and Gillespie* (1887), 57 L.T. 306; 3 T.L.R. 705; 3 Digest (Repl.) 446, *376.* A

Also referred to in argument:

R. v. *Gaunt* (1867), L.R. 2 Q.B. 466; 8 B. & S. 365; 16 L.T. 379; 31 J.P. 612; 15 W.R. 1172; sub nom. *R.* v. *Grant*, 36 L.J.M.C. 89; 3 Digest (Repl.) 454, *436.* B

R. v. *Glynne* (1871), L.R. 7 Q.B. 16; 41 L.J.M.C. 58; 26 L.T. 61; sub nom. *R.* v. *Flintshire Justices*, 36 J.P. 406; 20 W.R. 94; 3 Digest (Repl.) 447, *380.*

Stokes v. *Stokes*, [1911] P. 195; 80 L.J.P. 142; 105 L.T. 416; 75 J.P. 502; 27 T.L.R. 553; 55 Sol. Jo. 690, D.C.; 27 Digest (Repl.) 712, *6796.*

Case Stated by the justices of Gateshead. C

On Mar. 11, 1915, a summons was heard by the justices at Gateshead in which the respondent, Hilda Telford, a single woman, charged the appellant, James McGregor, with being the father of an illegitimate child to which she gave birth on Nov. 11, 1914, and asked for an affiliation order against him. On the hearing of the summons the justices were not satisfied that the evidence of the mother was sufficiently corroborated "in some material particular" as required D by the Bastardy Laws Amendment Act, 1872, s. 4, and accordingly dismissed the complaint. On April 15, 1915, a second summons was heard before the justices, in which the respondent again charged the appellant with being the father of her illegitimate child and asked for an affiliation order against him. Upon this second occasion the justices were satisfied with the corroborative evidence adduced and made an order against the appellant. Before the hearing of the second summons E it was contended on behalf of the appellant that the justices had no jurisdiction, as the case was now res judicata; that by reason of the provision of s. 37 (2) of the Criminal Justice Administration Act, 1914, the right of a re-hearing had been impliedly taken away, and that the only course open to a woman in bastardy proceedings was now the same as that in the case of a man—namely, an appeal to quarter sessions. On behalf of the respondent it was submitted that as an F appeal to quarter sessions was a more costly proceeding than a re-hearing, the deprivation of the old right of re-hearing would be a practical denial of justice. It was further contended that there was no ground for suggesting that the Act of 1914 had impliedly taken away the former right. Such right could only be taken away by express provision. The justices overruled the objection of the appellant and heard the summons with the result above stated. The question for the court G was whether the justices were right in law.

The Act itself came into force on Dec. 1, 1914.

Whiteley for the appellant.

Gingell, for the respondent, was not called on to argue.

H

LORD READING, C.J.—The question which we are called upon to decide in the present case is whether the new provision contained in s. 37 (2) of the Criminal Justice Administration Act, 1914, as to the right of appeal in affiliation proceedings on the part of the mother, has taken away from her the old right which she possessed of obtaining a re-hearing of her case by the justices after it has been once dealt with by them. If the court had been satisfied that the jurisdiction of I justices to re-hear the claim of a woman for a period of twelve months, although the claim had already been dealt with, had been founded upon the fact that she did not possess the same right of appeal which a man had, it cannot be denied that there would have been much to be said for the argument put forward on behalf of the appellant. But when one comes to examine closely *R.* v. *Machen* (1), upon which the whole of the present discussion has practically been based, it will be seen that the case does not establish any such proposition. The judgment of LORD DENMAN, C.J., shows clearly what the true position is when a woman has

A taken proceedings in bastardy and has failed. The dismissal of her application is rather in the nature of a non-suit in an action, and she is entitled, then, to come on a subsequent occasion when she is better prepared to prove her case, and if she does prove it she will obtain an affiliation order against the putative father. Apparently the real reason of the decision in *R.* v. *Machen* (1) has been misunderstood on some occasions, but the rule which it established has never B been altered: see *R.* v. *Hall and Gillespie* (2). Now, it must be assumed that when the Bill of 1914 was going through Parliament the legislature knew what was the state of the existing law. If it had been intended to alter the old law, this would have been expressly carried out by the statute. But there is nothing in the Act which changes the order of things in this respect. And as there is nothing in the statute which deprives the woman of her former rights in affiliation proceed- C ings, we must hold that they are, in fact, preserved. The appeal will, therefore, be dismissed.

RIDLEY, J.—I agree.

SCRUTTON, J.—I agree.

Appeal dismissed.

D Solicitors: *King, Wigg & Brightman*, for *Frank J. Lambert*, Gateshead; *H. Wynn Parry*, Gateshead.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

E

Re HOWELL. Re BUCKINGHAM. LIGGINS *v.* BUCKINGHAM

F

[Court of Appeal (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), November 2, 3, 1914]

[Reported [1915] 1 Ch. 241; 84 L.J.Ch. 209; 112 L.T. 188]

G *Will—Gift to executor—Right of executor to take beneficially—Construction of will—Residue to be "at the discretion of my executor and at his own disposal."*

Where an executor is given a legacy in a will it does not necessarily follow that he takes it as a trustee, with the result that he cannot claim any beneficial interest in it, unless it is shown irresistibly that he is intended to take it for his own purposes. The construction of the gift must depend on the language H of the will.

A testatrix by her will appointed B. her sole executor and directed him to pay her debts and funeral and testamentary expenses. After bequeathing various pecuniary legacies including one to B. she directed that "the residue of my property (if any) shall be at the discretion of my executor and at his own disposal."

I **Held:** the words "at his own disposal" showed that the testatrix intended that B. should take the residue beneficially and not as trustee for the next-of-kin of the testatrix.

Fenton v. *Nevin* (1) (1893), 31 L.R.Ir. 478, distinguished.

Decision of Warrington, J., [1914] 2 Ch. 173, reversed.

Notes. Distinguished: *Re Booth, Hattersley* v. *Cowgill* (1917), 86 L.J.Ch. 270; *Re Chapman, Hales* v. *A.-G.*, [1922] 2 Ch. 179. Referred to: *Re Edward's Will Trusts, Daglcish* v. *Leighton*, [1947] 2 All E.R. 521.

As to gifts of residue to executors, see 16 HALSBURY'S LAWS (3rd Edn.) 421, 422; and for cases see 24 Digest (Repl.) 950 et seq. A

Case referred to:

(1) *Fenton* v. *Nevin* (1893), 31 L.R.Ir. 478.

Appeal from a decision of WARRINGTON, J., made on an originating summons taken out by the executors of one George Buckingham to determine whether upon the true construction of the will of one Jane Howell the gift of "the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal" constituted a beneficial gift in favour of George Buckingham who was sole executor and had proved the will, and if not who was entitled to the residue. WARRINGTON, J., held that George Buckingham took the residue of the estate of the testatrix in his capacity of executor and not as a beneficiary and held it for the next-of-kin of the testatrix. The representatives of George Buckingham appealed. B C

H. M. Broughton for the representatives of George Buckingham.
J. W. Manning for the next-of-kin of the testatrix Jane Howell.

LORD COZENS-HARDY, M.R.—I have come to the conclusion that the decision of WARRINGTON, J., cannot be supported. It is said that when a legacy is given to an executor he takes it as such. He takes it as a trustee and cannot claim any beneficial interest in it. I protest against that proposition as being far too wide. The construction of the gift must depend on the language of the particular will in question. And I do not accept the proposition that an executor cannot take a legacy for his own benefit unless it is shown irresistibly that the right conclusion must be, without any doubt whatever, that he is intended to take it for his own purposes. D E

Jane Howell made her will in September, 1901. She made use of a printed form which she filled up herself. So far as material the will is as follows: She appointed George Buckingham "to be the executor of this my will." Then she gave several legacies in the form of absolute gifts, and then "unto Hannah Buckingham, wife of my executor, the aforesaid George Buckingham, the sum of £20. Unto George Buckingham (my executor) the sum of £10"; and she concluded her will as follows: F

> "After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal." G

Upon those words it is contended, and WARRINGTON, J., has so decided that George Buckingham did not take the residue at his own disposal but as a trustee and the next-of-kin take the beneficial interest. I am unable to come to that conclusion. I do not think that there is any authority which requires me to give to this will a construction which is contrary to my own opinion as to its meaning. H

Several cases have been cited in which there have been two or three executors, and the property was left at the discretion of the executors; and it was held that those words negative the idea of a beneficial interest. But I know of no case which in any way applies to a case like the present, where there was no trust declared either expressly or by implication prior to the gift of residue to the executor, and there was a sole executor, and it was held that the executor did not take beneficially. It seems to me that this is really a gift to the individual whom the testatrix has several times indicated as her executor. She does not use the words "my said executor" there or anywhere else in her will. In my opinion, the words at the end of the will are not giving a direction to the executor as such to dispose of the property at his discretion, but form a gift to George Buckingham, and not the less so because the property is to be at his own disposal. In my opinion there is nothing in the Irish case of *Fenton* v. *Nevin* (1) on which WARRINGTON, J., mainly relied as covering this case which conflicts with this I

A view. In that case there were two executors and no words similar to "at his own disposal." On the whole I am of opinion that the decision of Warrington, J., must be reversed, and that this appeal must be allowed.

KENNEDY, L.J.—I am of the same opinion.

B **SWINFEN EADY, L.J.**—I am of the same opinion, although the case appears to me to be one of some little difficulty. It will be observed that no trust is declared in any of the earlier parts of the will. It was urged that if this was intended to be a bequest of residue to the executor personally she would have said, "I give it to him"; that when she meant to make a direct gift she knew how to do so; and it is strange that she should have used such an involved phrase C in this gift. The answer to that is that, as in many other wills, the testatrix did not use proper words because she apprehended the difficulty of expressing her meaning in legal language. In *Fenton* v. *Nevin* (1) Fitzgibbon, L.J., said (L.R.Ir. at p. 484):

> "It is plain that whatever an executor takes as such he takes as a representative, and therefore not beneficially. Accordingly, before an executor can take D any part of the assets beneficially, he must show that the testator has given it to him as an individual."

In my opinion the lord justice states the law correctly. But the question is whether that has not been shown in this case. The testatrix here has superadded words to show that the gift is not only to be in his discretion as executor, but E as an individual and not under any trust. It is to be at his own disposal. Those words "at his own disposal" afford the key to the construction of the gift. In my judgment those words show that he is to take beneficially. He is sole executor, and there is no question of his having to consult with other persons. The concluding words of the gift are sufficient to show that the testatrix intended that he should take beneficially. For these reasons I agree that the appeal should F be allowed.

Appeal allowed.

Solicitors: *A. C. Dowding*, for *W. L. J. Orton*, Coventry; *Collyer-Bristow, Curtis, Booth, Birks & Langley*, for *Frederic Hall*, Folkestone.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re LIMOND. LIMOND *v.* CUNLIFFE

[CHANCERY DIVISION (Sargant, J.), June 22, 23, 1915]

[Reported [1915] 2 Ch. 240; 84 L.J.Ch. 833; 113 L.T. 815; 59 Sol. Jo. 613]

Will—Soldier's will—Actual military service—Troops remaining in zone of operations after end of war for escort duty—Testator killed by native—Validity of gift to attesting witness—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict.*, *c.* 26), *ss.* 11, 15.

The deceased was an officer in the Indian army and in 1895 was a member of an expedition engaged in frontier operations which for the purpose of the grant of war medals ended on Mar. 13, 1895. Certain troops including the deceased were, however, left behind as an escort to a party delimiting the frontier, and while with the party the deceased was mortally wounded by a fanatic. He was carried into camp and prior to his death he purported to make a will which he signed, and which was witnessed by two of his brother officers, to one of whom he made a bequest of his residuary personalty.

Held: (i) the deceased died while on actual military service within s. 11 of the Wills Act, 1837, and the will was valid as a soldier's will; (ii) the will, being a soldier's will, did not require attestation, s. 15 of the Act did not apply to a will so made, and the gift, therefore, to the attesting witness was valid.

Notes. Considered: *In the Estate of Grey*, [1922] All E.R.Rep. 124; *Re Wernher, Wernher* v. *Beit*, [1918] 1 Ch. 339. Referred to: *In the Estate of Rippon*, [1943] 1 All E.R. 676; *Re Priest, Belfield* v. *Duncan*, [1944] 1 All E.R. 51.

As to soldiers' wills, see 16 HALSBURY'S LAWS (3rd Edn.) 176–179; and for cases see 39 DIGEST 333 et seq., and 44 DIGEST 277. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to:

(1) *Emanuel* v. *Constable* (1827), 3 Russ. 436; 5 L.J.O.S.Ch. 191; 38 E.R. 639; 42 Digest 651, *585*.

(2) *Doe d. Taylor* v. *Mills* (1833), 1 Mood. & R. 288; 174 E.R. 98, N.P.; 44 Digest 276, *1084*.

(3) *Randfield* v. *Randfield* (1863), 2 New Rep. 309; 32 L.J.Ch. 668; 9 Jur.N.S. 842; 11 W.R. 847; 44 Digest 276, *1085*.

(4) *Wigan* v. *Rowland* (1853), 11 Hare 157; 1 Eq. Rep. 213; 23 L.J.Ch. 69; 21 L.T.O.S. 150; 17 Jur. 910; 1 W.R. 383; 68 E.R. 1229; 44 Digest 276, *1090*.

Also referred to in argument:

In the Goods of Saunders (1865), L.R. 1 P. & D. 16; 35 L.J.P. & M. 26; 13 L.T. 411; 11 Jur.N.S. 1027; 14 W.R. 148; 39 Digest 333, *187*.

In the Goods of Hiscock, [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110; 39 Digest 334, *202*.

Gattward v. *Knee*, [1902] P. 99; 71 L.J.P. 34; 18 T.L.R. 163; sub nom. *In the Goods of Knee, Gattward* v. *Knee*, 86 L.T. 119; 46 Sol. Jo. 123; 39 Digest 334, *197*.

Adjourned Summons.

The testator, Lieut. Alexander Limond, purported to make a soldier's will according to the provisions contained in the Wills Act in the following circumstances. The testator was a lieutenant in the Indian Army, and in 1895 took part in certain frontier operations in Waziristan, which for the purpose of the grant of the war medal were regarded as having ended on Mar. 13, 1895. However,

certain troops were left behind in the Tochi Valley as an escort to the delimitation party, and were styled the "Tochi Delimitation Escort." To this escort the testator belonged, and whilst so engaged was mortally wounded by a fanatic on May 14, 1895. Prior to his death the testator made a will disposing of most of his property to his brother-in-law, Capt. Cunliffe, who, in fact, witnessed the will with a brother officer, Colonel Mein. The testator's property consisted chiefly of reversionary interests in personalty, and no steps were taken at that time as the reversions had not fallen in. This event having now happened administration with the will annexed was granted in Dec., 1914, to the plaintiff, who now took out this summons for the determination (inter alia) of whether the gift to Capt. Cunliffe, the attesting witness, was valid.

Whinney for the plaintiff.
Wright-Taylor for the executrix of Capt. Cunliffe.
Robertson-Macdonald for the next-of-kin.

SARGANT, J.—For the purpose of determining the first point on this summons it is necessary to determine whether the deceased was in actual military service within s. 11 of the Wills Act, 1837. [HIS LORDSHIP stated the facts, and continued:] It has been held in various cases that for the purpose of determining whether a soldier is in actual military service, the commencement of the military service is the time when the mobilisation takes place. In the same way it seems to me that the actual military service does not cease until the full conclusion of the operations. In the case of a great part of the force, it may well be that the actual military service ceased on Mar. 13, 1895, which was the date chosen for the grant of the war medals, although I cannot help thinking that as regards the great bulk of the force their service would be down to a somewhat later date. But in the case of this particular force, which formed part of the expedition, they remained as an escort to the delimitation party—that is to say, to the party engaged in the delimitation of the frontier, which was an operation incident to the war in question. In order that final terms of peace might be ascertained it was no doubt necessary that there should be some delimitation of the frontier, and for the purpose of effecting that delimitation a party of engineers would be told off and a portion of the force that had been fighting was retained to act as escort. In my opinion any members of that escort who were so retained had not finished the expedition on which they had been sent and were in actual military service.

Having come to the conclusion that the testator in this case died when in actual military service, I now have to consider the question whether a bequest of residuary personalty to a person who did in fact witness his will is bad under the Wills Act, 1837. The Wills Act contains a proviso in these terms:

> "Provided always, and be it further enacted that any soldier being in actual military service, or any mariner or seamen being at sea, may dispose of his personal estate as he might have done before the making of this Act."

That is in fact carrying on a similar exemption or privilege contained in s. 23 of the Statute of Frauds. Here the will in question was in fact executed in the presence of two witnesses who were present at the same time and who signed as witnesses in the presence of the testator, so that the will was a will which would have been good independently of the privilege given by s. 11 of the Wills Act; but on the other hand it seems to me reasonably clear from the evidence that that was really a matter of chance or coincidence, and that what the testator was intending to do was to make a soldier's will. In Colonel Mein's account of the transaction, as contained in the letter of June 18, 1914, he says this:

> "The regiment was at the time on active service beyond the border and the will was a soldier's will. Seeing he was in a precarious condition when brought into camp I asked him if he had made a will. On his replying in the negative I said, 'If you wish to make one and feel equal to dictating you can

make a soldier's will in the presence of two witnesses, one of whom will write down what you say' ";

and in a letter of May 15, 1895, which was written to General Limond by Capt. Cunliffe, his brother-in-law, who is a witness to the will, and a residuary legatee of the personal estate, he says this: "Before the operation began Alek asked me to write a rough will and to call Major Mein to witness and hear it dictated." So that I think that although in fact the will does fulfil the requirements of the Wills Act, still it was intended to be made as a soldier's will and in exercise of the privilege reserved by s. 11.

That being so, the question arises whether there is a disqualification under s. 15 of the Wills Act. That section is as follows:

"And be it further enacted that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person or any person claiming under such person or wife or husband, be utterly null and void."

There was a very similar provision under the statute 25 Geo. 2, c. 6, to mitigate the hardship which was found to exist under the Statute of Frauds, because a will made in the presence of a witness who took a benefit under it was held to be made in the presence of a person who was not a creditable witness and the whole will failed. The language of 25 Geo. 2, c. 6, was general, and for some time there was a conflict of opinion as to whether the provisions of that statute applied to real estate or only to personal estate, which conflict was ultimately concluded by *Emanuel* v. *Constable* (1), which held that notwithstanding the general language of the Act it must be held merely to apply to wills under the Statute of Frauds, which required to have witnesses and only applied to real estate.

The mere fact that witnesses are supernumerary witnesses does not save them from the disqualification under s. 15 if in fact they are attesting a will which is executed under the affirmative provisions of the Wills Act. That is rendered clear by a succession of cases beginning with *Doe d. Taylor* v. *Mills* (2), which was a case under 25 Geo. 2, c. 6, and followed by *Randfield* v. *Randfield* (3), and *Wigan* v. *Rowland* (4). So that the mere fact that the attestation of this will by these two witneses was superfluous, inasmuch as the testator was on active service and availing himself of the privilege of s. 11, would not be sufficient to free the witnesses from the disqualification under s. 15 if s. 15 does in fact apply at all to s. 11. In my opinion s. 15 does not so apply. It seems to me on the true reading of the statute that the disqualifications introduced by s. 15 apply to witnesses who are attesting the execution of a will under the preceding provisions of the statute, that is to say, in particular s. 9, which provides that a will shall be executed in the presence of two witnesses, who are to sign as witnesses in the presence of each other and in the presence of the testator. I think there is authority for that kind of construction of s. 15 in *Emanuel* v. *Constable* (1) which was a case under the corresponding provisions of the statute 25 Geo. 2, c. 6. In that case, which was the case that decided that the statute 25 Geo. 2, c. 6, did not extend to wills of personal estate, the Master of the Rolls says (3 Russ. at 439):

"The avowed purpose of this statute, therefore, is to remove doubts which had arisen with respect to the persons who were to be deemed good witnesses within the intent of the Statute of Frauds, which required three or four witnesses to a will of lands; and the mischief to be avoided was the admission of witnesses to such a will who were interested to support the will. When this statute, therefore, proceeds to indicate that if any person shall attest the execution of any will or codicil who shall have a gift by the will or codicil

such gift shall be void, it is a reasonable construction to say that the legislature must be understood here to be speaking of such wills or codicils as by the Statute of Frauds require to be attested by witnesses; and the indefinite words 'any will or codicil' may reasonably be read 'any such will or codicil' unless it should appear from other parts of the statute that the legislature intended to give the words 'any will or codicil' their most extended and indefinite meaning."

Here, in the same way, it seems to me that, although s. 15 speaks in the broadest terms of the attestation of the execution of any will, it is really only dealing with the attestation of the execution of a will under the provisions of the Act itself, and that the proviso (s. 11) which leaves the wills of soldiers in actual military service on their former footing, that is to say without the necessity of there being any attestation at all, prevents the application to those wills of the requirements or the disqualifications of s. 15. Of course I bear this in mind, that the disqualification under s. 15 is not a disqualification of the testator, but a disqualification of the legatee, and to that extent I cannot find any argument in the section itself for saying that it should not apply to the wills of soldiers under s. 11. The governing consideration, to my mind, is this, that s. 15 is on the true general view of the statute dealing with the execution and attestation of wills under the provisions of the statute itself, and is not dealing with the subject-matter of soldiers' and sailors' wills, which, in my opinion, are left entirely unaffected in respect of execution and attestation by the provisions of the Act.

I think that enables me to answer the question on the summons that the gifts contained in the will of the testator to Ernest William Cunliffe are valid so far as they relate to personal estate.

Solicitors: *F. M. Voules*; *Emmett & Co.*, for *Whateley Bowling*, Southsea; *Mount, Sterry & Wheeler.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

Re WASSERBERG. UNION OF LONDON AND SMITHS BANK, LTD. *v.* WASSERBURG

[CHANCERY DIVISION (Sargant, J.), November 3, 4, 15, 1914]

[Reported [1915] 1 Ch. 195; 84 L.J.Ch. 214; 112 L.T. 242; 59 Sol. Jo. 176]

Gift—Donatio mortis causa—Delivery of subject-matter of gift—Imperfect delivery—Box containing sealed packet of bearer bonds addressed to donee deposited with bank—Delivery of key to donee—Sufficiency of delivery of bonds.

The testator, who was about to undergo a serious operation, went to his bank which had the custody of bearer bonds belonging to him and placed them in a sealed parcel addressed to his wife. He then showed the parcel to his wife, who had accompanied him to the bank, and said: "This is yours." He then locked the parcel in a box which he left with the bank, retaining the key which he showed his wife on his bunch of keys so that she should recognise it, and gave her a list of the bonds which he told her to keep safely. On returning home the testator gave his wife the key of the box and told her to lock it up with the list of the bonds. Under his direction she locked the key

in a drawer in her room of which she always kept the key. The same day the testator went into the nursing home where he shortly afterwards died.

Held: an inchoate or imperfect delivery of chattels might be sufficient to effectuate a donatio mortis causa; by delivery of the key to his wife, thereby transferring only a partial dominion over the bonds, the testator intended to pass the dominion; and that delivery was sufficient to effectuate a donatio mortis causa.

Notes. Considered: *Re Hawkins, Watts* v. *Nash*, [1924] All E.R.Rep. 430. Referred: *Re Stoneham, Stoneham* v. *Stoneham*, [1918–19] All E.R.Rep. 1051; *Re Lillingston, Pembery* v. *Pembery*, [1952] 2 All E.R. 184.

As to gifts mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 400 et seq.; and for cases see 25 DIGEST 552 et seq.

Cases referred to:

(1) *Ward* v. *Turner* (1752), 1 Dick 170; 2 Ves. Sen. 431; 21 E.R. 234, L.C.; 25 Digest 552, *372*.

(2) *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57; 59 L.J.Q.B. 377; 63 L.T. 153; 54 J.P. 804; 38 W.R. 588; 6 T.L.R. 296, C.A.; 25 Digest 508, *47*.

(3) *Duffield* v. *Elwes* (1827), 1 Bli.N.S. 497; 4 E.R. 959; sub nom. *Duffield* v. *Hicks*, 1 Dow. & Cl. 1, H.L.; 25 Digest 549, *351*.

(4) *Jones* v. *Selby* (1710), Prec. Ch. 300; 2 Eq. Cas. Abr. 573; 24 E.R. 143; 25 Digest 552, *374*.

(5) *Re Taylor, Taylor* v. *Taylor* (1887), 56 L.J.Ch. 597; 25 Digest 553, *376*.

(6) *Re Mustapha, Mustapha* v. *Wedlake* (1891), 8 T.L.R. 160; 36 Sol. Jo. 125; 25 Digest 553, *377*.

(7) *Hawkins* v. *Blewitt* (1798), 2 Esp. 663, N.P.; 25 Digest 554, *381*.

(8) *Bunn* v. *Markham* (1816), 7 Taunt. 224; 2 Marsh. 532; Holt, N.P. 352; 129 E.R. 90; 25 Digest 551, *363*.

(9) *Re Dillon, Duffin* v. *Duffin* (1890), 44 Ch.D. 76; 59 L.J.Ch. 420; 62 L.T. 614; 38 W.R. 369; 6 T.L.R. 204, C.A.; 25 Digest 543, *298*.

(10) *Farquharson* v. *Cave* (1846), 2 Coll. 356; 15 L.J.Ch. 137; 6 L.T.O.S. 363; 10 Jur. 63; 63 E.R. 768; 25 Digest 552, *370*.

(11) *Powell* v. *Hellicar* (1858), 26 Beav. 261; 28 L.J.Ch. 355; 5 Jur.N.S. 232; 7 W.R. 171; 53 E.R. 898; 25 Digest 554, *389*.

(12) *Reddel* v. *Dobree* (1839), 10 Sim. 244; 59 E.R. 607; sub nom. *Riddell* v. *Dobree*, 3 Jur. 722; 25 Digest 554, *382*.

(13) *Treasury Solicitor* v. *Lewis*, [1900] 2 Ch. 812; 69 L.J.Ch. 833; 83 L.T. 139; sub nom. *Re Dash, Treasury Solicitor* v. *Lewis*, 48 W.R. 694; 16 T.L.R. 559; 25 Digest 552, *371*.

(14) *Re Johnson, Sandy* v. *Reilly* (1905), 92 L.T. 357; 49 Sol. Jo. 314; 25 Digest 553, *379*.

Also referred to in argument:

Re Beaumont. Beaumont v. *Ewbank*, [1902] 1 Ch. 889; 71 L.J.Ch. 478; 86 L.T. 410; 50 W.R. 389; 46 Sol. Jo. 317; 25 Digest 542, *292*.

Adjourned Summons to determine whether a testator shortly prior to his death made an effective donatio mortis causa to his wife of certain bearer bonds.

Grant, K.C., and *J. Samuel Green* for the plaintiffs.

Romer, K.C., and *J. G. Wood* for Mrs. Wasserberg, widow of the testator.

Martelli, K.C., and *Sherington* for the infant defendants.

Henderson for J. Wasserberg.

Cur. adv. vult.

Nov. 16, 1914. **SARGANT, J.**, read the following judgment: The first question raised by this summons, and the only question on which I have reserved judgment, is whether the testator shortly prior to his death made an effective donatio mortis causa to his wife of a number of bearer bonds of the value of some £19,000.

A The facts appear from the affidavits supplemented by a statement or admission which was made to me in the course of the proceedings, and in which both the executors and the widow concurred. It seems that the testator, who was worth at his death from £80,000 to £90,000, exclusive of the bearer bonds now in question, kept two boxes of deeds or securities at his bankers, the Holborn branch of the Union of London and Smiths Bank, Ltd. One box, which I will call the first B box, could only be opened by the testator; it is referred to in the affidavits as the locked box; it contained private papers, deeds, and securities, but the bank had no definite knowledge of its contents. The other box, which I will call the second box, contained both bearer bonds and other securities belonging to the testator and could be and was from time to time opened by the bank for the purpose of collecting coupons for the testator; the bank had in their ledger a detailed list of C the contents of this box. The testator had been unwell for a long time, and had been under a specialist for about six months before his death. He was in fact suffering from cancer, but he was not aware of the fact until about Jan. 19 or 20, 1914, when arrangements had to be made for him to be taken to a nursing home for the purpose of undergoing a serious operation. On Tuesday, Jan. 20, the testator called on the plaintiff Lewis Barnett, informed him of the impending D operation and asked him to act as a trustee of his will, and on the following day the testator discussed with Mr. Lewis Barnett the terms of his will and the provisions to be made for his relatives and for winding-up his affairs in the event of the operation ending fatally. At this interview Mr. Lewis Barnett says that the testator stated his intention to give his wife a large sum either in money or in bearer shares so that if he got over the operation she might have ample E means to defray all household and personal expenses without troubling him as he intended, if and when he was well enough, to go to South Africa for at least a year. The testator also called on Mr. Lewis Barnett on the two following days. On the Thursday he stated that he was going to see his solicitors and make his will, and that he was also going to the bank to go through his securities and look out the bearer shares which he was going to give to his wife. And at the call on F Friday, which took place at 1 p.m., and at which he was accompanied by his wife, the testator stated that he had been to the bank and had put the bearer securities in an envelope for his wife and had put her name outside.

The testator did in fact go to his bank on the Thursday accompanied by a friend of his, a Mr. Klean, and saw the then manager, Mr. Langdon, and stated to him that he was about to undergo a serious operation, and that he wished to know if G he could transfer his bonds to his wife. Mr. Langdon explained to the testator that he could do as he liked with his bonds, but that if he died within three years the bonds would still be liable to death duties, and made the suggestion that the testator might, in order to carry out his wishes, place the bonds in a sealed parcel addressed to his wife. At some time in the course of that afternoon, but whether before or after the interview with Mr. Langdon does not appear, the testator saw H Mr. Thomas, the securities clerk at the bank, and said he was coming on the following morning to take away his bonds. On the next day, the Friday, the testator called alone at the bank between midday and 1 p.m. and saw Mr. Watson, the then assistant manager. In anticipation of the visit, the second box had been brought up from the bank's strong room and a list of the bearer securities I got out from the ledger and entered in the journal. The second box was brought into the room by Mr. Thomas, and the testator signed the journal and was handed the securities. He then asked for and was handed some brown paper, string, and sealing wax, and proceeded to fasten up the securities in the brown paper, and to tie up and seal the parcel. The testator then said to Mr. Watson that he was going to deposit the parcel with the bank in the name of his wife, to which Mr. Watson replied that if he did this then, in the event of his operation being successful, the parcel could only be removed by his wife, who would be the only person regarded by the bank as having any control of it. The testator said that

was not his intention, and, after considering for a moment or so, added: "I shall put her name on the outside of the parcel and lock it up in my locked box so that when my executors open it they will hand over the parcel to her." The testator then wrote on the parcel: "This is the property of Mrs. F. E. Wasserberg," and asked for his locked box—the first box—which was brought to him. Just after this the testator's wife, who had followed him to the bank, came into the room, and the following incident took place between them: The testator showed his wife the parcel and said: "This is yours." She called his attention to the fact that in the indorsement her initials had been reversed, and he then drew a line under her name on the indorsement, and wrote "Ethel F. Wasserberg" underneath and added his initials. Neither Mr. Watson nor Mr. Thomas was a party to the incident or noticed it. The testator then put the parcel into the first box, locked it and left it at the bank, retaining the key. He also showed his wife on his bunch of keys which was the key of the first box, so that she should recognise it. And he handed a list of the bearer bonds to his wife and bid her to keep it safely. The testator and his wife then left the bank and proceeded along Holborn to see Mr. Barnett, and while on the way there the testator told his wife to get the parcel out of the box at the bank and to put it in her own bank, which was another branch of the same bank at Swiss Cottage. After lunching in the neighbourhood they went back to the testator's office, where he signed his will, and shortly before 4 p.m. they returned to the testator's bank in Holborn, where he asked for the first box, opened it and placed the will there inclosed in a sealed envelope. They then drove back to their home at Hampstead, and on the way Mrs. Wasserberg said, "We might have brought that parcel with us and left it at my bank on the way," adding "No, it would be closed." The testator said the parcel would be all right where it was; that his wife had only to go and ask the manager for it and put it in her bank at some later time. He also said that he did not wish her to take the bearer securities home, probably alluding by this to the fact that they had no safe there. On arriving home the testator told his wife to lock up the list which he had given her of the securities, and gave her the bunch of keys containing the keys of the first box, and told her to lock them up also. Accordingly she, under his direction, locked both the list and the bunch of keys in a drawer in her own room, of which she had and always kept the key. He did not then give her the rest of his keys. They were afterwards given her at the nursing home, as he said he would not be wanting them there. He went to the nursing home that same evening, and remained there until his death on the following Wednesday, Jan. 28.

On these facts the validity of the transaction as a donatio mortis causa has been questioned on two grounds: first, that a gift was intended in all events, and not merely in the event of death, and that such gift was not completely effected: and, secondly, that even if the intention was merely to make a donatio mortis causa, there was no sufficient delivery to make it effective even for that purpose. The first objection was rested mainly on the conversation with Mr. Lewis Barnett on Tuesday, Jan. 20. But I am inclined to think that that conversation did not disclose the whole or even the main object of the testator, but merely recognised an incidental convenience of the proposed arrangement if the testator recovered: and that, had this happened, the testator's wife would have held the bonds not as her absolute property, but as his agent. And even if this is not a true view of the testator's intention on Jan. 20, I am quite satisfied that he altered that intention in the course of the next day or two, and that later on he had a quite clear and definite intention to provide with these bonds for his wife in the event, and in the event only, of his death: and that alternatively he meant by means of the delivery of the key to put the bonds at her disposal and under her dominion, though, in fact, this really important intention was not fully carried out by reason of the fact that the possession of the key would not have been enough for the bank to act on. The question, both on the facts of the particular case and in

A view of the general law, is whether there was any sufficient delivery of the bonds to give effect to the intended gift. It is pointed out by LORD HARDWICKE, L.C. in *Ward* v. *Turner* (1) that donationes mortis causa fell into two classes. There is first the class of cases in which a complete delivery or transfer takes place such as would be sufficient in the case of an ordinary gift and as in the case of a donatio mortis causa would necessitate a retransfer to the donor should he recover. B And there is also, as regards some kinds of property at all events, a second class of cases in which the transaction is sufficiently effected by an inchoate or incomplete delivery or transfer such as would not be sufficient in the case of an ordinary gift and, as in the case of an intended donatio mortis causa, requiring something further to be done by the legal personal representatives of the donor after his death. Accordingly I have to consider the matter under each of these C alternative heads. On doing so, I cannot think that the facts are sufficiently strong in the claimant's favour to bring the case within the first of the above two alternatives. As regards the incident at the bank, the case of *Cochrane* v. *Moore* (2) shows that mere words of gift are not in themselves sufficient, but there must be delivery. If the testator had actually given the parcel to his wife and she had handed it back to him for the purpose of safe custody that would prob- D ably have been enough. But as it is, the facts are, I think, that the testator did not at any time during that incident part with the custody of the bonds. Again, as regards the subsequent delivery of the key, I cannot think that this was a sufficient delivery to pass the bonds by way of ordinary gift. It would seem that the delivery of a key might be sufficient if the subject-matter of the gift were bulky goods in a warehouse which could not be actually delivered. But here E not only was the subject-matter of the gift eminently portable property, but the delivery of the key did not in itself enable the recipient to get at the bonds since the bank would not (as the testator must have known, at any rate after his conversation with Mr. Watson) have allowed Mrs. Wasserberg to have access to the box without some further authority from the testator.

As regards the second alternative, I am again of opinion that, as far as the F incident at the bank went, there was nothing sufficient to constitute an enforceable donatio mortis causa. Not only was there no complete delivery, but there does not seem to have been any attempt, however inchoate or incomplete, at any delivery at all. There were merely words of gift coupled with a careful indication for future guidance of what the property consisted of, where it was to be found, and how it was to be got at. But, on the other hand, the handing over of the G key later in the day went much further than this. On that occasion there was a transfer to Mrs. Wasserberg of part of the means of getting at the bonds, of a partial dominion over them, and there was of course a corresponding depreciation of the testator's facilities for dealing with them. Was this partial or inchoate delivery or transfer a sufficient delivery to effectuate a donatio mortis causa? In H my judgment that question must be answered in the affirmative, both on principle and (what perhaps is more important in so anomalous a branch of law as this) on actual authority. It was urged very strenuously by counsel for the infant defendants that in the case of chattels such as these bonds there must either be complete delivery on the one hand or non-delivery on the other, and that there was no half-way house such as was recognised by *Duffield* v. *Hicks* (3) I in the case of mortgage debts by means of the delivery of the mortgage deeds and has since been recognised in the case of money on deposit or policies of insurance amongst other property by virtue of the delivery of the deposit notes or other indicia of title. But after most careful consideration I see no reason in principle why this should be so. When it is once admitted that any property is a possible subject-matter for a donatio mortis causa—and in fact chattels of all kinds were much more obviously and readily within this category—I can see no more reason for declining to give effect to an incomplete or inchoate gift in the case of the one class of property than in the case of the other. The requirement

that there should be some act towards a gift or transfer avoids equally in both classes of property the dangers attaching to mere nuncupative legacies which were guarded against by the Statute of Frauds, 1677, the predecessor in this respect of the Wills Act, 1837, and there is no reason in the nature of things why chattels as well as choses in action should not be in such a position that there should be some physical thing the possession of which should be required in order to get at the property, and the transfer of which should accordingly amount to a transfer of the means or part of the means of getting at the property.

As to authority, *Jones* v. *Selby* (4) was a clear decision by the Master of the Rolls that the delivery of the key of a trunk with words of gift of the trunk and its contents was a good donation mortis causa of a Government tally for £500 inside the trunk, although the trunk itself was retained by the donor. And the propriety of this decision in law was approved by LORD HARDWICKE, L.C., in *Ward* v. *Turner* (1) though the actual decision had been reversed by LORD COWPER, L.C., because the evidence was not sufficient to show that the tally formed part of the contents of the trunk at the time of the gift. Again, in *Re Taylor* (5) the testator in his last illness showed his daughter a deposit note and told her it was to be hers in the event of his death. She placed it by his directions for safe custody in a cashbox which was kept in his bedroom, but she retained the key. This was held a good donatio mortis causa of the money, and this decision necessarily involved holding that the parting with the possession of the key constituted a sufficent delivery of the contents of the cashbox since, unless the deposit note itself had been sufficiently transferred, there could not have been any sufficient transfer of the money represented by it. And, again, in *Re Mustapha* (6) MATHEW, J., when sitting in the Chancery Division, held the delivery of a key of a wardrobe sufficient to pass for this purpose part of the contents of a safe, the key of which was in the wardrobe. In opposition to these express decisions a number of cases were referred to, but I cannot find that any one of them really negatived the proposition that an inchoate or imperfect delivery of chattels might be sufficient for the present purpose. In *Hawkins* v. *Blewitt* (7) LORD KENYON, C.J., held that there was no real continuing intention to give, and the key of the trunk whose contents were claimed had been redelivered to the alleged donor before his death. In *Bunn* v. *Markham* (8) both the key and the box had been retained by the testator. And it may be further remarked that in both the last-mentioned cases, as the action was one at law, effect could hardly be given to a donatio mortis causa of the class that is now being considered, where it is sought on the principle developed in *Re Dillon* (9) to complete in equity a gift which is incomplete in law. Turning now to decisions given by the courts of equity, *Farquharson* v. *Cave* (10) and *Powell* v. *Hellicar* (11) were both cases where delivery was merely to an agent of the donor, and was therefore not really a delivery at all. In *Reddel* v. *Dobree* (12) the donor kept the key of the box in question, and was expressly found by the court to have intended to retain absolute power and dominion over the contents of the box. And in *Treasury Solicitor* v. *Lewis* (13) STIRLING, J., found as a fact that the testatrix did not intend to make a donatio mortis causa at all, but intended that the articles in question should be dealt with as part of the property which she meant to dispose of at her death, and over which she meant to reserve dominion during her life. *Re Johnson* (14), again, was a case where there was a retention of the key, and FARWELL, J., held that there was no intention on the part of the testatrix not to part with dominion over the box. In the present case I think that when the testator handed the key to his wife he intended to part with dominion over the box which I have called the first box, and it may be incidentally remarked that in both *Re Mustapha* (6) and *Re Johnson* (14), and, indeed, in all the cases above referred to, extreme importance has always been attached to the possession of the key of any receptacle in which the articles claimed by way of donatio mortis causa may have been placed—a possession which in the present case passed to the widow.

A On the whole, therefore, I have come to the conclusion that there is no such absolute rule as has been contended for, and that the widow, Mrs. Wasserberg, has established her case and is entitled to the bonds in question.

Order accordingly.

B Solicitors: *H. H. Wells & Sons*; *Stevens, Sons & Parkes*; *Ray, Jackman & Falck.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

C

Re DRUMMOND. ASHWORTH *v.* DRUMMOND

[CHANCERY DIVISION (Eve, J.), March 25, 26, 1914]

D [Reported [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 30 T.L.R. 429; 58 Sol. Jo. 472]

Charity—Benefit to community—Relief of poverty—Gift in will for contribution to workpeople's holiday fund.

Will—Gift to club for old boys of school—Discretion of committee as to application—Validity of trust.

E By his will the testator bequeathed shares in a company of which he had been a director to trustees on trust to pay the income thereof to the directors for the purposes of contributing to the holiday expenses of the workpeople employed in the spinning department of the company in such a manner as a majority of the directors should in their absolute discretion think fit and the directors were empowered to divide the income equally or unequally between F such workpeople. After making other bequests the testator directed that the residue of his estate be held on trust for sale and conversion and that the proceeds of sale be held on trust for the Old Bradfordians' Club, London (being a club for old boys of Bradford Grammar School), to be used as the committee of the club should think best in the interests of the club or school. In the spinning department of the company upwards of 500 workpeople, G mostly girls, were employed at an average weekly wage of 15s. and twelve workpeople, who acted as overseers, at 36s. to 37s. a week. The workpeople could, at their option, subscribe to a holiday expenses fund which was supplemented by contributions from the company.

H **Held:** (i) as the company's workpeople could not be regarded as poor people within the statute of Elizabeth and as the trust was one for private individuals and not one for general public purposes, the trust for the spinning workpeople of the company was not charitable and was void as infringing the rule against perpetuities; (ii) the residuary gift imposed a trust that the money should be expended at the discretion of the committee of the club in the best interests of the school and club in the direction indicated in the will, and such I a trust was valid and did not tend to perpetuity.

Notes. The preamble to the repealed Statute of Elizabeth (1601) (43 Eliz. 1, c. 4) was preserved in s. 13 of the Mortmain and Charitable Uses Act, 1888, see 2 HALSBURY'S STATUTES (2nd Edn.) 916, now repealed by s. 38 of the Charities Act, 1960, see 40 HALSBURY'S STATUTES (2nd Edn.) 168.

Considered: *Re Rayner, Cloutman* v. *Regnart* (1920), 89 L.J.Ch. 369. Applied: *Re Wernher's Charitable Trust (Trustees)* v. *I.R.Comrs.*, [1937] 2 All E.R. 488. Followed: *Re Price, Midland Bank Executor and Trustee Co.* v. *Harwood*, [1943] Ch. 422. Considered: *Re Hobourn Aero Components Ltd.'s Air Raid Dis-*

tress Fund, *Ryan* v. *Forrest*, [1946] 1 All E.R. 501; *Gibson* v. *South American Stores (Gath and Chaves), Ltd.*, [1949] 2 All E.R. 985; *Oppenheim* v. *Tobacco Securities Trust Co.*, [1951] 1 All E.R. 31; Leahy v. A.-G. of New South Wales, [1959] 2 All E.R. 300. Referred to: *Re Taylor*, *Midland Bank Executor and Trustee Co.* v. *Smith*, [1940] Ch. 481; *Re Macauley's Estate*, *Macauley* v. *O'Donnell*, [1943] Ch. 435, n.; *Re Compton*, *Powell* v. *Compton*, [1945] 1 All E.R. 198; *Williams' Trusts Trustees* v. *I.R.Comrs.*, [1945] 2 All E.R. 236; *Re Scarisbrick's Will Trusts*, *Cockshott* v. *Public Trustee*, [1951] 1 All E.R. 822; *Re White's Will Trusts*, *Tindall* v. *United Sheffield Hospitals, Board of Governors*, [1951] 1 All E.R. 528; *Re Astor's Settlement Trusts*, *Astor* v. *Scholfield*, [1952] 1 All E.R. 1067; *Re Koettgen*, *Westminster Bank, Ltd.* v. *Family Welfare Association Trustees, Ltd.*, [1954] 1 All E.R. 581; *I.R.Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525.

As to public benefit being a requisite element of charity; Non charitable purposes, gift for benefit of individuals; Gift for association and perpetual institution; see 4 HALSBURY'S LAWS (3rd Edn.) 209, 233, 236; and for cases see 8 DIGEST (Repl.) 320, 355.

Case referred to:

(1) *Re Clarke*, *Clarke* v. *Clarke*, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811; 49 W.R. 628; 17 T.L.R. 479; 45 Sol. Jo. 484; 8 Digest (Repl.) 356, *352*.

Also referred to in argument:

Re Clark's Trust (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 24 W.R. 233; 8 Digest (Repl.) 355, *343*.

Cunnack v. *Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, *344*.

Braithwaite v. *A.-G.*, [1909] 1 Ch. 510; 78 L.J.Ch. 314; 100 L.T. 599; 73 J.P. 209; 25 T.L.R. 333; 8 Digest (Repl.) 355, *345*.

Re Macduff, *Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

A.-G. v. *Duke of Northumberland* (1877), 7 Ch.D. 745; 47 L.J.Ch. 569; 26 W.R. 586; varied (1878), 38 L.T. 245, C.A.; 8 Digest (Repl.) 410, *1020*.

Re Gassiot, *Fladgate* v. *Vintners' Co.* (1901), 70 L.J.Ch. 242; 17 T.L.R. 216; 8 Digest (Repl.) 357, *358*.

Income Tax Special Purposes Comrs. v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

Re Dudgeon, *Truman* v. *Pope* (1896), 74 L.T. 613; 12 T.L.R. 465; 8 Digest (Repl.) 317, *35*.

Re Elliott, *Raven* v. *Nicholson* (1910), 102 L.T. 528; 54 Sol. Jo. 426; 8 Digest (Repl.) 317, *36*.

Re Mann, *Hardy* v. *A.-G.*, [1903] 1 Ch. 232; 72 L.J.Ch. 150; 87 L.T. 734; 51 W.R. 165; 8 Digest (Repl.) 344, *257*.

Re Gosling, *Gosling* v. *Smith* (1900), 48 W.R. 300; 16 T.L.R. 152; 44 Sol. Jo. 196; 8 Digest (Repl.) 320, *49*.

Goodman v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 8 Digest (Repl.) 440, *1306*.

Re Wall, *Pomeray* v. *Willway* (1889), 42 Ch.D. 510; 59 L.J.Ch. 172; 61 L.T. 357; 37 W.R. 779; 8 Digest (Repl.) 319, *43*.

Re Christchurch Inclosure Act (1888), 38 Ch.D. 520; 57 L.J.Ch. 564; 58 L.T. 827; 4 T.L.R. 392, C.A.; affirmed, [1893] A.C.1, H.L.; 8 Digest (Repl.) 384, *776*.

Re Good, *Harington* v. *Watts*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 53 W.R. 476; 21 T.L.R. 450; 49 Sol. Jo. 445; 8 Digest (Repl.) 347, *278*.

Re Nottage, *Jones* v. *Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370*.

Cocks v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 325, *86.*

Re Delany, Conoley v. *Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest (Repl.) 325, *89.*

Thomson v. *Shakespear* (1859), John. 612; 29 L.J.Ch. 140; 1 L.T. 398; 24 J.P. 243; 6 Jur.N.S. 118; 8 W.R. 124; affirmed (1860), 1 De G. F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.JJ.; 8 Digest (Repl.) 358, *364.*

Carne v. *Long* (1860), 2 De G. F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur.N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, *1278.*

Re Dutton, Ex parte Peake (1878), 4 Ex.D. 54; 48 L.J.Q.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex parte Tunstall Athenæum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, *1281.*

Langham v. *Peterson* (1903), 87 L.T. 744; 67 J.P. 75; 19 T.L.R. 157; 8 Digest (Repl.) 394, *868.*

Re Amos, Carrier v. *Price*, [1891] 3 Ch. 159; 60 L.J.Ch. 570; 65 L.T. 69; 39 W.R. 550; 7 T.L.R. 559; 8 Digest (Repl.) 437, *1283.*

Re Smith, Johnson v. *Bright-Smith*, [1914] 1 Ch. 937; 83 L.J.Ch. 687; 110 L.T. 898; 30 T.L.R. 411; 58 Sol. Jo. 494; 8 Digest (Repl.) 338, *200.*

Hancock v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 37 Digest 105, *397.*

Adjourned Summons.

By his will, dated Nov. 24, 1911, the testator James Drummond, of Brook Lodge, Ilkley, in the county of York, a director of James Drummond & Sons, Ltd., appointed the three plaintiffs and another executors and trustees thereof, and after making certain devises and bequests, bequeathed to his trustees 1,700 of his preference shares in the company upon trust as to 500 thereof to pay the income to arise therefrom to the directors of the company for the purposes of contributing to the holiday expenses of the workpeople employed in the spinning department of the company in such manner as a majority of the directors should in their absolute discretion think fit, and the testator declared that the directors might divide the same equally or unequally between such workpeople or some of them only as they should in their absolute discretion think fit, and if the company should at any time be wound up then the testator directed the trustees to pay the money received by them in respect of the 500 preference shares to the governors of the Bradford Grammar School upon trust as mentioned in the will. The testator then dealt with the remaining 1,200 preference shares, and after certain further bequests directed that the residue of his estate be held on trust for sale and conversion and that the proceeds of sale be held on trust for the Old Bradfordians' Club, London (being a club instituted by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the club to be a sufficient discharge to his trustees.

By a codicil to his will, dated Dec. 2, 1911, the testator declared that he desired that the moneys should be utilised by the club for such purposes as the committee for the time being might determine, the object and intent of the bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club, and to enable the committee, if possible, to acquire premises to be used as a clubhouse for the use of the members, being old boys of the Bradford Grammar School, with power to the committee to make rules and regulations as to residence in or use of the same, and, further, that it was the object of the bequest that the moneys should be utilised in founding scholarships or otherwise in such manner as the committee for the time being should think best in the interests of the club or the school.

The testator died on Dec. 6, 1911, and his will with the codicil thereto was

duly proved by the plaintiffs as the executors thereof, the other executor having renounced probate. The company James Drummond & Sons, Ltd., continued to carry on business as worsted spinners and manufacturers.

In the company's spinning department there were some 400 to 500 workpeople, chiefly girls, whose average weekly wages were 15s., and some twelve overseers, who also worked in the department and whose wages were from 36s. to 37s. a week. For some years past there had been a holiday fund to which the operatives could contribute, and these funds were supplemented by contributions from the company. The Old Bradfordians' Club was founded in 1899 to encourage social intercourse amongst the old boys of the Bradford Grammar School, and had been managed by a committee elected by the members of the club. On Jan. 3, 1913, the Old Bradfordians Club (London), Ltd., was registered under the Companies (Consolidation) Act, 1908, for the purpose of taking over the assets and property of the club, and with objects similar to those of the club, the management of the Old Bradfordians' Club as registered being vested in the committee.

An originating summons was taken out on Dec. 3, 1913, by the trustees of the will to determine whether the gift of shares to contribute to the holiday expenses of the workpeople was valid; and whether the residuary gift to the Old Bradfordians Club was valid.

Andrewes-Uthwatt for the trustees.

Clayton, K.C., and *Howard Wright* for John Drummond, heir-at-law of the testator.

J. E. Harman for the directors of the company.

Dighton Pollock for the governors of Bradford Grammar School.

Austen-Cartmell for the Attorney-General.

EVE, J., stated the facts and continued: The question which I have to determine is whether a bequest by the testator in the following terms is a good charitable bequest:

> "I bequeath to my trustees 1,700 of my preference shares of £10 each in James Drummond & Sons, Ltd., upon trust as to 500 thereof to pay the income to arise therefrom to the directors of James Drummond & Sons., Ltd., for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of James Drummond & Sons, Ltd., in such manner as a majority of the said directors shall in their absolute discretion think fit, and I declare that the said directors may divide the same equally or unequally between such workpeople, or some of them only, as they shall in their absolute discretion think fit."

It has been argued, first, that although there is nothing expressed in the bequest as to the poverty of the recipient, or as to his or her inability to take a holiday without the assistance of the contribution thereby contemplated, I ought to infer from the form of the bequest that there was thereby imposed upon the directors a trust so to exercise their discretion as to make contributions only in those cases in which the operative would have been unable to take a holiday, or to contribute his or her quota to the holiday expenses fund without the assistance of the contribution, and, secondly, that the whole class of people employed at a weekly wage of 15s. is a class of persons who may properly be described as poor people within the statute of Elizabeth [(1601) 43 Eliz. 1, c. 4]. I do not think I can place that construction on the gift, or accede to either of these views. I think that what the testator really contemplated was the provision of a fund by the income of which the contributions theretofore made by the company should be continued, and that there is nothing in this bequest or in the terms in which the discretion is given to the directors which imposes upon them the obligation of inquiring into the ability of the participants to provide themselves with a holiday without assistance or limits their powers of contribution to cases where no holiday would be possible without such contribution. Neither can I hold judicially that

a large body of people working at what does indeed seem to be a very small wage can properly be regarded as being reduced to such a condition of poverty as to be described as poor people within the meaning of the statute.

Then it is said that, even if that be the case, the gift is still a good charitable gift because it is a gift for general public purposes, intended for the benefit of a particular section of the public, and is within the principles underlying that class of case in which a good charitable trust has been held to be created, not for all the inhabitants of any particular town, village, or borough, but for a particular, and very often a small, section of those inhabitants, such, for example, as a trust for the benefit of those possessing certain qualifications, as freemen of a borough, or residing in certain tenements, or constituting a particular class, such as widows or aged persons. If I could see my way to uphold the gift on that line of authority, I should be very pleased to do so, because undoubtedly the dividing line is a very fine one. Counsel for the Attorney-General has contended that the trust is wholly a trust for public purposes, the securing of a holiday for a large body of the inhabitants of this particular town and the benefit thereby of the general health of the community; that it only differs from the cases on which he relied in that it fixes the qualification, not with reference to any particular place of residence or to the possession of any particular franchise, but with reference to employment in a particular business, and a particular department in that business, and he contends that, if a public trust can be created for the occupiers for the time being of a few small cottages in a Hampshire village, a similar trust can be created for the large aggregation of persons constituting for the time being the employees in some of these great industrial undertakings. I think the answer to that argument has been supplied by counsel for the heir-at-law in his reply. The distinction lies in this: The present case is not a trust for general public purposes, it is a trust for private individuals, a fluctuating body of private individuals it is true, but still private individuals, and there is nothing in the nature of a public trust. That being the case it is outside the line of authorities cited, and not being for public purposes I am constrained to hold that it is not charitable, but void as infringing the rule against perpetuities. It is not disputed that on this finding the alternative gift to the grammar school must also fail.

The question as to the validity of the residuary gift in favour of the Old Bradfordians' Club was then argued.

Maugham, K.C., and *C. Hartree* for the Old Bradfordians' Club (London), Ltd.

Clayton, K.C., and *Howard Wright* for the heir-at-law and next-of-kin of the testator.

EVE, J.—The testator by his will, after making certain devises and bequests, devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees for sale and conversion and, subject to certain payments therein mentioned, to stand possessed of the residue of the moneys produced by such sale and conversion upon trust for the Old Bradfordians' Club, London.

In a codicil made a few days after making this will the testator introduced a number of express provisions affecting the residuary bequest, and the effect of the will and codicil taken together is such that I think there is a great difficulty in arriving at the conclusion that the testator intended that the members of the club should divide this residuary bequest amongst themselves as individuals. Counsel for the club has contended that that is the effect of the codicil, but I think the codicil does mean more than the mere expression of the testator's desire, and is to some extent a trust. It is a trust for the benefit of the Bradford Grammar School and the Old Bradfordians' Club. The testator specifies in the codicil the purposes to which he desires his money should be devoted. One of these objects was that the committee should acquire premises to be used as a club-house for the use of the members of the club; another purpose which the testator had in view was the foundation of scholarships for the benefit of the club or the

school. It is said that such gifts tend to or savour of a perpetuity. I think that on the true construction of this will and codicil the testator's intention was that the moneys were to be received for those purposes specified in the codicil, and, if that is the true construction, there would no doubt be great difficulty in holding a gift to be valid which infringed on the rule against perpetuities.

In my opinion, however, that is not the substantial meaning of this will and codicil. On the assumption that those specific matters were the objects of the testator's intention, they were objects which the testator leaves not merely to the discretion of the committee—his intention is to be carried out. There is, therefore, in my opinion, a trust to apply the moneys to such purposes as the committee of the club may determine to be for the benefit of the old boys of the Bradford Grammar School or the members of the Old Bradfordians' Club. In other words, he empowers the committee to deal with this property so long only as they apply it in the direction indicated in his codicil. It is not, however, such a trust as would render the legacy void as tending to a perpetuity, and there are numerous authorities to support that view, amongst others, *Re Clarke*, *Clarke* v. *Clarke* (1). In the course of his judgment BYRNE, J., lays down the law in these words ([1901] 2 Ch. at p. 114):

> "It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be: Will the legacy, when paid, be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which, by the terms of the gift, or by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad."

Counsel for the heir-at-law has argued that the testator's intention as disclosed in the codicil is that he will not permit the money to be divided amongst the members of the club. The words in the codicil are these:

> "I desire that the said moneys shall be utilised by the club for such purposes as the committee for the time being may determine, the object and intent of this my bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club, and to enable the committee, if possible, to acquire premises to be used as a club house for the use of the members, being old boys of the Bradford Grammar School, with power to the committee to make rules and regulations as to residence in or use of the same, and further it is the object of this my bequest that the said moneys shall be utilised in founding scholarships, or otherwise in such manner as the committee for the time being shall think best in the interests of the club or school."

It appears to me that the testator contemplated two things. First, he intended absolute gifts to the association; secondly, he contemplated a trust which would still allow the committee to spend the trust moneys in such a manner as they in their discretion might think best in the interests of the school and club, subject, however, to the guidance of the testator's directions. The manner in which the moneys are to be expended rests with the treasurer of the club acting through the committee of the club, subject to the trust imposed by the testator. The particular application of the moneys will depend on the discretion of the committee in promoting the benefit of the legatees not individually, but as an association. I think counsel for the club is right when he says that in a case of this sort you must consider the character of the legacy. There is, in my opinion, a trust, but not such a trust as would render the legacy void as tending to a perpetuity. I

declare, therefore, that there is a valid gift to the club for such purposes as the committee shall determine for the benefit of the old boys or members of the club.

Order accordingly.

Solicitors: *Blundell, Gordon & Co.*, for *Gordon, Hunter & Duncan*, Bradford; *Kingsford, Dorman & Co.*, for *Vint, Hill & Killick*, Bradford; *Speechly, Mumford & Co.*, for *Mumford, Johnson & Co.*, Bradford; *J. Moverley Sharp*; *Treasury Solicitor.*

[*Reported by* W. GRIST HAWTIN, ESQ., *Barrister-at-Law.*]

SMITH AND ANOTHER *v.* SELWYN

COURT OF APPEAL (Kennedy, Swinfen Eady and Phillimore, L.JJ.), April 7, 1914]

[Reported [1914] 3 K.B. 98; 83 L.J.K.B. 1339; 111 L.T. 195]

Practice—Action based on felonious act—Need to prove prior prosecution of defendant, or reasonable excuse if none—Stay of proceedings in absence of proof.

An action for damages based upon a felonious act committed against the plaintiff by the defendant is not maintainable until the latter has been prosecuted or a reasonable excuse has been given why a prosecution has not taken place, and the duty of the court in such a case is to stay the proceedings in the action until the defendant has been prosecuted.

Notes. Considered: *Admiralty Comrs.* v. *Steamship Amerika* (*Owners*), [1917] A.C. 38; *Yardy* v. *Greenwood* (1935), 79 Sol. Jo. 363; *In the Estate of G., M.* v. *L.*, [1946] P. 183. Referred to: *Canvey Island Comrs.* v. *Preedy* (1921), 91 L.J.Ch. 203; *Jack Clark* (*Rainham*), *Ltd.* v. *Clark*, [1946] 2 All E.R. 683; *Fowler* v. *Lanning*, [1959] 1 All E.R. 290.

As to actions in respect of felonious torts, see 1 HALSBURY'S LAWS (3rd Edn.) 11 et seq.; and for cases see 1 DIGEST (Repl.) 76, 77.

Cases referred to:

(1) *Osborn* (*Osborn*) v. *Gillett* (1873), L.R. 8 Exch. 88; 42 L.J.Ex. 53; 28 L.T. 197; 21 W.R. 409; 1 Digest (Repl.) 39, *287*.

(2) *Appleby* v. *Franklin* (1885), 17 Q.B.D. 93; 55 L.J.Q.B. 129; 54 L.T. 135; 50 J.P. 359; 34 W.R. 231; 2 T.L.R. 170; 1 Digest (Repl.) 76, *573*.

(3) *Stone* v. *Marsh, Stracey and Graham* (1827), 6 B. & C. 551; 9 Dow. & Ry.K.B. 643; Ry. & M. 364; 5 L.J.O.S.K.B. 201; 108 E.R. 554; 1 Digest (Repl.) 454, *1053*.

(4) *White* v. *Spettigue* (1845), 1 Car. & Kir. 673; 13 M. & S. 603; 14 L.J.Ex. 99; 4 L.T.O.S. 317; 9 J.P. 761; 9 Jur. 70; 153 E.R. 252; 1 Digest (Repl.) 74, *557*.

(5) *Wells* v. *Abrahams* (1872), L.R. 7 Q.B. 554; 41 L.J.Q.B. 306; 26 L.T. 433; 36 J.P. 710, 20 W.R. 659; 36 J.P. Jo. 260; 1 Digest (Repl.) 76, *565*.

Also referred to in argument:

Re Shepherd, Ex parte Ball (1879), 10 Ch.D. 667; 48 L.J.Bcy. 57; 40 L.T. 141; 27 W.R. 563; 14 Cox, C.C. 237, C.A.; 1 Digest (Repl.) 76, *566*.

Midland Insurance Co. v. *Smith* (1881), 6 Q.B.D. 561; 50 L.J.Q.B. 329; 45 L.T. 411; 45 J.P. 699; 29 W.R. 850; 1 Digest (Repl.) 73, *547*.

Scaife v. *D'Avigdor* (1883), 10 Q.B.D. 412; 48 L.T. 761; 47 J.P. 248; 1 Digest (Repl.) 76, *570*.

Appeal by the defendant from an order of LORD COLERIDGE, J., at chambers.

The plaintiffs were husband and wife. By their statement of claim they alleged as follows:

1. The plaintiff Dorothy Smith is the wife of the plaintiff William Charles Smith, and at the time of the grievances hereinafter complained of resided with him at No. 1, Dudley Road, Ilford, Essex. In and about December, 1913, the said Dorothy Smith was desirous of obtaining an engagement as a vocalist on the theatrical or music-hall stage, and in response to an advertisement in the "Stage" newspaper of Dec. 11, 1913, attended at the Hippodrome, Greenwich, and there saw the defendant. The defendant is part proprietor and the manager of the said Hippodrome. On the said Dec. 11, 1913, the said plaintiff was given a trial turn at the said Hippodrome, and was afterwards, on the said day in her professional name of "Miss Dorothy Hayes," by a contract in writing signed by the defendant, engaged by the defendant to appear at the said Hippodrome as a vocalist in her usual performance, on a date to be arranged, at a salary of £3 per week, and to give one matinée if required. The said plaintiff accepted the said engagement, and it was on the said Dec. 11, 1913, subsequently verbally agreed that her engagement should commence on Dec. 15, 1913.

2. On Dec. 12, 1913, the defendant, intending and contriving to corrupt and violently or otherwise have criminal relations with the said plaintiff, by a telephone message to the said plaintiff, induced the said plaintiff as and for a rehearsal to again attend and the said plaintiff did attend at the said Hippodrome. The defendant on the said Dec. 13, 1913, at the said Hippodrome, then intending and contriving as aforesaid in pursuance of his said designs, verbally induced the said plaintiff to accept and partake of some liquid alleged by the defendant and believed by the said plaintiff to be brandy, but which, as the defendant well knew, was not brandy but was brandy and/or a liquid mixed with or composed of some noxious poisonous narcotic or other drug (the name of which is at present unknown to the plaintiff or either of them) which, as the defendant well knew, was calculated and by him intended to have the effect of rendering the said plaintiff powerless and incapable of muscular control or resistance, and of reducing her to a state of collapse and insensibility.

3. The plaintiff being so induced by the defendant, and believing as aforesaid, drank part of the said liquid, and almost immediately thereafter in consequence thereof became injuriously affected and oppressed by a sense of suffocation and giddiness, and was rendered powerless and incapable of muscular control or resistance and was reduced to a state of collapse and insensibility, and while the said plaintiff was so affected as aforesaid and under the influence of the said drug the defendant unlawfully and indecently assaulted the said plaintiff, and violently against her will had, or alternatively attempted to have, carnal knowledge and intercourse with her.

4. In consequence of the premises the said plaintiff became and was ill and suffered much mental and physical pain, and for a long time feared pregnancy, and she was unable to discharge her household duties as theretofore, and her marital relations with her husband, the plaintiff, William Charles Smith, became strained and impaired, and she lost for a long time the consortium of her husband, and she was and still is unable to follow her occupation, and she lost the benefit of her said engagement as a vocalist at the said Hippodrome and she was injured in her character, credit, and reputation as a vocalist. And the plaintiff, William Charles Smith, lost the services of his said wife in the discharge of her said household duties, and his marital relations with her were and became strained and impaired and he lost the consortium of his said wife. The plaintiffs claimed damages.

The defendant applied at chambers for an order to stay or dismiss the action as being an abuse of the process of the court upon the ground that the statement of

A claim disclosed, as the basis of the action, a felony under s. 22 of the Offences against the Person Act, 1861, for which the defendant had not been prosecuted. On Mar. 5, 1914, Master CHITTY made an order refusing the application to stay the action, and that order was affirmed by LORD COLERIDGE, J., on Mar. 13. The defendant appealed.

B *C. W. Lilley* for the defendant.
C. E. Jones for the plaintiffs.

KENNEDY, L.J.—This case raises a somewhat difficult, but at the same time, interesting question. The appeal is brought against an order of LORD COLERIDGE, J., who affirmed an order of Master CHITTY, refusing to stay or dismiss C the action. The ground of the present appeal is that the statement of claim on its face alleges material facts which, if true, are so alleged for the purpose of justifying a claim to damages for assault as to constitute a charge of felony against the defendant, and that as there has been no prosecution for the felony and no reasonable excuse shown for a prosecution not having taken place, it is not open to the plaintiffs to claim damages in a civil action for that wrong.

D The question which has been raised is not an easy one to solve and some of the decisions which were cited in argument are not easy to reconcile. In the result, however, this is certain that the court has a right, if not an imperative duty, to stay proceedings in a civil action to recover damages if it is clear that the basis of the civil action is a felony committed by the defendant. I think it is quite useless to go over the ground again which has been so amply covered by E counsel. I think the result of the cases is this, that it is the duty of the court in each instance, to consider whether there should be a stay or not if it is clear that the cause of action arises from a felony. I have, myself, come to the conclusion that while paras. 2 and 3 of the statement of claim might be construed as alleging facts upon which the plaintiffs will rely for their claim for damages for an assault on the female plaintiff, yet the scheme is substantially—and it is admitted that F it was so intended—to allege that the defendant induced the female plaintiff to go to a particular place with the intent to have carnal knowledge of her, and when she was there with the same intent or design, as the statement of claim puts it, induced her to take some liquid with a drug in it and did it with a view so as to render her incapable of muscular control and resistance, and while she was in that condition carried out his design to assault her and against her will either had or G attempted to have carnal knowledge of her.

In my opinion, apart from the allegation that the defendant had carnal knowledge of her, what is alleged here is a proceeding which, if proved, constitutes a felony within s. 22 of the Offences against the Person Act, 1861. I do not think that that section is overridden or affected by s. 3 (3) of the Criminal Law Amendment Act, 1885, whereby a similar act is made a misdemeanour. On the face H of the statement of claim, there is, in my opinion, an allegation of a felony, and I think it being within the power of the court to stay the proceedings in the action, and the result of the cases which have been cited being that that is the proper course to adopt, we ought to act on that and not allow the action to go to trial. I think we ought to stay the proceedings, but not absolutely, without giving the plaintiffs an opportunity of alleging, as the basis of their claim, an assault on the I female plaintiff which did not amount to a felony. In that action, I think it might be alleged that the person so assaulted was unable to resist because of her physical condition. Although it may not be easy, I conceive it to be possible to state a good cause of action without alleging felony as the basis of it. I think the plaintiffs are entitled to be allowed to allege that and have it tried, and I should be very loth to exercise our power in such a way as to deprive the plaintiffs of all remedy. I think our order should be to uphold the decision of the learned judge in so far as he refused to grant a stay, such stay, however, to be granted with liberty to the plaintiffs to apply for leave to proceed to action with such amended

statement of claim as might be approved by the court. Of course, if the plaintiffs choose to take criminal proceedings the bar to the continuance of the present action would forthwith disappear. I only wish to add here that there are two plaintiffs, husband and wife, and if any distinction is to be drawn between them it might be that the husband had a claim because the felonious act was not committed on him. I am not prepared to overrule the authorities that have been cited, namely, BRAMWELL, B., in *Osborn* v. *Gillett* (1) and HUDDLESTON, B., and WILLS, J., in *Appleby* v. *Franklin* (2). The two claims are so interlaced here that it is very difficult to separate them; the husband's claim is, of course, a mere bagatelle, the real claim being in respect of the injury to the wife. Under these circumstances I cannot separate them and I draw no distinction between them.

The order will in substance be to stay all further proceedings in the action on the present statement of claim with liberty to the plaintiffs to amend within twenty-one days; and if no amendment is made within this time, the action to be stayed until after criminal proceedings have been taken against the defendant. The appeal must, therefore, be allowed.

SWINFEN EADY, L.J.—I am of the same opinion. It is now well established that, according to the law of England, where injuries are inflicted on the civil rights of an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution. In 1827, in *Stone* v. *Marsh* (3), LORD TENTERDEN, delivering the judgment of the Court of King's Bench, stated the law thus (6 B. & C. at p. 564):

> "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action."

That is the rule, and then he proceeds to state the ground of the rule.

> "The rule is founded on a principle of public policy. . . . Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose."

In *White* v. *Spettigue* (4) the law was laid down in somewhat similar terms by ROLFE, B., who said (13 M. & W. at p. 608):

> "I think the true principle is, that where a criminal, and consequently an injurious, act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony, and go for the conversion."

The learned judge is there speaking of an injurious act which is also a felony. So, too, COCKBURN, C.J., in *Wells* v. *Abrahams* (5) said (L.R. 7 Q.B. at p. 557):

> "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy—that is, the right of redress by action—is suspended until the party inflicting the injury has been prosecuted."

That being the established law, the question arises as to how it is to be enforced where an action is brought upon alleged facts which, if true, disclose a felony. COCKBURN, C.J., said in the same case (ibid.):

> "But it may very well be that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be

prosecuted for felony, the summary jurisdiction of this court might be invoked to stay the proceedings which would involve an undue use, probably an abuse, of the process of this court, in which case the court is always willing to interfere to prevent such abuse."

BLACKBURN, J., said (ibid. at p. 559):

"I am not prepared to say that, if an action were brought against a defendant and it was stated by the Attorney-General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the court might not, in such a case, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried."

LUSH, J., said (ibid. at p. 563):

"It is undoubtedly laid down in the text-books that it is the duty of a person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement: but by what means that duty is to be enforced we are nowhere informed."

We have, therefore, to lay down the proper course of procedure in such a case. The proper course seems to me to be that indicated by COCKBURN, C.J., in the passage I have cited—that is to say, to stay the action on terms—and I agree with the order stated by KENNEDY, L.J.

PHILLIMORE, L.J.—I am of the same opinion. It is a well-established rule of law that a plaintiff against whom a felony has been alleged by the defendant cannot make that felony the basis of an action unless the defendant has been prosecuted or some good reason has been given why a prosecution has not taken place. I am glad that the effect of our present decision will be to establish the only proper mode of enforcing that rule. I agree with the order that has been suggested and only desire to add a few words. In my opinion two distinct felonies are alleged in the statement of claim. At the end of para. 3 there is a charge of rape, and in paras. 2 and 3, read together, there is a charge of felony. It might be uncertain whether para. 2 alleged the administration of a drug to the female plaintiff with a view of making her unable to resist so that the defendant might have carnal knowledge of her. It has been frankly admitted that is the combined meaning of paras. 2 and 3. It comes, therefore, within s. 22 of the Offences against the Person Act, 1861, which is complied with, and it may also be a misdemeanour within the meaning of s. 3 (3) of the Criminal Law Amendment Act, 1885. I think there are some distinctions to be drawn between those two sections, but I care not, because the claim here is based on a felony. In my opinion, this statement of claim charges two felonies based on the same facts. I entirely agree with KENNEDY, L.J., how the matter should be dealt with.

Appeal allowed.

Solicitors: *Surridge & Mullis*, for *Mullis & Walmisley*, Ilford; *Walter Martin & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HALL BROS. STEAMSHIP CO., LTD. *v.* R. AND W. PAUL, LTD.

[KING'S BENCH DIVISION (Sankey, J.), June 16, 1914]

[Reported 111 L.T. 811; 30 T.L.R. 598; 12 Asp.M.L.C. 543; 19 Com. Cas. 384]

Shipping—Charterparty—"Port"—"Safe port"—Port at which ship could lie laden and discharge always afloat.

Under the terms of a charterparty a steamship chartered to carry a cargo of maize called at a named port "for orders to discharge at a safe port in the United Kingdom or so near thereto as she can safely get, always afloat, and deliver such cargo in accordance with the custom of the port for steamers." The ship was directed by the defendants, receivers of the cargo, to discharge at King's Lynn to which port she proceeded, but her draught was such that it was impossible for her on any tide to enter the dock there without being lightened. Accordingly, she lightened at another port ten miles away where it was usual for such vessels to lighten, and completed her discharge at King's Lynn. In an action to recover the extra expense incurred by them in lightening the vessel the shipowners contended that King's Lynn was not a safe port within the meaning of the charterparty, and that the defendants had committed a breach of contract in ordering the vessel to proceed there and were liable in damages,

Held: (i) the term "port" in a charterparty must be read in its commercial sense and not be given the meaning placed on it by the legislature in Acts passed with respect to objects such as pilotage and revenue; (ii) a safe port meant a port to which a vessel could get laden as she was and at which she could lie and discharge always afloat; and, therefore, King's Lynn was not a safe port, and the shipowners were entitled to recover: *The Alhambra* (1) (1881), 6 P.D. 68, applied.

Notes. Referred to: *G. W. Grace & Co.* v. *General Steam Navigation*, [1950] 1 All E.R. 201; *Compania Naviera Maropan S.A.* v. *Bowaters Lloyd Pulp and Paper Mills, Ltd.*, [1955] 2 All E.R. 241; *Reardon Smith Line, Ltd.* v. *Australian Wheat Board*, [1956] 1 All E.R. 456.

As to what constitutes a port and a safe port, see 30 HALSBURY'S LAWS (2nd Edn.) 515 et seq.; and for cases see 41 DIGEST 519 et seq.

Cases referred to:

(1) *The Alhambra* (1881), 6 P.D. 68; 50 L.J.P. 36; 44 L.T. 637; 29 W.R. 655; 4 Asp.M.L.C. 410, C.A.; 41 Digest 523, *3514*.

(2) *Leonis Steamship Co., Ltd.* v. *Rank, Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; 24 T.L.R. 128; 52 Sol. Jo. 94; 13 Com. Cas. 136, C.A.; 41 Digest 569, *3937*.

(3) *Hillstrom* v. *Gibson and Clark* (1870), 8 Macph. (Ct. of Sess.) 463; 22 L.T. 28 W.R. 424; 4 Asp.M.L.C. 233, D.C.; 41 Digest 519, *3478*.

(4) *Capper & Co.* v. *Wallace* (1880), 5 Q.B.D. 163; 49 L.J.Q.B. 350; 42 L.T. 130; 248; 41 Digest 564, *3894i*.

(5) *Nielsen* v. *Wait* (1885), 16 Q.B.D. 67; 54 L.T. 344; 34 W.R. 33; 2 T.L.R. 34; 5 Asp.M.L.C. 553; sub nom. *Neilson & Co.* v. *Wait & Co.*, 55 L.J.Q.B. 87, C.A.; 41 Digest 527, *3555*.

(6) *Reynolds & Co.* v. *Tomlinson*, [1896] 1 Q.B. 586; 65 L.J.Q.B. 496; 74 L.T. 591; 40 Sol. Jo. 419; 8 Asp.M.L.C. 150, D.C.; 41 Digest 522, *3510*.

(7) *Treglia* v. *Smith's Timber Co., Ltd.* (1896), 12 T.L.R. 363; 1 Com. Cas. 360; 41 Digest 518, *3475*.

Action tried by SANKEY, J., in the Commercial Court.

Mackinnon for the plaintiffs.
Inskip for the defendants.

SANKEY, J.—The plaintiffs, as owners of the steamship *Peerless*, claim the sum of £48 12s. 9d. against the defendants as receivers of a cargo of maize shipped at Rosario-San Nicolas, on the said vessel, under a bill of lading dated Dec. 16, 1913, and incorporating the terms and conditions of a charterparty of Nov. 11, 1913. By the said charterparty the vessel was

> "to call at Tenerife for orders to discharge at a safe port in the United Kingdom, or so near thereto as she can safely get, always afloat, and deliver such cargo in accordance with the custom of the port for steamers."

The *Peerless* duly called at Tenerife and received orders to discharge at King's Lynn. She proceeded on her voyage, but her draught was such that it was impossible for her at any time, on any tide, to enter the dock at King's Lynn, and she accordingly lightened at a spot known as the Bar Flat Light Buoy, which is about eleven miles off down the Wash. She then went on and discharged the remainder of the cargo in the dock. The extra expense incurred by the owners in lightening the vessel amounted to £48 12s. 9d., and, the items not being challenged, the question which falls for decision is whether the plaintiffs are entitled to recover the sum claimed.

For them it was contended that King's Lynn was not a safe port within the meaning of the charterparty, that the defendants had committed a breach of their contract in ordering the vessel to proceed there, and were, therefore, liable in damages. The defendants, in reply, took three points: (1) That the plaintiffs were estopped from alleging that King's Lynn was not a safe port, because their master had accepted the order to proceed there; (ii) that King's Lynn was in fact a safe port within the meaning of the charterparty; (iii) that King's Lynn included (a) the dock; (b) the place where the vessel was lightened, and, therefore, that the vessel was obliged to discharge at each of such places. As to the first of these points—namely, that the plaintiffs were estopped by the action of their master from asserting that King's Lynn was not a safe port, I am unable to accept the defendant's contention. It will be observed that King's Lynn was not inserted either in the charterparty or the bill of lading as the port of discharge. It was the duty of the defendants on arrival of the vessel at Tenerife to order her to proceed for discharge to a safe port, or so near thereto as she could safely get, always afloat. The fact that the master went to King's Lynn caused no prejudice to the defendants, but rather the reverse. It was the place to which they directed him to go, and there was no evidence that his acceptance of their order had in any way induced them to alter their position so as to preclude the plaintiffs from averring that King's Lynn was not a safe port. Even assuming the master to have known at Tenerife the true facts about King's Lynn, I cannot think his proceeding as he did would have estopped his owners from contending it was not a safe port. In such circumstances he would have had the right to get as near thereto as he safely could and there discharge afloat: (see *The Alhambra* (1)). And his conduct at Tenerife and after not only was reasonable and in the interests of the defendants, but minimised the loss or damage they would have sustained or incurred by the captain proceeding elsewhere. Further, there was no evidence that the master had any authority to take his vessel to a port which was not safe.

Before discussing the other two points, which may be dealt with together, it is necessary to ascertain the facts. I am satisfied that at no time, on any tide, could the *Peerless* have got into King's Lynn dock without being lightened. All vessels situated as she was lighten at Bar Flat Light Buoy. By the King's Lynn Conservancy Act, 1897, the limits of the port of King's Lynn are defined, and it was proved that the Bar Flat Light Buoy was not only within such limits, but ten miles within them from a seaward direction. It was, therefore, contended that the port of King's Lynn within the meaning of the charterparty included (a) the dock, (b) the place where the vessel lightened, and that the vessel was obliged to go to each of such places. In so far as it is a question of fact I find that the port of King's Lynn is the dock at King's Lynn itself, and not the Bar Flat Light Buoy

eleven miles down the Wash, or, indeed, if the defendants' contention is correct, any place even ten miles further out at sea.

In my opinion the term "port" in a charterparty is to be taken in its commercial sense, and is not to be defined by the meaning given to it by the legislature in Acts passed for such entirely different objects as pilotage or revenue. Any doubt or controversy on the point must now be taken as settled in *Leonis Steamship Co., Ltd.* v. *Rank, Ltd.* (2), where BUCKLEY and KENNEDY, L.JJ., discuss all the cases. Founding myself on their judgments, I come to the conclusion that the port of King's Lynn in a commercial sense is the dock at that place.

This brings me to the final point. Was King's Lynn a safe port within the meaning of the charterparty? In my view it was not. A safe port means a port to which a vessel can get laden as she is and at which she can lay and discharge, always afloat. I am aware that there are decisions on the point which appear to conflict, but I think *The Alhambra* (1) is correct, and that it governs this case. There are three decisions which appear to conflict: (i) *Hillstrom* v. *Gibson and Clark* (3) was a decision of the majority of the Scottish Court of Appeal, and is entitled to the greatest respect, but I am unable to distinguish its facts from those in *The Alhambra* (1), which I am bound to follow, and it appears to me from the observations on p. 73 of the report that BRETT, L.J., did not agree with the Scottish judges; (ii) the decision by a Divisional Court in *Capper & Co.* v. *Wallace* (4) really supports the contention of the present plaintiffs, and such dicta as are founded on *Hillstrom* v. *Gibson and Clark* (3) must be now taken subject to the remarks in *The Alhambra* (1) where it was cited; (iii) in *Nielsen* v. *Wait* (5) there was a finding that Sharpness was in the port of Gloucester, and that there was a custom to lighten at Sharpness. The present point was not discussed nor was *The Alhambra* (1) cited. See further the remarks of DAY, J., in *Reynolds & Co.* v. *Tomlinson* (6) ((1896) 1 Q.B. 586). Further, MATHEW, J., in *Treglia* v. *Smith's Timber Co., Ltd.* (7) approved *The Alhambra* (1).

To sum up, we have on the one hand in 1881 the decision of JAMES, BRETT, and COTTON, L.JJ., in *The Alhambra* (1), which is directly in point, followed in 1896 by DAY and LAWRANCE, JJ., in *Reynolds & Co.* v. *Tomlinson* (6), and also in 1896 by MATHEW, J., in *Treglia* v. *Smith's Timber Co., Ltd.* (7). On the other hand, we only have the decision in *Nielsen* v. *Wait* (5) where different considerations arose, and *The Alhambra* (1) was not cited. Under these circumstances I prefer to follow *The Alhambra* (1), and I give judgment for the plaintiffs for the amount claimed.

Solicitors: *Williamson, Hill & Co.*, for *Ingledew & Fenwick*, Newcastle-upon-Tyne; *Lowless & Co.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

A

MAIDLOW *v.* MAIDLOW

[Court of Appeal (Swinfen Eady and Pickford, L.JJ.), July 23, 1914]

[Reported [1914] P. 245; 84 L.J.P. 20; 112 L.T. 804]

B *Divorce—Maintenance of wife—Variation of order—Order by consent for yearly payments to wife "for her life"—Matrimonial Causes Act*, 1907 (*7 Edw. 7, c.* **12**), *s.* **1 (2) (*a*).**

A wife, having obtained a divorce from her husband, petitioned for an order for permanent maintenance. The registrar reported that the parties had agreed on the amount to be paid and submitted that the husband should pay C that sum to the wife "for her life," and an order was made on the application of the wife in that form. Subsequently the wife petitioned for an increase of the maintenance and the husband cross-petitioned for a reduction. At the hearing before the registrar the wife withdrew her petition, contending that as the order was a consent order the court had no jurisdiction to vary it.

D **Held:** if the consent order had been for the payment of permanent maintenance to the wife during the joint lives of husband and wife, the mere fact that the parties had agreed the amount to be paid would not have prevented an application being made under the provisions of s. 1 (1) (a) of the Matrimonial Causes Act, 1907 [now s. 28 of the Matrimonial Causes Act, 1950], for an increase or decrease of the amount if the circumstances of the parties had subsequently changed, but as the consent order was made for payment E to the wife "for her life" the court had no jurisdiction to vary it, and the presentation of the wife's petition for an increase of maintenance did not estop her from relying on the order.

Notes. The Matrimonial Causes Act, 1907, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. For s. 1 of the Act of 1907, see now ss. 19 and 28 of the Matrimonial Causes Act, 1950 [29 Halsbury's Statutes (2nd F Edn.), pp. 407 and 414].

Considered: *Abbott* v. *Abbott* (1930), 160 L.J.P. 36; *Hinde* v. *Hinde*, [1953] 1 All E.R. 171. Referred to: *Re Landau, Ex parte Trustee* v. *Bankrupt*, [1934] All E.R.Rep. 130; *Mann* v. *Mann*, [1936] 1 All E.R. 952.

As to variation of an order for maintenance, see 12 Halsbury's Laws (3rd Edn.) G 444 et seq.; and for cases see 27 Digest (Repl.) 621 et seq.

Appeal by the husband from an order of Sir Samuel Evans, P., dismissing the husband's appeal from an order of the registrar whereby he dismissed a petition by the husband for the reduction of permanent maintenance to be paid by the husband to the wife.

H On June 7, 1894, a marriage took place between Mr. and Mrs. Maidlow, and there was one daughter, the only issue of the marriage, who was born in 1895. On July 23, 1907, the wife obtained a decree nisi for dissolution of the marriage on the ground of the adultery and cruelty of her husband, and that decree was made absolute on Feb. 3, 1908. On Feb. 13, 1908, the wife presented a petition for permanent maintenance, and the averments therein contained were referred to the registrar for investigation and to make a report. On May 19, 1908, the I registrar made his report. He therein stated the marriage between the husband and the wife, the issue of the marriage, and that the wife had obtained a decree nisi for dissolution of the marriage, and that the decree was made absolute on Feb. 3, 1908. He then stated the pecuniary position of the husband and of the wife, who were both people of small means; and that the husband's income was variously stated by the parties: the wife putting it at £600 and commissions, and certain other sources of income unknown to the wife. The husband put his salary at £400 a year without commissions, and stated his only other receipts to be £33

a year. It was admitted that the wife had £120 a year under her father's will. The registrar then went on to report as follows:

> A suggestion was made by me on the first hearing, which, with a trifling variation, was assented to by both the parties, when they came before me again. The amount to be paid is therefore agreed. It is £90 a year for the petitioner and £30 a year for the daughter till twenty-one. The usual course would be that such an order should be made on summons by a registrar. The [wife] has, however, been advised by her counsel that, for her greater security against the [husband's] creditors, actual or possible, she should ask for an order, to be confirmed in open court. It is therefore submitted that the [husband] should be ordered to pay the agreed amount of £90 a year to the [wife] for her life and £30 a year to the daughter till she is twenty-one, such payments to begin from Feb. 3, 1908, the date of the decree absolute.

On June 1, 1908, an order was made on the application of the wife by BARGRAVE DEANE, J., that the report of the registrar should be confirmed; and that the husband should pay the agreed amount of £90 a year to the wife "for her life" and £30 a year to the daughter till she was twenty-one, such payments to commence from the date of the decree absolute. On Oct. 13, 1913, the wife presented a petition for an increase of the permanent maintenance on the ground that since the date of the order of BARGRAVE DEANE, J., the property and income of the husband had increased. On Dec. 13, 1913, the husband presented a cross-petition for a reduction of the permanent maintenance.

On the matter coming on for hearing before the registrar it was contended, on behalf of the wife, that as the order made by BARGRAVE DEANE, J., was a consent order the court had no jurisdiction to vary it. The wife's petition was accordingly withdrawn. On June 23, 1914, the registrar dismissed the husband's cross-petition. The husband appealed to SIR SAMUEL EVANS, P., from so much of the registrar's order as dismissed the petition, and the President dismissed his appeal. The husband now appealed to the Court of Appeal.

Bayford for the husband.
Le Bas for the wife.

SWINFEN EADY, L.J.—In this case the husband appeals against so much of the order of the learned President as dismissed a petition by the husband for the reduction of the amount of the permanent maintenance that was ordered to be paid by him to the wife. [HIS LORDSHIP stated the facts as above set forth and read the report of the registrar, and continued:]

If the report had not contained the clause in the submission, and there had been an order by consent in the language of the Matrimonial Causes Act, 1907, for the payment of maintenance to the wife during the joint lives of the husband and the wife, then, in my opinion, the mere fact that the parties had agreed the sum to be paid would not have prevented an application from being made under the provisions of s. 1 (2), of that Act if the circumstances of the parties afterwards changed. It may well be that the parties consented to what would be a proper allowance, having regard to the means of the husband and wife, and that they determined on a proper amount rebus sic stantibus. If, however, there should be a material change of circumstances after the order has been made, even though by consent, for the payment of the sum agreed upon for their joint lives, that fact would not prevent an application being subsequently made, if circumstances altered, for the sum to be increased or decreased.

Unless the parties consent to an order in the form suggested by the registrar, it was objected that there was no jurisdiction in the judge to make such an order. He could, it was said, order payment of maintenance during the joint lives under the statute, but there is no power under s. 1 (2) to order payment to the wife "for her life." Under s. 1 (1) the court is empowered, if it thinks fit, on any decree for dissolution or nullity of marriage, to order that the husband shall, to the

satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life, as having regard to the various circumstances there specified, may be deemed reasonable. Under sub-s. (2) of the same section the court is empowered, if it thinks fit, to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable. It was argued that there was a bargain in the present case between the husband and the wife which the court was not at liberty to vary; and that the wife accepted a less sum than she might otherwise have claimed, so that she might have the advantage of receiving it "for her life." In my opinion that is the right view, and an order so made cannot be subsequently varied.

Then it is said that by her petition the wife herself has sought to vary the order. But the argument based upon that cannot, in my opinion, be maintained. There has been no fresh bargain. As soon as the matter passed into counsel's hands and the form of the order was observed, the petition was withdrawn. The registrar also noted the same objection, and the petition was dismissed.

This conclusion to which I have come is founded upon the words appearing in the order "for her life." Counsel for the husband has said that he has evidence as to the circumstances in which the words came to appear in the report and in the order. This judgment proceeds upon the footing that those words are there. Any application to correct the order must be made to the court below. If, as is said, the words are only there per incuriam, the order ought to be corrected, and the position will be different. But the words are there now, and it is not open to us to consider an application to strike them out. This appeal fails, with the usual consequences.

PICKFORD, L.J.—I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *J. D. Arthur*; *Willis & Willis*, for *E. J. Howard*, Bournemouth.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

THAMES AND MERSEY MARINE INSURANCE CO. *v.* BRITISH AND CHILIAN STEAMSHIP CO.

[COURT OF APPEAL (Swinfen Eady, Phillimore and Pickford, L.JJ.), November 4, 5, 1915]

[Reported [1916] 1 K.B. 30; 85 L.J.K.B. 384; 114 L.T. 34; 32 T.L.R. 89; 13 Asp.M.L.C. 221; 21 Com. Cas. 150]

Insurance—Marine insurance—Subrogation—Loss of ship and cargo—Shipowners held partially responsible—Right of insurers to be subrogated up to insured sum.

The plaintiff insurance company insured the defendants' ship for £45,000 and paid this sum to the defendants when the ship sank after a collision. In a collision action the defendants were held to be seven-twelfths responsible for the loss. In further proceedings, on appeal from a registrar, the learned President laid down the principles upon which the compensation figure was to be based, and this was eventually agreed at £67,000 of which the defendants, being entitled to five-twelfths, received £26,000. This figure included compensation for both charter and ship and was not apportioned. The insurers

claimed to be subrogated and to be entitled to be paid by the defendants the whole of the amount recovered by them in the collision action up to £45,000.

Held: (i) the insurers were entitled to recover from the defendants all sums which the defendants received in respect of the ship up to £45,000, the amount of the insurance; (ii) the matter of apportionment should be referred back to the registrar.

Notes. Considered: *Boag* v. *Standard Marine Insurance Co., Ltd.*, [1937] 1 All E.R. 714. Referred: *Goole and Hull Steam Towing Co., Ltd.* v. *Ocean Marine Insurance Co., Ltd.*, [1927] All E.R.Rep. 621.

As to subrogation, see 22 HALSBURY'S LAWS (3rd Edn.) 160 et seq.; and for cases see 29 DIGEST 290 et seq. For the Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14.

Cases referred to:

(1) *The Racine*, [1906] P. 273; 75 L.J.P. 83; 95 L.T. 597; 22 T.L.R. 575; 10 Asp.M.L.C. 301, C.A.; 41 Digest 809, *6707*.

(2) *North of England Iron Steamship Insurance Association* v. *Armstrong* (1870), L.R. 5 Q.B. 244; 39 L.J.Q.B. 81; 21 L.T. 822; 18 W.R. 520; 3 Mar. L.C. 330; 29 Digest 122, *748*.

Appeal by the defendants from a decision of SCRUTTON, J., in an action tried by him without a jury, reported, [1915] 2 K.B. 214.

SCRUTTON, J., held (i) that the underwriters were entitled to recover to the extent to which they had paid in respect of the subject-matter insured any sums which the defendants had received in respect of the loss of the same subject-matter, although that sum was based on a larger value than the insured value; and (ii) that, as the underwriters only insured the ship for one year, they were not concerned with the value of the ship in 1917, and that, as on the evidence the value of the ship at the time of the loss must be taken to be £65,000, in respect of which the defendants had received from the owners of the *E.* £26,900, the underwriters were entitled to be subrogated to the defendants to the full amount of £26,900, and to recover from the defendants the difference between that sum and the amount payable under the running-down clause, and judgment was accordingly given for the plaintiffs.

The facts are set out in the judgment of SWINFEN EADY, L.J.

Leslie Scott, K.C., and *Raeburn* for the defendants.
Maurice Hill, K.C., and *D. Stephens* for the plaintiffs.

SWINFEN EADY, L.J.—This is an appeal by the defendants from the judgment of SCRUTTON, J., at the trial of an action in which the Thames and Mersey Marine Insurance Co. were plaintiffs and the British and Chilian Steamship Co. were the defendants.

The plaintiffs under a valued policy insured the ship for the sum of £45,000. The ship was under charter to the Dominion Coal Co. for a period of seven St. Lawrence seasons, commencing with the spring of 1911 and expiring, therefore, in 1917. There was a collision between the steamship *Helvetia*, the subject of the insurance, and the *Empress of Britain*, with the result that the *Helvetia* was sunk, and the plaintiffs have paid as for a total loss £45,000. Proceedings were taken in the Admiralty Court to determine the responsibility for the collision, and the result of the proceedings was that both vessels were pronounced to blame, and the share of the loss to be paid by the *Empress of Britain* was fixed at five-twelfths. Under the collision clause the plaintiffs are liable in respect of the loss and damage arising from the collision to pay a sum of £19,660. In the proceedings taken to ascertain the amount payable by the *Empress of Britain* an inquiry was directed, and in the first instance the registrar reported purporting to follow the case of *The Racine* (1), and he took the value of the ship as at Nov. 15, 1912, which was not the date of the collision, but the end of the current season, and he fixed it at

A £65,000, and he took the loss of hire up to the same date and assessed that at £2,000. There was an appeal from that. The shipowners appealed, and the matter came before the President, and he held that on the true effect of *The Racine* (1) the value of the ship should be taken as at November, when the charter would expire, and that the hire should be assessed to that date, and accordingly he remitted the report to the registrar to reconsider the matter upon that basis. The B parties then went again before the registrar, and the result was that the parties, then being the *Helvetia* on the one side and the *Empress of Britain* on the other, agreed upon a lump sum of £67,000, without dividing the amount as between ship and charter. For five-twelfths of that sum the *Empress of Britain* was held to be liable, and she has paid a sum of, roughly, £26,900. The present action is brought by the underwriters claiming to be subrogated to the position of the shipowners C in regard to the sum recovered in respect of the ship and to obtain payment of the amount.

The first question which was raised in the action and which has been raised before us on this appeal is, what is the right of the underwriters, the plaintiffs, to recover in respect of that amount? The whole of the insured value being covered by insurance, the claim of the plaintiffs is to recover from the defendants D the whole of the amount recovered by them in the collision action up to £45,000, the amount of the policy; on the other hand, the defendants have contended that by the decree of the Admiralty Division they were held entitled to recover in the collision action five-twelfths of their loss, and they say that as between the plaintiffs and the defendants that loss must be treated as £45,000, and that it is to their rights in that respect that the plaintiffs are subrogated, and that they are E consequently entitled only to recover five-twelfths of £45,000. SCRUTTON, J., decided in favour of the plaintiffs on that point. He held that the insurers were entitled to recover to the extent to which they paid in respect of the subject-matter insured any sum which the shipowners had received in respect of the loss, although that sum was based on a larger value than the insured value. By s. 27 of the Marine Insurance Act, 1906, it is provided that:

F > "(i) A policy may be either valued or unvalued. (ii) A valued policy is a policy which specifies the agreed value of the subject-matter insured. (iii) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and the assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial."

G By s. 79 it is provided:

> "(i) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured [here the insurer has paid for a total loss of the ship] he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject- H matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss."

What the insurers here are really saying is that, according to the true construction of the statute, they are entitled to be subrogated to all the rights and remedies of I the assured in and in respect of the subject-matter of the ship, and not to part of it only. In my opinion, the Act embodies the law as laid down in *North of England Iron Steamship Insurance Association* v. *Armstrong* (2) and the judgment below was right on this point, and the plaintiffs are entitled to recover from the shipowners all the sums which the shipowners received in respect of the ship up to the £45,000, the amount of the insurance.

The second point is a different one. The defendants contend that in apportioning the sum recovered in the collision action the learned judge was wrong in fixing £65,000 as the value of the subject-matter insured at the time of the loss—

that is to say, as the value of the ship. The sum recovered was recovered as a lump sum and there was no apportionment, and there has as yet been, apart from the learned judge's judgment, no apportionment of this sum as between ship and charter. It was a compromise, and the parties agreed to a lump sum. The President laid down in his judgment on appeal from the registrar the basis upon which the figures were to be arrived at. [His Lordship then dealt with this point and concluded:] In my opinion, the proper way to deal with the matter is to refer it back, having decided that the underwriters are entitled to recover the whole amount recovered by the shipowners in respect of the ship, and to direct an inquiry how the sum of about £26,000, the larger sum, ought to be apportioned as between the ship and the charter upon the basis of the President's judgment.

PHILLIMORE, L.J.—I agree.

PICKFORD, L.J.—I agree.

Appeal dismissed. Reference to referee.

Solicitors: *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Alfred Bright & Sons*, for *Batesons, Warr & Wimshurst*, Liverpool.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

HUTH *v.* HUTH

[Court of Appeal (Lord Reading, C.J., Swinfen Eady, L.J., and Bray, J.), March 25, 26, 1915]

[Reported [1915] 3 K.B. 32; 84 L.J.K.B. 1307; 113 L.T. 145; 31 T.L.R. 350]

Libel—Publication—Unsealed addressed envelope—Envelope opened and alleged libel read by servant in breach of duty—Liability of contents of envelope to be read by postal officials.

The defendant sent an alleged libel through the post in an unsealed envelope addressed to the plaintiff. The plaintiff's butler, in breach of his duty, read the contents of the letter.

Held: (i) there was no evidence that to the defendant's knowledge a letter addressed to the plaintiff would be likely to be unjustifiably opened by the butler; (ii) there was no presumption that as an unsealed envelope went through the post it would be opened and the contents read by postal officials; and, therefore, there was no publication of the matter complained of.

Notes. Considered: *Roff* v. *British and French Chemical Manufacturing Co. and Gibson*, [1918] 2 K.B. 677.

As to publication of a libel, see 24 Halsbury's Laws (3rd Edn.) 33–43; and for cases see 32 Digest 76.

Cases referred to:

(1) *Thorley* v. *Earl of Kerry* (1812), 4 Taunt. 355; 3 Camp. 214, n.; 128 E.R. 367; 32 Digest 29, *202*.

(2) *Delacroix* v. *Thevenot* (1817), 2 Stark. 63, N.P.; 32 Digest 77, *1078*.

(3) *Robinson* v. *Jones* (1879), 4 L.R.Ir. 391; 32 Digest 77, *1073ii*.

(4) *Gomersall* v. *Davies* (1898), 14 T.L.R. 430, C.A.; 32 Digest 77, *1072*.

(5) *Sadgrove* v. *Hole*, [1901] 2 K.B. 1; 70 L.J.K.B. 455; 84 L.T. 647; 49 W.R. 473; 17 T.L.R. 332; 45 Sol. Jo. 342, C.A.; 32 Digest 116, *1485*.

Also referred to in argument:

Williamson v. *Freer* (1874), L.R. 9 C.P. 393; 43 L.J.C.P. 161; 30 L.T. 332; 22 W.R. 878; 32 Digest 116, *1482*.

Clutterbuck v. *Chaffers* (1816), 1 Stark. 471, N.P.; 32 Digest 77, *1077*.

Appeal from a decision of DARLING, J., in an action for libel.

H. A. McCardie (*Marshall Hall, K.C.*, and *Barrington Ward* with him) for the plaintiffs.

Hohler, K.C. (*C. Doughty* with him), for the defendant.

LORD READING, C.J.—The four plaintiffs, who are infants, bring an action for libel against the defendant, who is their father. As they are infants, the action is brought in the name of their next friend; and the object of the action is, it is said, to obtain an injunction to prevent the repetition of the matter which, according to the plaintiffs' case, is defamatory. For some reason, which we do not know, the wife of the defendant left him, and went to live at Torquay with her four children in the house, apparently, of a Miss Stark, the next friend. It is neither material nor necessary to probe into the delicate question of the relations existing between the husband and the wife; it is sufficient to say that the defendant was evidently extremely annoyed, or wished in some way to annoy his wife, and he sent a letter addressed to her which has given rise to this action for libel.

The letter was addressed to Mrs. Huth, by her maiden name, care of Miss Stark, at the address at Torquay. Inside the letter was an account, an ordinary tradesman's bill, which had been sent by a saddler named Boyes to Captain Huth, the defendant, in respect of some bill for £2 or £3 which had been incurred upon orders given by Mrs. Huth. Captain Huth sent the bill in an envelope addressed as I have just described, and across the bill, or on it, wrote the words complained of in this case. "Mrs. Huth" was struck out, and in the defendant's handwriting appear the words "not known, try Miss Edith Greaves"—that is, the maiden name of Mrs. Huth. Later there appear on the same document addressed to the saddler the words: "The woman known as 'Mrs. Huth' "—that is in inverted commas—"will henceforth take her maiden name of Miss Edith Greaves.—Yours truly, P. S. HUTH." Again, on the same document is this: "The woman in question has forfeited all claims to the title of 'Mrs. Huth' "—and "Mrs. Huth" again is in inverted commas—"and I hereby and herewith disown her.—P. S. HUTH." That account, with this writing of the defendant upon it, was inclosed in the envelope addressed, as I have said, to the lady in her maiden name, and stamped with a halfpenny stamp, the envelope being consequently neither sealed nor gummed.

When the action came before DARLING, J., and a jury, he withdrew the case from the jury on the grounds, first, that there was no evidence of publication; secondly, that the words complained of were not capable of a meaning defamatory of the persons who were suing; because in this case it was not the wife who was suing, on account of the difficulties arising by reason of the law relating to husband and wife, but the four infant children, the allegation being that as the libel was that Mrs. Huth had not really gone through a marriage ceremony, or a valid marriage ceremony with Captain Huth, therefore the four children were illegitimate. That was the innuendo. The learned judge came to the conclusion that the words complained of were not capable of bearing a defamatory meaning of the four children. The plaintiffs appealed to this court, and we have had an able and interesting argument upon both questions.

It is said with regard to the first point—namely, publication, that there was evidence to go to the jury that this document had been published to some third person because, first, the butler had in fact read it. It is said that his attention was attracted by the peculiar form of address to Mrs. Huth, as he had lived for some thirteen or fourteen years with Captain and Mrs. Huth and knew the lady's maiden name, and that he then took out the account and read the defamatory

matter. The butler was called at the trial, and said that he opened the letter in the sense of removing the document from inside the envelope, and read it. He said that he did that because he was curious. It cannot be contended, and is not contended, as I understand, that if a person, in breach of his duty, opens an envelope and reads a letter, and there is no reason to expect that he would be likely to commit this breach of duty, the fact that he opens the envelope and reads the letter amounts to publication by the person who sends it; but it is argued in this case that, as the document was enclosed in an unsealed and ungummed envelope, it must be assumed that the defendant knew, or ought to have known, or might have expected that a servant in the house would open a letter in such an envelope so addressed. It is further said that an envelope unsealed, with a halfpenny stamp on it, is liable always to be opened by the postal authorities and the document is liable to be examined and read, and consequently that it must be taken that there was some evidence of publication to the Post Office.

With regard to the first point, that is the publication to the butler, I am clearly of opinion that there is no evidence of any such publication to the butler upon the point merely whether the fact that the butler opened the letter and read it because he was curious, would make it publication by the defendant. Fortunately, it is no part of a butler's duty to open the letters that come to the house of his master or mistress addressed to the master or mistress; and in this case there is nothing exceptional in it except that his curiosity was excited by reason of the lady being addressed by her maiden name. No one can help a man's curiosity being excited, but it does not justify him in opening a letter, and it could not make the defendant liable for the publication to the butler of the contents of the envelope, because it must of course be borne in mind that, however insulting and offensive the matters may have been which the husband wrote to his wife, they were addressed to the wife and only intended for the wife, and she alone saw them, no action for libel could be brought by her. An action for libel can only be brought if there is publication to some third person. The publication to the butler in this case is not sufficient.

Counsel for the plaintiffs has argued strenuously, and very ingeniously, a further point with regard to the Post Office, and I think that that broad general proposition requires somewhat careful examination. Certainly I should be very sorry to lay down any proposition of law which would enable libels to be published with greater safety than has hitherto been the case; but the ground put forward here is that there is a presumption of fact that when a postcard is forwarded through the Post Office the contents of the postcard have been published to some third person, and consequently the mere fact of proving that the postcard was written by the defendant and posted by him is in itself held to be some evidence that the defendant published the writing on the postcard. That is a presumption of fact founded on clear grounds rather than of law. It has been laid down, and I think rightly, that the court will take judicial notice of the nature of the document, which is the postcard, and will presume, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have read what is written thereon. In this way the presumption of law based on the authorities arises. If, of course, even in such a case as that, the defendant could establish that the postcard never was read by a single person—if it were possible to establish such a state of things, although it is very difficult to conceive—he would, notwithstanding the presumption, succeed in the action, because he would have proved that there was no publication. But of course he cannot, and does not. The fact that it is practically impossible to prove that anyone did read the postcard is the very reason why the law takes judicial notice of the nature of the document, and says the mere fact that it is written on a postcard which is posted must be taken as some evidence that a third person will read it, or has read it. Now, that is clear law, and is quite beyond dispute.

Then counsel for the plaintiffs says: "Yes, if that is so with regard to a postcard, you must make the same presumption with regard to a letter which is un-

sealed and ungummed: in other words, you must never treat a document which is circulated with a cover just as you would treat a document circulated without a cover." The question really in this case is whether that is right. Counsel for the plaintiffs has referred us to several authorities which require very short examination. With regard to the case in 1812, *Thorley* v. *Earl of Kerry* (1), before Mansfield, C.J., in which really the point was not taken at all, the matter came before the court on a writ of error. It appears that in 1812 Lord Kerry had written a letter which he had delivered unsealed to his servant to carry. One does not wonder that the point of law was not taken that that was no evidence of publication to the servant. That was long before the days of postcards, or of the halfpenny post in unsealed or ungummed envelopes. It is said that in *Delacroix* v. *Thevenot* (2), in the year 1817, there was a similar statement of law, although under different circumstances. Lord Ellenborough there held that, notwithstanding that the letter was not private and sent to the address of the plaintiff, if the clerk there was in the habit of opening letters directed to the plaintiff which were not marked private, and this was one of such letters and he did open it, that was evidence of publication to the clerk. There it is to be observed that the clerk said he did open it, and therefore it was proved that there was publication to him. Another case to which our attention was directed was *Robinson* v. *Jones* (3), where there is a judgment of Palles, C.B. That does not take the case any further; it deals with postcards, and really only states the law. Although it was dealing with a matter of privilege it only states the law as to postcards, which I have already stated. A further case was mentioned of *Gomersall* v. *Davies* (4), which came before the Court of Appeal. That was a case of a letter sent to the plaintiff by the defendant, opened by the clerk of the addressee, the plaintiff, in the ordinary course of business; and it was held there that there was evidence to go to the jury when the clerk came forward and said: "I opened this letter in the ordinary course of my duty. I came here and found the letters addressed to my principal, and I read this letter." There it was left by the judge to the jury, who answered the question in favour of the plaintiff, and the Court of Appeal were of opinion that it was rightly left to them, because they said on the facts that there was evidence that, to the defendant's knowledge, letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment. It is to be observed that the distinction between the case of the clerk in that case and that of the butler in the case at present under discussion is that the clerk opened it in the ordinary course of his business, while the butler opened it in breach of his duty, outside the ordinary course of his business.

That really deals with all the cases to which our attention is directed, and it appears to me that there is no such presumption as was contended for by counsel for the plaintiffs with regard to letters which are unsealed. It is not right, in my opinion, to treat a letter sent in an envelope with a halfpenny stamp, and which is ungummed, as though it were an open letter. Before the document can be abstracted from the envelope and read there must be some act in the nature of the opening of the letter which is ungummed by the person who has it in his hand, and I do not think that the court could presume that letters would be opened in the ordinary course of business, or that they might be opened if sent in this fashion. I do not think that that is a presumption to be drawn. It is quite true to say, and here I think counsel for the plaintiffs pressed the point very closely and very nearly home when he said that the Post Office have the right to examine the document which is in the letter stamped with a halfpenny stamp. It is part of their duty to see that that which is sent under cover of a halfpenny stamp is matter which should properly be sent for a halfpenny stamp and does not require a penny stamp. But that is not sufficient to carry the plaintiffs in this case. If they could have called a postman who said, "Yes, I did do this," or a postmaster or some official who said, "Yes, I examined this document and read it in order to see whether it was a thing which could properly go under a halfpenny stamp," then

would arise a state of things which I think counsel for the plaintiffs would be justified in saying amounted to evidence of publication by the defendant. But that is where he fails in this case. No such person can be called. I cannot think that the court is entitled to presume, merely because the envelope went through the post, that it would be opened. I suppose what is said with regard to these letters is true of every package which is sent through the Post Office. It is true of every parcel which is sent through the Post Office, and in certain circumstances it may be true also of other documents, even though they may be sealed; but that does not justify the presumption to which counsel for the plaintiffs is driven in this case—that is, that such a letter in an envelope which is unguimmed is to be treated just as a postcard. I think that that point fails, and that there is therefore no evidence of publication in this case. Upon the second point—that is, whether the words are capable of a defamatory meaning, I do not propose to express my opinion. It is sufficient to dispose of this case by holding that there was no evidence of publication. Of that I am satisfied, and therefore the appeal must be dismissed.

SWINFEN EADY, L.J.—This action is one of an unusual character, being by infant children against their father for libel. It claims damages and an injunction, and the real object of the action is not to obtain pecuniary damages, but to stop the defendant's wife being persecuted and distressed by documents, alleged to contain defamatory statements of the plaintiffs, being sent to her through the post. In form, it is an action by the children, and that form was necessary by reason of the wife being unable to bring any action for libel of this kind against her husband. The substance of it is to protect the wife against a further incursion of these documents. I regard it from that point of view, and deal with the action upon that footing.

The learned judge at the trial, the plaintiffs having to prove the publication of the libel, held that there was no evidence of publication, and it is that point which is first raised on this appeal. The document in question was inclosed in an envelope, but the envelope was not sealed or fastened with any adhesive matter, or otherwise, and it was sent through the post with a halfpenny stamp. The only alleged publication was that the butler, on receipt of this letter through the post, opened it, perused it, replaced the inclosure in the envelope, and, without comment, placed it on the dining room table for his mistress on the occasion in question. The mistress was in the house; she was living there at the time. It is not suggested that the butler had any duty in connection with the letter. It could not even be alleged that the mistress was away, and that there was a question whether it was worth while to forward it, not that that would have been, unless he had authority to do so, a sufficient excuse for his conduct; but there was no excuse of that sort, and the butler was called and said, on being pressed, that he opened it really from curiosity to see what the inclosure was. So it was opened and perused by the butler in breach of his duty.

In my opinion, the question of publication can shortly be disposed of in this way. There was no publication, because there was no evidence that, to the defendant's knowledge, a letter addressed to his wife and enclosed in this envelope, but unsealed and not fastened down, would in the ordinary course be likely to be opened by the butler, or by any other person in the employ of the mistress, or at the mistress's house, before it was delivered to her.

When the cases which were referred to are looked at it will be seen that in each case the defendant, who must be taken to have intended the natural consequences of his own act in the circumstances of the case, must on that footing have intended the publication which in fact took place. In *Delacroix* v. *Thevenot* (2), where the libel was contained in a letter and the letter opened by a clerk, the evidence was not only that the clerk was in the habit of opening letters directed to his master which were not marked private, but it was further stated that the defendant, who was acquainted with the plaintiff, was aware of the nature of the clerk's employ-

ment. There LORD ELLENBOROUGH said that there was sufficient evidence for the jury to consider whether the defendant did not intend the letter to go to the hands of a third person, which would be a publication. It must be borne in mind, in connection with a publication of this sort, that it is immaterial whether the letter is sealed or unsealed, because if a person sends a letter, although carefully sealed, say, to a merchant at his office, knowing that the merchant has a staff of clerks who in the ordinary course of business open all letters sent to the merchant's office, that would be clearly a publication if the letter were opened and perused by a clerk in that way, even although that letter were most carefully sealed. Then, again, in the other case to which reference was made (*Gomersall* v. *Davies* (4)) the question raised on appeal was whether there was evidence of the publication of the libel. What had happened was that the plaintiff was a man engaged in the business of a game and poultry salesman, and evidence was given that, in the ordinary course, letters addressed to him would be opened by his clerk or foreman and brought to him in the market, and then A. L. SMITH, L.J., dealt with it on appeal in this way: The question being whether there was evidence of publication, he said:

> "The jury, in answer to questions put to them, found that the plaintiff's business was such that to the defendant's knowledge letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment."

In the face of that finding, how can it be said that it was an accidental publication? In each of those cases, therefore, there was evidence from which publication could be established by the fact that it was published in the way that the defendant must have been presumed to have intended it. Evidence of that sort is entirely wanting in the present case. Counsel for the plaintiffs urged that a letter inclosed in a wrapper or envelope of this sort must be treated as on the same footing as a postcard or as a telegram. I am quite unable to accede to that view. No doubt with regard to each of those documents, a postcard or a telegram, it was said by A. L. SMITH, L.J., in *Sadgrove* v. *Hole* (5) ([1901] 2 K.B.D. at p. 4):

> "It is certainly my opinion that if a man writes a libel on the back of a postcard and then sends it through the post there is evidence of publication, as in the case of a telegram. The cases cited show that the two stand on the same footing";

but that is wholly different from a case where a communication is enclosed in an envelope, and cannot, without some unauthorised act, be withdrawn from the cover and perused. When I say "cannot," I mean is not, without some unauthorised act, withdrawn from the cover and perused. No doubt if the plaintiffs had been able to establish that the perusal of this communication was in the ordinary course by a person in discharge of his duty, the case would have been different; as, for instance, if he was able to show that it was withdrawn and perused by a Post Office official. In the Post Office regulations there are certain things which are prohibited from being sent through the post at all. There are other things as to which the public have a privilege of sending under a halfpenny stamp, but they are a limited class of things, and if the article, say a communication in the nature of a letter, is sent in this way, it is liable to be surcharged, and, in order to protect the Post Office, the Post Office officials have certain statutory powers. I see in the last edition of the Post Office Guide, under the inland post warrant of 1903, there is a provision that certain articles shall not be posted, or conveyed, or delivered by post, and then if they are, in breach of this regulation, tendered for transmission, transmission will be refused, or if they are detected in transit, they will be detained, and they are liable to be dealt with in such manner as the Postmaster-General may direct, and the sender is liable, in some cases, to prosecution. Although, therefore, persons in the employ of the Postmaster-General in the discharge of their duty may have to peruse and examine postal communi-

cations, and although a publication of a libel in that way would be established, there is no inference of fact or law to be drawn that, in all cases, communications of this sort are opened and read by the Post Office officials. A

In these circumstances I am of opinion that in the present case there was no evidence of publication to go to the jury, and the learned judge was right in the view that he took, and that the appeal on this point fails. That being so, it is not necessary to consider the other portion of the case. B

BRAY, J.—I am of the same opinion. The learned judge in this case withdrew the case from the jury on two grounds: First, that there was no evidence of publication by the defendant; and, secondly, that the words were not capable of being read in a defamatory sense.

I will deal with the first ground. The facts are not in dispute: This writing C was put in an envelope which was not closed or sealed: it was posted, and arrived in the ordinary course of post at the house where Mrs. Huth resided, and was opened by the butler; and the first contention of the plaintiffs was that that constituted a publication by the defendant. A publication it was, but the question was whether it was a publication by the defendant, or a publication of which he was responsible. It appears quite clearly from the butler's own evidence that he D knew, although this envelope was addressed to Miss Edith Greaves, that it was intended for his mistress, Mrs. Huth; he knew that perfectly well. Also there was nothing which would entitle him, in the ordinary course of his duty, to open that. He admitted that he did so from curiosity. There can be no doubt, in those circumstances, that the opening of that envelope, and the reading of the contents, was a wrongful act by the butler. In my opinion it is quite clear that, E in the absence of some special circumstances, the defendant cannot be responsible for a publication which was the wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated that; it was not the natural consequence of his sending that letter, or that writing, in the way in which he did. There are no such special circumstances here, and therefore, in my opinion, the publication, such as there was to the butler, was not a publication by the F defendant or a publication for which the defendant could be made responsible.

Then it was said that this matter was in an envelope and unsealed, and that, and that alone, was some evidence from which a jury would be at liberty to infer that it was in fact published, because they cannot give their verdict in favour of the plaintiffs without having evidence before them that there was a publication in fact. Now the only evidence that can be suggested is that there is a presump- G tion of fact from the fact that the letter was sent in the way in which it was sent. What is a presumption of fact? A presumption of fact arises from the high degree of probability of the existence of the fact. A familiar instance of a presumption of fact is the case of a man who is charged with larceny, and who is found in recent possession of the stolen goods. In that case there is a presumption of fact which affords evidence that the prisoner did in fact steal them, arising H from the high degree of probability, arising from the recent possession, that he did in fact steal them. Can there be such a presumption of fact here? The envelope was not like a postcard or a telegram; a distinct act of taking the contents out of the envelope was necessary. Is there any presumption of fact, is there any high degree of probability that that would occur in the course of transmission from the defendant through the post to Mrs. Huth? In my opinion certainly not. It is I said that the Postmaster-General, or those deputed by him, have the right to open an unsealed letter and read the contents, and see if they are in accordance with the Post Office regulations. I assume that. I have no doubt that it is so: but ought that to induce us to say that there is a high degree of probability that it would be so done? On the contrary, it is the barest possibility, and the barest possibility will not do. In my opinion there is no such presumption of fact, and there being no evidence which would justify the jury in saying that the defendant was responsible for the publication to the butler, the learned judge was right in

withdrawing the case, on that point, from the jury. As to the other point I do not desire to say anything, but it must not be understood, because I do not desire to say anything, that I, therefore, am dissenting in any way from the learned judge's judgment.

Appeal dismissed.

Solicitors: *Calder, Woods & Pethick*, for *Urry, Woods & Pethick*, Ventnor; *G. F. Hudson, Matthews & Co.*, for *Ragau Martin & Frend*, Tunbridge Wells.

[*Reported by* W. C. SANDFORD, Esq., *Barrister-at-Law.*]

Re MONOLITHIC BUILDING CO. TACON *v.* MONOLITHIC BUILDING CO.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Joyce, J.), February 25, 26, 1915]

[Reported [1915] 1 Ch. 643; 84 L.J.Ch. 441; 112 L.T. 619; 59 Sol. Jo. 332; 21 Mans. 380]

Company—Charge on property—Priority—Mortgage not registered within statutory period—Subsequent mortgage debenture duly registered—Notice by second mortgagee of first mortgage—Companies (Consolidation) Act, 1908, (8 *Edw.* 7, *c.* 69), *s.* 93.

An unregistered mortgage issued by a company **held** to be void under s. 93 of the Companies (Consolidation) Act, 1908 [see now s. 95 of the Companies Act, 1948], against a creditor who had a subsequent registered mortgage debenture charged on the company's property, although the creditor had notice of the unregistered mortgage.

Notes. The Companies (Consolidation) Act, 1908, s. 93, has been replaced by s. 95 of the Companies Act, 1948.

Referred to: *Re M.I.G. Trust, Ltd.*, [1933] Ch. 542.

As to the registration of charges, see 6 HALSBURY'S LAWS (3rd Edn.) 491 et seq.; and for cases see 10 DIGEST (Repl.) 810 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Le Neve* v. *Le Neve* (1747), Amb. 436; 1 Ves. Sen. 64; 3 Atk. 646; 27 E.R. 291, L.C.; 38 Digest (Repl.) 877, *898*.

(2) *Greaves* v. *Tofield* (1800), 14 Ch.D. 563; 50 L.J.Ch. 118; 43 L.T. 100; 28 W.R. 840, C.A.; 42 Digest 541, *1019*.

(3) *Edwards* v. *Edwards* (1876), 2 Ch.D. 291; 45 L.J.Ch. 391; 34 L.T. 472; 24 W.R. 713, C.A.; 7 Digest (Repl.) 111, *673*.

(4) *Davis* v. *Earl of Strathmore* (1810), 16 Ves. 419; 33 E.R. 1013; 42 Digest 760, *1860*.

(5) *Doe d. Ellis* v. *Owens* (1842), 10 M. & W. 514.

(6) *Re Toomer, Ex parte Blaiberg* (1883), 23 Ch.Dd. 254; 52 L.J.Ch. 461; 49 L.T. 16; 31 W.R. 906, C.A.; 42 Digest 670, *809*.

Also referred to in argument:

Ford v. *White* (1852), 16 Beav. 120; 51 E.R. 723; 35 Digest 454, *1951*.

Re Cardiff Workmen's Cottage Co., Ltd., [1906] 2 Ch. 627; 75 L.J.Ch. 769; 95 L.T. 669; 22 T.L.R. 799; 50 Sol. Jo. 696; 13 Mans. 382; 10 Digest (Repl.) 816, *5309*.

Appeal from a decision of ASTBURY, J., in an action brought by the plaintiff Dame C. E. Tacon against the Monolithic Building Co., Ltd., J. H. T. Jenkins, and W. Calway, claiming a declaration that a mortgage granted to her by the company on Mar. 3, 1913, had priority over a subsequent, registered mortgage debenture and a sub-mortgage thereof held by the last two defendants. The company appeared, but put in no defence and as against them judgment went in default. ASTBURY, J., held that the plaintiff was entitled to priority and the defendant J. H. T. Jenkins appealed.

J. W. Manning for the defendant.
Frank Russell, K.C., and *Lyttelton Chubb* for the plaintiff.

LORD COZENS-HARDY, M.R.—This is an appeal from a decision of ASTBURY, J., and it raises a point which has never been authoritatively decided before. It is undoubtedly of importance, but counsel have not brought to light any authority which expressly decides the question before us. It turns upon the true meaning of s. 93 of the Companies (Consolidation) Act, 1908 [now s. 95 of the Companies Act, 1948.]

The defendant company is a limited company subject to the provisions of that Act. It acquired some property in Hertfordshire, and executed a mortgage on Mar. 3, 1913, in the ordinary form for an advance of £500. That mortgage was not registered within the period required by the section. It was registered afterwards, but not registered within the statutory period. The omission to register it was not due to any fraud. There was a mistake of the advisers, who thought that a mortgage on land did not require to be registered. There was a first mortgage debenture subsequent to that, which was registered, and there was a second mortgage debenture which was also registered. The fact that Jenkins, the defendant, had notice of everything that had taken place is quite clear. I never came across a case in which notice was so clearly proved. He was the managing director of the company. He had witnessed the execution of the mortgage deed, and, I think, was the person who affixed the company's seal, so that Jenkins had the clearest possible notice of the mortgage in respect of which the plaintiff claims. I should add—and this is all I need say about it—that subsequently—namely, on Mar. 27, 1914, three days before the writ in this action was issued—an order of the court was made extending the time for registering the plaintiff's mortgage until April 17, 1914, and the order was made without prejudice to the rights of the parties prior to the time such mortgage was actually registered.

I propose to consider the language of s. 93 [now s. 95 of the Companies Act, 1948] without having my mind influenced for the moment—I had almost said without having my mind poisoned for the moment—by consideration of any authorities or other Acts dealing with this question. This was a mortgage on land executed by a company, and s. 93 (1) enacts as follows:

> "(1) Every mortgage or charge created after July 1, 1908, by a company registered in England or Ireland and being either . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable."

Jenkins was a creditor of the company in respect of his registered mortgage debenture. That is quite plain. The subsection which I have just read in effect says that, so far as any security under the property comprised in an unregistered

mortgage is concerned, it is to be void against the liquidator and any creditor of the company unless registered within the statutory period. What does that mean? I confess my inability to say anything else than this, that it means exactly what it says, that an unregistered mortgage is to be void against the creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section. It is void also against the liquidator in the event of a winding-up of the company. That is a contingency, however, which we need not consider here, and which might give rise to certain questions which have been stated and discussed in argument, but as to which I deliberately refrain from expressing any opinion. I am only dealing with this case, and only propose to deal with it, in reference to the difference of position between a registered secured creditor and a prior unregistered secured creditor.

It is argued that we ought to read this sub-section—contrary, as it seems to me, to its established construction and intent—as saying that an unregistered mortgage must be void against any creditor of the company except where he has had notice of the existence of that prior unregistered mortgage. I ask why? Notice is not material in the case of a creditor. I feel the greatest possible difficulty in saying that that doctrine can apply. I put aside altogether any question of fraud. The doctrine of the court in a case of fraud, of course, proceeds upon a different footing, and any security may be postponed if you can find fraud in its inception. But it is not fraud to take advantage of legal rights the existence of which may be assumed to be known to both parties. We are dealing here with a case where there has been the use of a common seal. Then it is said go back 170 years to *Le Neve* v. *Le Neve* (1); look at the decisions under the Middlesex Registry Act, 1708, and also, I think, certain other Acts. It was there held that there might be such an equity as would induce the court to say that an unregistered charge should not be postponed to a registered charge. In the first place, the language of that statute seems to me to be materially different. The preamble to the Act which is found in s. 1 is framed in this way:

> "Whereas by the different and secret ways of conveying lands tenements and hereditaments such as are ill disposed have it in their power to commit frauds and frequently do so by means whereof several persons (who through many years' industry in their trades and employments and by great frugality have been enabled to purchase lands or to lend moneys on land security) have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances and not only themselves but their whole families thereby utterly ruined."

And it then provided that deeds not registered should be adjudged fraudulent or void against any subsequent purchaser for valuable consideration. In the great case of *Le Neve* v. *Le Neve* (1), where there was a solicitor who had been concocting a scheme by which the children of a first marriage should be defrauded and deprived of their security by means of a second marriage settlement on the second marriage, LORD HARDWICKE held that notice to that person was notice to the second wife, and that in some respects she was affected by his fraudulent conduct. But I do not think that it would be correct to say that LORD HARDWICKE's decision went simply upon the actual fraud in the concoction and carrying through of the arrangement.

That decision, and the decisions which have followed it, have, certainly for the last half century—I think for longer—been strongly dissented from by the courts, and have been followed with great reluctance by judge after judge. But they felt themselves not at liberty—in dealing with the Middlesex Registry Act on which this decision had been given, and on the interpretation of which many decisions had doubtless depended—to override LORD HARDWICKE's decision, and they have in many cases followed it. I fail to see the reason why we should apply that principle to this subsection of the modern Act of Parliament—namely,

s. 93 (1) of the Act of 1908 [now s. 95 of the Companies Act, 1948] which I have previously read.

Then it is said that the Court of Appeal in *Greaves* v. *Tofield* (2), in the year 1880, really adopted the same principle. It is necessary to look at that case. It turned on the construction of the Judgments Act, 1855. There the section in question was s. 12, which enacts as follows:

> "And whereas by reason of the repeal in the last session of Parliament of the Act of the fifty-third year of King George the Third, chapter one hundred and forty-one, requiring the enrolment of life annuities or rentcharges, purchasers are no longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: Be it therefore enacted by the authority aforesaid as follows: Any annuity or rent-charge granted after the passing of this Act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode"—and other particulars—"shall be left with the senior master of the Court of Common Pleas. . . ."

It was held by the Court of Appeal, consisting of JAMES, MELLISH, and BAGGALLAY, L.JJ., that the words "lands intended to be affected thereby" did not apply where there was notice of an unregistered deed. But I personally do not feel much difficulty about that case for this reason: If you look at that section you see that it was the last section of an Act comprising several sections of which it was expressly said certain consequences shall follow notwithstanding any notice. S. 4 enacts that:

> "No judgment . . . shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding."

If you go to s. 5, which deals with protections against judgments not registered, it is again provided that

> "so that notice of any judgment, decree, order, or rule, not duly re-registered, shall not avail against purchasers, mortgagees, or creditors."

S. 10 says that no order of the Court of Bankruptcy shall affect lands unless it is registered,

> "any notice of any such order to any such purchaser, mortgagee, or any creditor in anywise notwithstanding."

Then you come to s. 12 in which there is a remarkable omission of any reference to the absence of notice. In those circumstances the court held, differing from SIR GEORGE JESSEL in the court below, that there was no contradiction in that case under s. 12, and that the fair meaning of that section was that the old equitable doctrine which has been applied in these matters for many years was deliberately not intended to extend to a case in which those words were not put in which were correctly inserted in ss. 3, 4 and 5. Whether that was or was not sufficient to justify the decision, I cannot say; it certainly was a point in the case which distinguishes it from the present case.

But is that the only case we ought to consider? I think not. There is another decision of the Court of Appeal in *Edwards* v. *Edwards* (3) under the Bills of Sale Act, 1882, which is a modern Act, and it was there argued that a bill of sale not registered ought to be good as against a judgment creditor who had notice of its

existence, and *Le Neve* v. *Le Neve* (1) was cited. James, L.J., before referring to the language of the Bills of Sale Act, said (2 Ch.D. at p. 295):

"I think it would be dangerous to engraft an equitable exception upon a modern Act of Parliament. The Act provides that a bill of sale shall be registered within twenty-one days, 'otherwise such bill of sale shall as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity authorising the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale . . .'"

A little later on he says (ibid. at pp. 295, 296):

"The mortgagee says to the execution creditor, 'You are not prejudiced, for you knew of my security.' The execution creditor replies, 'I knew that you had a security, but you knew the law as well as I. You knew that if I issued execution your security would be of no avail as to chattels of which you had not taken possession. I knew that my remedy against those chattels was liable to be defeated by your taking possession before I seized them in execution. You knew that your security was liable to be defeated by my taking them in execution before you took possession.' Both parties stood on their legal rights—neither of them was misleading the other."

It is not consistent with the policy of the legislature to import fine equitable distinctions into these cases, and I am therefore of opinion that the argument founded on the knowledge of the judgment creditor cannot prevail. Mellish, L.J.'s judgment is, if possible, still more in point. He says (ibid. at p. 297):

"Then it is urged that although this instrument, which was a bill of sale within the Act, was not registered, it is good against the execution creditor, because he had notice of it when his debt was contracted. Notice he clearly had, but does that take the case out of the Act? I am of opinion that at law it clearly would not be held to do so."

Then later on he says (ibid.):

"Then is a court of equity to act differently? I agree with the Lord Justice James that we ought not to put such constructions on modern Acts of Parliament. If the legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a court of equity say that in certain circumstances it shall be valid? The courts of equity have given relief on equitable grounds from provisions in old Acts of Parliament [obviously referring to the Registry Acts] but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines."

Can any distinction be drawn because it is void to all intents and purposes? If a deed is said to be void against the first and second incumbrancers, what is the use of saying void to all intents and purposes? Of course the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going concern. It is not void to all intents and purposes, but it is void as between the two incumbrancers. It is rather strange, but *Edwards* v. *Edwards* (3) was not cited in *Greaves* v. *Tofield* (2). I have difficulty in distinguishing the principle which guided the court in those two cases, unless the distinction is based upon those two sections to which I have referred. As between those two authorities I certainly prefer *Edwards* v. *Edwards* (3), and I think that the principle there laid down of the old equitable doctrine of *Le Neve* v. *Le Neve* (1) and subsequent cases which have followed it, ought not to be applied or extended to modern Acts of Parliament. For those reasons I think that the

decision of the learned judge in the court below was wrong, and that this appeal ought to be allowed.

PHILLIMORE, L.J.—I am of the same opinion. No case was made of fraud on the part of the defendants, and we need not consider and cannot consider in this case whether or not the plaintiff has any remedy against Jenkins for negligence or misconduct in his independent office of managing director of this company. We have to construe s. 93 of the statute [now s. 95 of the Companies Act, 1948]. It makes void a security, not the debt, not the cause of action, not the simple contract debt; but it makes void the security, not against everybody, not against the company grantor, but against the liquidator and against any creditor. It leaves the security to stand against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company.

There are three ways in which documents, or three degrees to which instruments, may be void. They may be void together, like a bill of sale under £30 under the Bills of Sale Act, 1882; they may be void as to the security and good as to the obligation; and they may be void against certain parties only. But in each of those cases they are quoad a particular transaction void, and the matter is not made stronger by saying "to all intents or purposes" or any phrase of that kind. It is suggested here that the defendant Jenkins' knowledge of the mortgage precludes him from insisting upon his rights as a registered holder of debentures. I answer in the terms of *Edwards* v. *Edwards* (3), which has been already quoted by the Master of the Rolls, but which I must just briefly read because I am not going to put any other answer in my own language: "The mortgagee says to the execution creditor, 'You are not prejudiced, for you knew of my security.' The execution creditor replies, 'I knew that you had a security, but you knew the law as well as I.'" I omit the next words, because they have already been cited. "Both parties stood on their legal rights—neither of them was misleading the other." That is this case upon the facts as found.

The difficulty in our way is, no doubt, the case of *Greaves* v. *Tofield* (2). In that case they had three explanations given for it, any one of which will let it stand with the principle laid down in *Edwards* v. *Edwards* (3). *Greaves* v. *Tofield* (2) was decided on the ground that there was exactly the same phrase in the Act in question (Judgments Act, 1855) as in the Act of 4 & 5 William and Mary, c. 20. When I say exactly, I mean for all material purposes. "Shall not affect any lands or tenements" are the words of the Judgments Act, 1855. "No judgment not docketed shall affect any land or tenements" says s. 3 of the Act of 4 & 5 William and Mary, c. 20, upon which the decision in *Davis* v. *Earl of Strathmore* (4) was given, the case which has been followed ever since. That is the first observation to make. Secondly, the mischief in each case is recited in the same way, as also in the Middlesex Registry Act, 1708. It is the mischief that the second incumbrancer or purchaser will be deceived by absence of knowledge of the first, a mischief which cannot ensue if he in fact knows. I omit the subtleties of constructive notice for this purpose. It cannot arise if he in fact knows. The third point is what the Master of the Rolls has already pointed out, that when the legislature has intended in that Act that knowledge or notice shall prevent a subsequent purchaser or incumbrancer from relying on non-registration, the legislature has said so in three other sections, omitting it in this. Therefore, on this ground, *Greaves* v. *Tofield* (2) may well stand as a decision—and, of course, we cannot overrule it—upon the particular Act of Parliament there before the court without being in any way in conflict with the broader language of *Edwards* v. *Edwards* (3).

What principle does the plaintiff in the present case contend for? There are only two ways in which this matter can be put. The first is, the object of the registration is to prevent people advancing money or purchasing in the dark. It is in order that people who do not know shall not be affected by a prior assurance.

If they do know, the mischief disappears, and therefore, although there is no such phrase in the Act, it does apply to such cases. The other is quite a different principle. The other makes the subsequent incumbrancer trustee for the first incumbrancer, and that is really the view in *Le Neve* v. *Le Neve* (1) which LORD HARDWICKE puts upon dolus malus and what he calls (quoting from the civil law) "machinationem ad circumveniendum," and in the particular case—and I do not say his authority would go further, or that it has been quoted as going further—there was that very thing. If B. knows of an incumbrance on Black Acre already effected in favour of A., he may take a second incumbrance without intending to destroy A.'s incumbrance, when he takes it thinking that there will be sufficient security for both, and when he finds that there will not be sufficient for both he may effect registration of his incumbrance knowing that the other has not been registered, with a view to getting as much advantage as he can. There is no fraud in that. He is standing on his legal rights. But if A. has a conveyance of the whole property, and B. takes a second conveyance of the whole property knowing that A.'s is not registered, and promptly registers, then his endeavour from the beginning has been to destroy that which he knows was an honest transaction though not protected by law. It is the same, of course, if, knowing that A. has a conveyance of the whole property, he takes a mortgage which partially affects A, or if, A. having a mortgage, B. takes a conveyance which will defeat A.'s mortgage, and that is what happened in *Le Neve* v. *Le Neve* (1). It was not that the registration was effected in order to gain an advantage. It was that the whole inception of the transaction was to create an assurance which would defeat what the party intending to benefit by it knew was really an honest transaction. In that case, I assume that the manner in which the matter would be worked out would be by making the second person trustee of his advantages in favour of the first, at any rate as to third persons coming later, but, if that is not the case, then all that can be said is that the second person is postponed to the first because he is taken to have known of the first all along. The way of working out an administration of the assets if there was a liquidation, and if there were other creditors coming in, would be, it seems to me, difficult in both those cases, and extremely difficult in the case where, as in this case, there was no fraud at all.

On all these grounds it seems to me that the best thing is to go to the plain words of the statute. This document as against any creditor is void. The defendant here is a creditor, and therefore as against him it is as if it did not exist. Let us not import any consideration which may be applicable, or which it might be desirable to make applicable, where there is dolus malus, but which in any other case certainly neither are applicable, nor should be made applicable. Therefore I agree that this appeal should be allowed.

JOYCE, J.—This appeal, it appears to me, raises an important general question, and that is whether a creditor, in this case a secured creditor, who at the time of his debt being contracted, or taking his security, had notice of a prior security on the company's property unregistered, is thereby precluded from setting up s. 93 of the Companies (Consolidation) Act, 1908 [now s. 95 of the Companies Act, 1948] against such prior security.

In my opinion, it would be most unfortunate, and lead to endless difficulty and confusion, if the decision of the court below in this case were to stand. We have to consider the plain, or certainly tolerably plain, words of a recent Act of Parliament. There is a saying of PARKE, B., in *Doe d. Ellis* v. *Owens* (5), with reference to the construction of Acts of Parliament, which I should like to cite (10 M. & W. at 521):

> "It is our duty to construe the statute according to the grammatical meaning of the words, unless some absurdity would ensue from so construing it, or an uniform series of decision had already established a particular construction.

I do not think any of the cases cited of sufficient weight to preclude us from putting our own construction on the words of the statute."

There are also some observations of SIR GEORGE JESSEL very similar to what we constantly hear about the construction of wills in *Re Toomer, Ex parte Blaiberg* (6), which was a bill of sale case. He says (23 Ch.D. at p. 257):

"Whatever view we take of this case the result will be a singular one, and one which was probably not contemplated by the legislature. I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act. Any other course would be apt to lead us astray. If the later Act can clearly have only one meaning, we ought to give effect to it accordingly. If instead of doing that we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former Act, we might in that way go back to half a dozen older Acts, and, after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act."

This is a modern Act passed only the other day. I will not re-read what the Master of the Rolls has read from MELLISH, L.J.'s judgment, which has never been questioned or criticised in any respect, but those observations in his judgment are to my mind very much in point in this case. I think that before getting lost in any wilderness of authorities, or a multitude of exceptions, we ought to look at the Act itself, and I think the Act is perfectly plain. The Act itself does not say that any charge shall be void altogether, but it specifies in the most precise and complete manner—it takes ten lines to do it—it prescribes in the most precise and particular manner the extent to which the other charges are to be avoided.

Upon that specification the respondent seeks to set up a qualification, or rather to insert an exception among the creditors. He wants to insert an exception from the creditors there mentioned "with the exception of creditors who have notice of the prior charge." Having regard to that contention, it is not unimportant—in fact it is, indeed, important—to remember that the statute avoids the charge as against the liquidator. Now, he of all persons is the person who has notice. The company—and he represents the company—has notice of the charge. If the charge unregistered is to be void as against him, I myself have great difficulty in seeing what would be the sense of making it not void as against some other creditors. And I should also have great difficulty in seeing how the thing works out if we assented to the construction sought to be placed on this by the respondents. I myself have great difficulty in seeing how it would work in a winding-up. Practically, in my opinion, it would be unworkable, and for my own part I could not sanction the engrafting on these plain words of the Act a very ingenious limitation, which in the result, in my opinion, would render this Act unworkable and absurd. I think this section of the Act means exactly what it says, and that it is not subject to any such exception as has been suggested by the respondent in this case.

Appeal allowed.

Solicitors: *C. B. Cottam*; *Farrar, Porter & Co.*, for *Bertram R. Yorke*, Eye, Suffolk.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

GOLDSOLL *v.* GOLDMAN

[Court of Appeal (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), December 17, 1914]

[Reported [1915] 1 Ch. 292; 84 L.J.Ch. 228; 112 L.T. 494; 59 Sol. Jo. 188]

Contract—Illegality—Public policy—Restraint of trade—Unreasonable area of restraint—Covenant not to be interested directly or indirectly in business of "real or imitation jewellery"—Severability of covenant—Enforcement as limited in two respects.

The defendant agreed with the plaintiffs, who were dealers in mainly imitation jewellery, that he would not for a period of two years directly or indirectly be concerned or interested in or render services to the business of a vendor or dealer in real or imitation jewellery, "in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia or Spain, or within twenty-five miles of Potsdamer-strasse, Berlin or St. Stefan's Kirche, Vienna."

Held: (i) the area of restraint was unreasonable and should be limited to the United Kingdom and the Isle of Man; (ii) the covenant should be limited to what was necessary for the protection of the plaintiff's business and so should be limited to imitation jewellery only; and (iii) the doctrine of severability applied, and the covenant as limited in these two respects was enforceable against the defendant.

Order of Neville, J., [1914] 2 Ch. 603, varied.

Notes. Considered: *Express Dairy Co., Ltd.* v. *Jackson*, [1929] All E.R.Rep. 327. Referred to: *Herbert Morris, Ltd.* v. *Saxelby*, [1915] 2 Ch. 57; *Attwood* v. *Lamont*, [1920] All E.R.Rep. 55; *Putsman* v. *Taylor*, [1927] All E.R.Rep. 356; *Morris, Ltd.* v. *Gilman, Ltd.* (1943), 60 R.P.C. 20.

As to restraint of trade by agreement in general, see 32 Halsbury's Laws (2nd Edn.) 397 et seq.; and for cases see 43 Digest 21 et seq. As to severability of a covenant in restraint of trade, see 32 Halsbury's Laws (2nd Edn.) 427–430; and for cases see 43 Digest 46 et seq.

Case referred to:

(1) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143*.

Also referred to in argument:

Price v. *Green* (1847), 16 M. & W. 346; 16 L.J.Ex. 108; 153 E.R. 1222; sub nom. *Green* v. *Price*, 9 L.T.O.S. 296, Ex. Ch.; 43 Digest 47, *486*.

Haynes v. *Doman*, [1899] 2 Ch. 13; 68 L.J.Ch. 419; 80 L.T. 569; 15 T.L.R. 354; 43 Sol. Jo. 553, C.A.; 43 Digest 24, *158*.

Appeal by the defendant from an order of Neville, J.

The facts are set out in the headnote and the judgments.

Rigby Swift, K.C., and *Lincoln Reed* for the defendant.

Jenkins, K.C., and *Vernon* for the plaintiffs.

LORD COZENS-HARDY, M.R.—This is an appeal from Neville, J., and the question is whether a covenant entered into between Goldsoll and Goldman is unreasonable as it stands; and, if it is, whether it is severable, so that it may be good in part and bad in part.

The plaintiffs are carrying on the business of dealers in imitation jewellery. They do not carry on business in real jewellery, and I say this, although some of

the articles sold are of real gold in which Teecla pearls or other stones are set, while occasionally the imitation pearls or stones have a setting of real diamonds. Substantially, the business is in imitation jewellery. In 1912 Goldman was carrying on a business in competition with Goldsoll, and the agreement in question was entered into with the object of putting an end to the competition. There was ample consideration for the agreement, and by the clause of the deed which we have to consider Goldman covenanted with Goldsoll that he would not for a period of ten years (which was reduced by a subsequent agreement to two years)

> "either solely or jointly with or as agent or employee for any person or company, directly or indirectly carry on or be engaged, concerned, or interested in or render services (gratuitously or otherwise) to the businesss of a vendor of or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man, or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefan's Kirche, Vienna."

Notwithstanding this covenant, Goldman has, according to the finding of the learned judge in the court below, been assisting and rendering services to a co-defendant who is carrying on a business identical with the plaintiffs' in the same street. It is perfectly clear that there has been a breach of the covenant. But that is not conclusive of the case, for what we have to consider is whether the covenant he has infringed can be treated as good, either in whole or in part, and can be enforced.

On the question of the space covered by the covenant, NEVILLE, J., has held, and I entirely agree with him, that it is unreasonably large, in so far as it is intended to cover not merely the United Kingdom and the Isle of Man, but also the foreign countries mentioned in the covenant. He has also held—and his decision is consistent with a long series of authorities—that the covenant can be severed as regards the space covered by it. It is clear that part of the covenant dealing with the area is reasonable, and the learned judge in the court below has limited the injunction which he has granted to "the county of London, England, Scotland, Ireland, and Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man." That such a covenant is severable in this respect has been decided by authorities nearly two hundred years old.

No objection is taken, or could be taken, with regard to the limit of time. But the further difficulty has been raised that while the business of the plaintiffs was, as I have said, a business in imitation jewellery, the covenant is against carrying on or being engaged, concerned, or interested in "the business of a vendor of or dealer in real or imitation jewellery." It is admitted that the business of a dealer in real jewellery is not the same as that of a dealer in imitation jewellery. There are many shopkeepers who would be insulted if they were asked whether they sold imitation jewellery. That being so, it is difficult to support the whole of this provision, for the covenant must be limited to what is reasonably necessary for the protection of the covenantee's business.

Then comes the question whether the doctrine of severability is applicable to this part of the covenant. In my opinion it is, and the covenant is good in so far as it purports to restrain the covenantor from carrying on business in imitation jewellery.

The result is that, in my opinion, the order of NEVILLE, J., is right, with the exception that the words "real or" ought to be omitted from the injunction granted by him. The appeal fails on the matter as to which the plaintiffs alone complained, and it must be dismissed.

KENNEDY, L.J.—I entirely agree. The facts are not in dispute between the parties so far as they affect the particular question that we have to consider—namely, the propriety of the injunction granted by NEVILLE, J. It is not dis-

puted that there was evidence to justify NEVILLE, J., in holding that the defendant is a person who has, in breach of his covenant, been assisting or working for a person who is a vendor of or dealer in imitation jewellery. In so far, therefore, as dealing in imitation jewellery is concerned, it is clear that the injunction granted would be right, subject only to the question raised as to the unreasonableness of the covenant as being too large a restraint of trade. As the Master of the Rolls has pointed out, it is no use now to consider whether, when a person chooses to take from another a covenant in restraint of trade larger than is necessary for the protection of his business, the contract may not be enforced against the covenantor in respect of the part of the restraint required for the protection of the covenantee. The doctrine of severability has been admitted by the courts, and, while I am far from saying that I do not see the force of the great objections brought forward by LORD MOULTON in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1), and by NEVILLE, J., in the present case, it is no use going into that because it has been held in authorities binding on this court that, if words are used in a covenant such as admit of severability by mentioning different areas, we must sever the covenant so as to limit it to an area which is not too large. Moreover, if ever there was a case of severability, we have it in the present case, for countries are specified which may be treated as representing the United Kingdom as distinguished from foreign countries. There is, therefore, no sound objection to holding, as NEVILLE, J., has done, that severed in that way there is a reasonable part to the contract which ought to be enforced in favour of the plaintiffs.

It remains to deal with the nature of the business in respect of which the restrictive covenant has been taken. It relates to "the business of a vendor of or dealer in real or imitation jewellery." It is not really disputed that the essential and sole business which the covenant was intended to protect was that of a dealer in imitation jewellery in the sense that the articles sold were never real in their entire composition; and that the central portion by which they would naturally be described—as, for instance, a ruby ring or a pearl necklace—was not real. It is against dealing in goods of that kind that the plaintiffs ought to be protected; and as we can here, by reason of the language, sever "vendor of or dealer in real or imitation jewellery," we ought to do so, and limit the injunction to dealing in imitation jewellery, striking out the words "real or." This limitation of the injunction would not protect the defendant if he were to go into a business part imitation and part real, but he would still come within the words of the injunction. I agree, therefore, that the order of NEVILLE, J., should be modified as the Master of the Rolls has already said, and I agree that this modification should not affect the way in which the costs of the appeal are to be borne. The defendant Goldman has been doing the very thing which would be a breach of the covenant if the words "real or" had been omitted. He has no merits, and we are able to do that which prevents even the suggestion of any unreasonable restriction.

SWINFEN EADY, L.J.—This appeal raises two points. It is said that the covenant is invalid, owing to the area to which it applies being too wide; and the nature of the business to which it relates also being too wide. This is not a case between master and servant, but between vendor and purchaser. The plaintiffs purchased the defendant's business in order to prevent competition by the defendant. The covenant provided that the covenantor was not to carry on business in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man, or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefan's Kirche, Vienna. NEVILLE, J., has held it to be valid as regards the United Kingdom, and the defendant contends that this is wrong. In my judgment the covenant is clearly severable as regards area, and the provision against trading in the United Kingdom is not wider than is reasonable for the protection of the covenantee. The business is carried on mainly by

advertisement in illustrated papers in the United Kingdom, and business is obtained from Scotland and other places as well as from England itself. As much as £6,000 a year is spent on advertising. I am of opinion that the restriction to the United Kingdom is not excessive as regards area, and that, as the covenant is severable, it is valid to that extent.

There is a further point, however, with regard to the nature of the business. The agreement in question states that both the parties to it were carrying on business in real and imitation jewellery, and the business has been described as one in which the imitation jewels used may be set with small real diamonds and are usually set in gold or platinum. That is what the parties meant by the business in real and imitation jewellery. But in the operative part of the deed the covenant is not expressed in the same language. It is a covenant not to

> "carry on, or be engaged, concerned, interested in, or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real or imitation jewellery . . ."

And it is argued that this might extend to prevent dealing in real jewellery alone. When this was pointed out, the plaintiffs at once expressed their willingness to have the injunction modified so as to apply only to dealing in imitation jewellery. The words "real or" will therefore be struck out of the injunction granted by NEVILLE, J. The injunction so limited will extend to a dealing in imitation jewellery in the sense in which the words have been used in court, and will include a dealing in jewellery which is partly real and partly imitation. Subject to this variation in the order, I think the appeal fails, and must be dismissed.

Order varied.

Solicitors: *W. B. Glasier*; *J. R. Cardew Smith.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

PUDDEPHATT *v.* LEITH

[CHANCERY DIVISION (Sargant, J.), December 17, 1915]

[Reported [1916] 1 Ch. 200; 85 L.J.Ch. 185; 114 L.T. 454; 32 T.L.R. 228; 60 Sol. Jo. 210]

Injunction—Mandatory injunction—Restraint of breach by mortgagee of shares of agreement to vote in accordance with wishes of mortgagor.

The defendant made an advance to the plaintiff upon the security of some shares which were transferred into his name. The defendant agreed to "vote in all cases, when a vote is necessary in respect of these shares, as you wish me to do." Subsequently, the defendant voted at a company meeting against the wishes of the plaintiff and indicated his intention of doing so again at the next company meeting.

Held: (i) the undertaking to vote in accordance with the plaintiff's wishes was a binding collateral agreement; (ii) as there was one definite thing to be done about which there could be no doubt the court would grant a mandatory injunction as well as a prohibitive injunction to compel the defendant to vote as required by the plaintiff at future company meetings.

Herman Loog v. *Bean* (1) (1884), 26 Ch.D. 306, and *Wolverhampton Corpn.* v. *Emmons* (2), [1901] 1 K.B. 515, applied.

Notes. Referred to: *I.R.Comrs.* v. *Bibby & Sons, Ltd.*, [1945] 1 All E.R. 667; *I.R. Comrs.* v. *Silverts, Ltd.* [1950] 2 All E.R. 271.

As to voting at company meetings in general, see 6 HALSBURY'S LAWS (3rd Edn.) 338-340; and for cases see 9 DIGEST (Repl.) 608 et seq. As to mandatory injunctions in general, see 21 HALSBURY'S LAWS (3rd Edn.) 361 et seq; and for cases see 28 DIGEST (Repl.) 772 et seq.

Cases referred to:

(1) *Hermann Loog* v. *Bean* (1884), 26 Ch.D. 306; 53 L.J.Ch. 1128; 51 L.T. 442; 48 J.P. 708; 32 W.R. 994, C.A.; 28 Digest (Repl.) 775, *272*.

(2) *Wolverhampton Corpn.* v. *Emmons*, [1901] 1 K.B. 515; 70 L.J.K.B. 429; 84 L.T. 407; 49 W.R. 553; 17 T.L.R. 234; 45 Sol. Jo. 256, C.A.; 7 Digest (Repl.) 416, *306*.

Motion with witnesses which by consent was treated as the trial of the action. The facts are set out in the headnote and in the judgment.

Romer, K.C., and *Beebee* for the plaintiff.

H. E. Wright for the defendant.

SARGANT, J.—Early in the year 1913 the defendant agreed to advance money to the plaintiff on the security of 500 fully paid shares in a limited company of which she was the holder. The agreement for the advance was dated Feb. 14, 1913, but the defendant had previously, on Jan. 20, 1913, written to the plaintiff the following letter:

> "I should have mentioned to you to-day that your voting rights in virtue of the shares held in mortgage by me during the period of the loan will be untouched. Though the shares will be in my name and my voice may give the votes, I shall give no such vote without first consulting you. I shall vote in all cases, when a vote is necessary in respect of these shares, as you wish me to do. This proviso will not be mentioned in the agreement, but you can preserve this note if you like."

The shares were transferred into the name of the defendant. Disputes have now arisen in regard to the management of the affairs of the company, and at a general meeting the defendant has voted in respect of the shares against the wishes of the plaintiff. As he has indicated his intention so to vote at another approaching general meeting of the company, the plaintiff commenced this action claiming an injunction restraining the defendant from voting in respect of the mortgaged shares otherwise than as directed by her, and an injunction ordering him to vote in respect of the shares at any poll to be taken at the approaching general meeting or any adjournment of it against a certain resolution and in favour of certain other resolutions. This was a motion to enforce the injunction and by consent was treated as the trial of the action.

It is clear that the undertaking to vote in accordance with the plaintiff's wishes contained in the letter of Jan. 20, 1913, constituted a collateral agreement binding on the defendant. In my opinion, therefore, the right of the plaintiff is clear, and the only remaining question is whether she is entitled to a mandatory injunction to enforce her right. It is not disputed that she is entitled to a prohibitive injunction, and in my opinion she is also entitled to a mandatory injunction. Primâ facie this court is bound, as COTTON, L.J., said in *Herman Loog* v. *Bean* (1) to give effect to a clear right by way of a mandatory injunction. There are, no doubt, certain exceptions to this rule, as in the case of a contract of service, because in such cases it is impossible for the court to make its order effective; but in *Wolverhampton Corpn.* v. *Emmons* (2) a mandatory injunction was granted to compel the defendants to build in accordance with certain plans; and in the present case, inasmuch as there is only one definite thing to be done about which

there can be no possible doubt, I am of opinion that I ought to grant not only the prohibitive but also the mandatory injunction claimed by the plaintiff, and I make an order accordingly.

Solicitors: *Hatchett Jones & Co.; Field, Roscoe & Co.*, for *Pinsent & Co.*, Birmingham.

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

R. *v.* SMITH

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Darling and Lush, JJ.), July 29, 1915]

[Reported 84 L.J.K.B. 2153; 114 L.T. 239; 80 J.P. 31; 31 T.L.R. 617; 59 Sol. Jo. 704; 25 Cox, C.C. 271; 11 Cr. App. Rep. 229]

Criminal Law—Evidence—Similar acts subsequent to indicted offence—Admissibility.

Criminal Law—Evidence—Privilege—Consultation between accused and solicitor—Information sought showing client whether commission of crime desirable.

Criminal Law—Trial—Summing-up—Theory put forward by judge as to how deceased died not suggested by either prosecution or defence.

The appellant was indicted for the murder of M. who had been discovered dead in her bath after having gone through a ceremony of marriage with him. At the trial evidence was given that subsequently to the death of M. two other women had died in their baths in similar circumstances after having gone through marriage ceremonies with the appellant. Evidence was also given of a consultation between the appellant and a solicitor concerning, inter alia, the effect in law of a voluntary settlement made by M. and whether the trustees could buy an annuity without M.'s permission. The trial judge in the course of his summing-up to the jury put forward a new theory as to how the deceased was drowned which had not been previously suggested by either the prosecution or the defence.

Held: (i) as there was primâ facie evidence that the appellant had committed the act charged, evidence of similar acts was admissible, including evidence of the circumstances relating to the deaths of the two women; (ii) evidence was rightly admitted of the consultation between the appellant and a solicitor, as such evidence was admissible when an accused person asked his solicitor for information which would show him how he could commit the offence or whether it was necessary or desirable to commit it: *R.* v. *Cox and Railton* (1) (1884), 14 Q.B.D. 153, applied; (iii) it would have been better if the judge had not put forward a new theory, but he was right in telling the jury that they must come to their own conclusions on that theory.

Notes. Considered: *R.* v. *Harrison-Owen*, [1951] 2 All E.R. 726; *Harris* v. *D.P.P.*, [1952] 1 All E.R. 1044; *R.* v. *Dawson*, [1960] 1 All E.R. 558. Referred to: *Godman* v. *Times Publishing Co.*, [1926] 2 K.B. 273.

As to evidence of similar facts, see 15 HALSBURY'S LAWS (3rd Edn.) 291-293; and for cases see 22 DIGEST (Repl.) 66 et seq. As to privilege between client and legal adviser, see 15 HALSBURY'S LAWS (3rd Edn.) 421 and ibid., Vol. 10, pp. 479-480, and ibid., vol. 12, p. 39 et seq.; and for cases see 22 DIGEST (Repl.) 399 et seq.

Cases referred to:

(1) *R.* v. *Cox and Railton* (1884), 14 Q.B.D. 153; 54 L.J.M.C. 41; 52 L.T. 25; 49 J.P. 374; 33 W.R. 396; 1 T.L.R. 181; 15 Cox, C.C. 611, C.C.R.; 14 Digest (Repl.) 491, *4749*.

(2) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

Also referred to in argument:

R. v. *Ball*, *R.* v. *Ball*, [1911] A.C. 47; 75 J.P. 180; sub nom. *D.P.P.* v. *Ball* (*No. 2*), 80 L.J.K.B. 691; 103 L.T. 738; 55 Sol. Jo. 139; 22 Cox, C.C. 366; 6 Cr. App. Rep. 31, H.L.; 14 Digest (Repl.) 426, *4138*.

R. v. *Boyle and Merchant*, post; [1914] 3 K.B. 339; 83 L.J.K.B. 1801; 111 L.T. 638; 24 Cox, C.C. 406; 10 Cr. App. Rep. 180; sub nom. *R.* v. *Boyle*, *R.* v. *Merchant*, 78 J.P. 390; 30 T.L.R. 521; 58 Sol. Jo. 673, C.C.A.; 14 Digest (Repl.) 437, *4237*.

Perkins v. *Jeffery*, ante, p. 172; [1915] 2 K.B. 702; 84 L.J.K.B. 1554; 113 L.T. 456; 79 J.P. 425; 31 T.L.R. 444; 25 Cox, C.C. 59, D.C.; 14 Digest (Repl.) 423, *4116*.

R. v. *Christie*, ante, p. 63; [1914] A.C. 545; sub nom. *D.P.P.* v. *Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 30 T.L.R. 471; 58 Sol. Jo. 515; 24 Cox, C.C. 249; 10 Cr. App. Rep. 141, H.L.; 14 Digest (Repl.) 405, *3962*.

R. v. *Baird* (1915), 84 L.J.K.B. 1785; 113 L.T. 608; 25 Cox, C.C. 86; 11 Cr. App. Rep. 186, C.C.A.; 14 Digest (Repl.) 422, *4111*.

Bullivant v. *A.-G. for Victoria*, [1901] A.C. 196; 70 L.J.K.B. 645; 84 L.T. 737; 50 W.R. 1; 17 T.L.R. 457; 45 Sol. Jo. 483, H.L.; 18 Digest (Repl.) 116, *988*.

Appeal against a conviction for murder before SCRUTTON, J., at the Central Criminal Court. The facts are set out in the headnote.

Marshall Hall, *K.C.*, *Montague Shearman* and *H. Grattan Bushe* for the appellant.

A. H. Bodkin, *Travers Humphreys* and *Cecil Whiteley* for the Crown.

The judgment of the court was delivered by

LORD READING, C.J.—The appellant was convicted of the murder of Bessie Munday. His appeal to this court is based on points of law relating to the admission of evidence and to the summing-up of the judge at the trial. On the charge of murder preferred against the appellant, evidence was admitted showing that he murdered two other women at a later date. The first question raised by the appeal is whether the judge acted rightly in admitting evidence of the deaths of the two other women, Alice Burnham and Margaret Lofty.

The principles of law governing the admission of evidence of this nature have been often under the consideration of this court and depend chiefly on the statement of the law in *Makin* v. *A.-G. for New South Wales* (2), where LORD HERSCHELL says ([1894] A.C. at p. 65):

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in his indictment were designed or

accidental, or to rebut a defence which would otherwise be open to the accused."

In the present case the prosecution tendered evidence relating to the other two women, and it was admitted by the judge as tending to show that the act charged was committed with design. It is sufficient to say that it is not disputed, and cannot be disputed, that if as a matter of law there was primâ facie evidence that the appellant committed the act charged, evidence of similar acts become admissible. We have come to the conclusion that undoubtedly there was as a matter of law primâ facie evidence that the appellant committed the act charged. The point, therefore, taken by the defence under this head fails.

The second point taken is that even assuming that evidence of the other two women was admissible, the prosecution should not have been allowed to give evidence beyond the fact that the two women were found dead in their baths. Obviously for the reasons given in dealing with the first point, it would not have been of any assistance to cut short the evidence in this way. We think that the prosecution were entitled to give, and the judge rightly admitted, evidence of the circumstances relating to the deaths of the two women.

Another point raised by the defence is that evidence was given and admitted of communications between a solicitor and his client which were privileged. We think that the evidence was rightly admitted in accordance with the principles laid down in *R.* v. *Cox and Railton* (1), which has been cited before us. The principle of law is well known that where communications are made by a prisoner to his solicitor, evidence of such communication is admissible when, as in the present case, the prisoner asked his solicitor for information which would show him how he could commit the offence, or whether it was necessary or desirable to commit it. The defence have made observations with reference to questions which were asked by the two doctors in the case. Looking at the questions it is obvious that they were asked on the assumption that certain facts were true, and the doctors were asked to exercise their skill and knowledge with regard to assumed facts.

It is also contended that the judge in summing up the case to the jury put forward a new theory relating to the mode of killing the woman, as to which it is said no suggestion had been made during the trial. While the case was being heard, suggestions as to how death had occurred were put forward by both the prosecution and the defence. The judge told the jury that they need not necessarily have regard to the exact way in which the deceased woman was killed if in fact they were satisfied that the accused killed her. It is not disputed that the woman's death was caused by drowning, and it was not necessary to prove the exact method so long as the jury were satisfied that the accused caused the death by drowning. It would, we think, have been better if the judge had not put forward a new theory, but we think he was right in telling the jury that they must come to their own conclusion as to a suggestion which he made in addition to a number of others. The court is of opinion that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *W. P. Davies*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

CHANNEL COLLIERIES TRUST, LTD. *v.* DOVER, ST. MARGARET'S AND MARTIN MILL LIGHT RAIL. CO.

COURT OF APPEAL (Lord Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.JJ.), July 8, 9, 1914]

[Reported [1914] 2 Ch. 506; 84 L.J.Ch. 28; 111 L.T. 1051; 30 T.L.R. 647; 21 Mans. 328]

Company—Director—Sole director—One director not quorum—Power of sole director to appoint new directors—Qualification—New directors not qualified by shareholding—Validity of acts done by them—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, c. 17), *ss.* 89, 99.

By s. 89 of the Companies Clauses Consolidation Act, 1845: "If any director die, or resign, or become disqualified or incompetent to act as a director, or cease to be a director by any other cause than that of going out of office by rotation . . . the remaining directors . . . may elect in his place some other shareholder duly qualified to be a director. . . ." By s. 99: "All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

Two of the three directors of the defendant company retired. The sole continuing director, although not constituting a quorum, appointed two new directors. Neither of these two directors at the date of their appointment held the necessary qualification shares, although they obtained them immediately after their appointment.

Held: (i) the continuing director though not constituting a quorum could validly appoint new directors by virtue of s. 89, and (ii) the acts of the de facto directors who were not qualified to be appointed were validated by s. 99 as they had acted in good faith.

Dawson v. *African Consolidated Land and Trading Co., Ltd.* (1), [1898] 1 Ch. 6, and *British Asbestos Co., Ltd.* v. *Boyd* (2), [1903] 2 Ch. 439, considered and applied.

Re Staffordshire Gas and Coke Co., Ltd., Ex parte Nicholson (3) (1892), 66 L.T. 413, overruled.

Decision of SARGANT, J., [1914] 1 Ch. 568, affirmed.

Notes. Referred to: *Morris* v. *Kanssen*, [1946] 1 All E.R. 586.

As to the appointment of directors in general, see 6 HALSBURY'S LAWS (3rd Edn.) 274 et seq.; and for cases see 9 DIGEST (Repl.) 451 et seq. For the Companies Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 277.

Cases referred to:

(1) *Dawson* v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6; 67 L.J.Ch. 47; 77 L.T. 392; 46 W.R. 132; 14 T.L.R. 30; 42 Sol. Jo. 45; 4 Mans. 372, C.A.; 9 Digest (Repl.) 451, *2965*.

(2) *British Asbestos Co., Ltd.* v. *Boyd*, [1903] 2 Ch. 439; 73 L.J.Ch. 31; 88 L.T. 763; 51 W.R. 667; 11 Mans. 88; 9 Digest (Repl.) 460, *3013*.

(3) *Re Staffordshire Gas and Coke Co., Ltd., Ex parte Nicholson* (1892), 66 L.T. 413; 9 Digest (Repl.) 460, *3008*.

(4) *MacDougall* v. *Gardiner* (1875), 10 Ch. App. 606; 32 L.T. 653; 23 W.R. 846, L.JJ.; 9 Digest (Repl.) 622, *4150*.

Also referred to in argument:

Howbeach Coal Co., Ltd. v. *Teague* (1860), 5 H. & N. 151; 2 L.T. 187; 6 Jur.N.S. 275; 8 W.R. 264; 157 E.R. 1136; sub nom. *Howbeach Coal Co.* v. *Teague*, *Howbeach Coal Co.* v. *Bennett*, 29 L.J.Ex. 137; 9 Digest (Repl.) 452, *2971*.

Kirk v. *Bell* (1851), 16 Q.B. 290; 117 E.R. 890; 9 Digest (Repl.) 546, *3598*.

Re Alma Spinning Co., Bottomley's Case (1880), 16 Ch.D. 681; 50 L.J.Ch. 167; 43 L.T. 620; 29 W.R. 133; 9 Digest (Repl.) 546, *3593*.

Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw, [1904] 2 K.B. 327; 91 L.T. 66; 53 W.R. 285; 20 T.L.R. 493; sub nom. *Re Allison, Johnson and Foster, Ltd., Ex parte Carlill, Birkinshaw and Ferguson*, 73 L.J.K.B. 763, D.C.; 10 Digest (Repl.) 1050, *7280*.

Re R. Bolton & Co., Salisbury-Jones and Dale's Case, [1894] 3 Ch. 356; 64 L.J.Ch. 27; 71 L.T. 284; 10 T.L.R. 614; 1 Mans. 431; 7 R. 504, C.A.; 9 Digest (Repl.) 472, *3091*.

Appeal from a decision of SARGANT, J.

SARGANT, J., held that though the single continuing director had power under ss. 89 and 92 to appoint the two new directors, their appointment was invalid as they acquired the necessary qualification subsequently; but the allotment by the board of three directors, two of whom had been invalidly appointed was validated by s. 99. On the appeal the plaintiff sought an injunction restraining the two new directors from acting as directors or as shareholders of the defendant company in respect of the shares purported to have been allotted to them. The facts appear in the headnote and in the judgments.

Romer, K.C., and *R. Roope Reeve* for the plaintiff.
Martelli, K.C., and *H. S. Preston* for the defendants.

LORD COZENS-HARDY, M.R.—This appeal, although it comes on in the shape of an interlocutory question, raises a point of general importance to companies, whether they are limited liability companies or Parliamentary companies governed by the Companies Clauses Consolidation Act, 1845. The facts can, I think, very shortly be stated.

The defendant company is a light railway company incorporated in Aug., 1909. There were three directors, Sir W. H. Crundall, Sir W. D. Pearson (now Lord Cowdray), and Sir J. Jackson. The number of directors was originally five, but that number was reduced under a proper clause to three, so that there was a quorum of the directors. A quorum of directors was three, but if the number of directors was reduced to three the quorum was to be two. There was a qualification of shares for the directors. For reasons which do not concern us Sir W. D. Pearson and Sir W. H. Crundall were minded to retire. They transferred all their shares and they became no longer eligible to act as or to be directors of the company. What, then, was the position of the company? It was a company with Sir J. Jackson as sole director. What was his power? It seems to me that he had power under the Companies Clauses Consolidation Act, 1845, as being the continuing director, to fill up the vacancies on the board. The fact that a person exercising that power was less than the quorum is not really a relevant matter. The generality of the language used in the section is so clear that it is impossible for us to overlook it. Any other view on that point would paralyse many a company. It is very common indeed to have a company the directors of which are merely the quorum, and therefore, unless there is a power for the continuing director or directors to fill up the place, the companies would be at a deadlock; nothing could be done except by the intervention of the court in the manner suggested by MELLISH, L.J., in *MacDougall* v. *Gardiner* (4), an intervention which seems to me rather difficult to justify except on the sheer ground of absolute necessity. I think, therefore, that Sir J. Jackson had power to fill up the vacancies caused by the retirement of his two colleagues.

That, however, does not get over the difficulty. Assume that he had the power, he could only appoint persons who had the requisite qualification as shareholders. What he did on July 29 of last year was this: He purported to appoint J. Proffitt and A. Jackson directors, and at the same meeting or subsequently or on the same day the necessary qualification shares were allotted to those two persons. That was not in my opinion sufficient to make J. Proffitt and A. Jackson directors, because the subsequent obtaining of qualification shares did not validate the original appointment. But what happened was this: All the parties concerned, that is to say, Sir J. Jackson, J. Proffitt and A. Jackson, acting, according to the learned judge in the court below, and I see no reason to doubt it, in perfect good faith, were not aware of the invalidity of the appointment by want of qualification, and they honestly believed that it was sufficient if contemporaneously with, although in point of time immediately after, their appointment they obtained the qualification shares.

What is the principle which ought to be applied in a case like this? The relevant section is s. 99 of the Companies Clauses Consolidation Act, 1845, which enacts as follows: [His Lordship read s. 99 and continued:] That section, or a section in equivalent words, has been construed by this court, and by Farwell, J., as a judge of first instance in a manner which is binding upon us. It is binding so far as it is a decision of the Court of Appeal whether we agree with it or not, and so far as it is a decision of Farwell, J., it would be followed by us unless for good reason we came to the conclusion that it was wrong.

It has been held by the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) that s. 99 is not limited to dealings between the company and outsiders, but that it applies also to dealings between the company and persons who are inside the company. I am using a neutral word as far as I can. It has been also held by Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2) that the words "notwithstanding it may be discovered afterwards that there was some defect" do not mean merely notwithstanding that the facts which show the defect were afterwards made known, but that they mean notwithstanding that the defect itself, the defect arising from the facts, was afterwards discovered. That seems to me to be, if I may respectfully say so, plainly right. That is the view which Farwell, J., in terms adopted in *British Asbestos Co., Ltd.* v. *Boyd* (2), and he applied it to the case in which the defendants to the action were directors themselves who were relying upon, acting upon, and claiming the benefit of s. 99, or the equivalent section under the Companies Act, 1862.

It has been argued by counsel for the plaintiffs with great force that s. 99 of the Act of 1845 is a clause which ought not to be one upon which persons who were aware of the facts, although not aware of the legal conclusions from the facts, ought to be allowed to rely, because they must be taken to know the law, and it would be wrong that they should take the benefit of s. 99. I am quite unable to accept that view. It seems to me that it is really a question which may be put very shortly: Aye or No were the parties in this transaction acting in good faith? If so, s. 99 ought to be available for all purposes, including the directors themselves. If there is a lack of good faith, then, of course, the court would not allow persons who are parties to the want of good faith, if I may use such a phrase, to take the benefit of it.

Our attention has been called to a decision of Kekewich, J., in *Re Staffordshire Gas and Coke Co., Ltd., Ex parte Nicholson* (3), in which he took the view that the section applied only where the parties had no notice of the actual defect in point of fact. Sargant, J., passed that case by with the remark that it was before the decision of this court in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1), and, of course, before the decision of Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2). I cannot but conclude that if the decision of the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) had been before Kekewich, J., he would have taken a different view. So far as I am aware, the observations of the learned judge in *Re Staffordshire Gas and Coke Co.,*

Ltd., Ex parte Nicholson (3) have never been followed, and I feel bound to say that I think those observations are wrong. If there is good faith—and I emphasise that requirement—the mere fact that the person claiming the benefit of the section had notice of the existence of the facts which led to the disability is not sufficient to disentitle a person to rely upon it if he can honestly say: "I was not aware of the defect and the consequences of the facts I knew; I was not aware of the disqualification which now exists." That, I think, is really the point of the case. LINDLEY, L.J., in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) points out very forcibly that some provision of this kind which applies by common sense should apply to companies of this kind. The language of the section enables us to give it the wide operation this court and FARWELL, J., have attributed to it, and I should be sorry indeed that we should be tempted by the able argument that we have heard to narrow the construction of that section—to narrow its highly beneficial and proper application in the manner that we have been asked to. I think that SARGANT, J.'s judgment in this case was perfectly right, and in my opinion, therefore, the appeal should be dismissed with costs.

SWINFEN EADY, L.J.—I agree. In this case the defendant company, according to its constitution, had fixed the quorum of directors at two, seeing that the number of directors had been limited to three. For the time being there would be three directors, of whom two were to be a quorum, and the constitution further provided that the qualification of directors should be £250—that is to say, holding twenty-five shares of £10 each. There were for a time three directors, Sir W. Pearson (afterwards Lord Cowdray), Sir J. Jackson and Sir W. H. Crundall. Lord Cowdray and Sir W. H. Crundall transferred their shares, and thereupon ceased to be directors, so that Sir J. Jackson was the sole director. There is an affidavit showing that he was proposing to go abroad. At all events, being the sole director, he proposed to appoint two additional directors, and on July 29 there was a board meeting at which he was present and took the chair. Then there was a minute to the effect that Sir J. Jackson as the sole remaining director appointed A. Jackson and J. Proffitt as directors in place of Lord Cowdray and Sir W. H. Crundall. Then it follows on immediately that A. Jackson and J. Proffitt accepted the office of directors, and A. Jackson applied for an allotment of twenty-five shares of the company, and J. Proffitt for an allotment of twenty-four shares of the company, the latter making, with the one share already held by J. Proffitt, his qualification of twenty-five shares. And the above shares were allotted to them respectively in accordance with their applications.

The first question which arises is whether Sir J. Jackson, as the sole remaining director, had power to appoint additional directors. In other words, whether he had power to fill up these casual vacancies that occurred. The argument was that as there was less than a quorum of the board Sir J. Jackson could not do so at all. It required at least two, and there was only one remaining director. In my opinion that is covered by s. 89 of the Companies Clauses Consolidation Act, 1845, especially when read in connection with the interpretation clause. The interpretation clause, s. 3, says that in the Act the following words shall have the several meanings assigned to them unless there be something in the subject or the context repugnant to such construction and then: "Words importing the plural number only shall include the singular number." Then s. 89 provides as follows: [HIS LORDSHIP read s. 89 and continued:] I think that the context requires the remaining directors to include the case of a remaining director. It is obvious that the number of the board may, by death or resignation or otherwise, be so reduced that it may be below the quorum, as well as that there may be vacancies occurring in the board while still leaving a quorum. But in either case it is necessary or proper that the vacancy should be filled up. In my opinion the necessity of the case requires that "the remaining directors" should be read as including the case of a remaining director, so that if and so long as there is any remaining director he

may proceed to fill up the board by appointing persons in the place of the casual vacancies that occur.

For these reasons I am of opinion that it was open to Sir J. Jackson as the sole remaining director, under s. 89, to appoint duly qualified persons to be directors in the place of the two who had ceased to be members of the board.

Then a slip was made. The appointed persons were not at the moment of the appointment qualified. They applied for and obtained their qualification, or thought they obtained their qualification, at the same meeting. It is manifest, it is not disputed, that a slip was made, and that in order for them to be validly appointed directors they must have had a qualification at the date of appointment, but nevertheless, acting in good faith, they accepted the shares, and they acted and continued to act as directors. The question is whether their acts as de facto directors, the acts of the three de facto directors, are protected by s. 99 of the Companies Clauses Consolidation Act, 1845, whereby it is enacted that: [His Lordship read s. 99 and continued:] It has been said that in substance the law is stated in this very short passage in Buckley, L.J.'s book on the Companies Acts, where he sums it up in these words:

> "Endangering accuracy for the sake of brevity, it may be said that the effect of this section is that, as between the company and persons having no notice to the contrary, directors de facto are as good as directors de jure."

That is the note to s. 74 of the Companies (Consolidation) Act, 1908. But it is equally applicable to s. 99 of the Companies Clauses Act, 1845, which applies to companies governed by that Act. It is now settled that this section protects acts both with regard to insiders and outsiders. And having regard to the law as laid down by the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) and to the view subsequently taken by Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2)—with which I must say I entirely concur—I think that it is a beneficial construction to put upon the section.

Common sense really requires that there shall be some provision giving legal effect to the acts in respect of which there is a technical informality because some slip has been made, where the acts have been done in good faith and where the slip has occurred because the parties have not had present to their minds the legal difficulties in the way of doing what they honestly think they are entitled to do. In most of the cases that arise I think that the directors or persons living know the facts of the case and of course are presumed to know the articles of the company. But it is not present to their minds that they are not doing the matter in a properly formal way. In the case in question it does not appear to have been present to the minds of the two new directors that it was necessary for them to have had their qualification shares at the moment of their appointment and did not validate their appointment if they acquired them a moment afterwards. Of course these matters are done at one and the same board meeting. I think that the judgment of Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2) is not only good law, but very good sound common sense, and I entirely concur in it, and in the judgment already pronounced by the Master of the Rolls.

PICKFORD, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Birkbeck, Yeo & Co.*; *Batten, Proffitt & Scott.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re SCOTT. SCOTT *v.* SCOTT

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Joyce, J.). February 10, 11, 1915]

[Reported [1915] 1 Ch. 592; 84 L.J.Ch. 366: 112 L.T. 1057; 31 T.L.R. 227]

Will—Legacy—"Free of legacy duty"—Chattels in France—Mutation duty and penalties payable under French law—Responsibility for payment.

A testator by his will left to S. "free of legacy duty" pictures and works of art which were at the time of his death in Paris. By the law of France a mutation duty was payable on the legacies. There had been a delay in paying the mutation duty by reason of litigation in the English courts, and, in addition to the mutation duty, certain penalties were payable under French law.

Held: (i) "free of legacy duty" was used in the proper legal grammatical English sense and did not include the mutation duty payable under French law which was payable by the legatee; (ii) the penalties were in substance an extra mutation duty and the person who had to pay the mutation duty had also to pay the penalties; (iii) the executors were under no duty to go to the foreign country to procure the bequests and pay what was necessary to procure them.

Per LORD COZENS-HARDY, M.R.: There may be such conduct on the part of an executor in wilfully and improperly delaying the assent to a legacy that the specific legatee would be entitled to claim compensation or damages for what would be a breach of trust.

Per PHILLIMORE, L.J.: Where a legatee has been left a specific bequest such as a picture "it may be very well held that the testator intends, when he gives a bequest of that kind, that it should reach the hands of the specific legatee, if it is only a reasonable matter of packing and transfer, without expense, but beyond that I decline to go."

Notes. Considered: *Hasslock v. Ward* (1940), 27 Tax Cas. 303. Referred to: *Re Grosvenor, Grosvenor* v. *Grosvenor*, [1916] 2 Ch. 375; *Re Rooke, Jeans* v. *Gatehouse*, [1933] All E.R.Rep. 978; *Re Norbury, Norbury* v. *Fakland*, [1939] 2 All E.R. 625; *Re Fraser, Fraser* v. *Hughes*, [1941] 2 All E.R. 155; *Re Quirk, Public Trustee* v. *Quirk*, [1941] Ch. 46; *Re Cunliffe-Owen, Mountain* v. *Comber*, [1951] 2 All E.R. 220.

As to the payment of foreign duties, see 16 HALSBURY'S LAWS (3rd Edn.) 350; and for cases see 21 DIGEST 130.

Cases referred to:

(1) *Re De Sommery, Uniacke* v. *De Sommery*, [1912] 2 Ch. 622; 82 L.J.Ch. 17; 107 L.T. 253, 823; 57 Sol. Jo. 78; 21 Digest 130, *958*.

(2) *Perry* v. *Meddowcroft* (1841), 4 Beav. 197; 49 E.R. 814; 28 Digest (Repl.) 322, *3901*.

Also referred to in argument:

Re Brewster, Butler v. *Southam*, [1908] 2 Ch. 305; 77 L.J.Ch. 603; 99 L.T. 517; 21 Digest 130, *957*.

Re Johnson, Cockerell v. *Earl of Essex* (1884), 26 Ch.D. 538; 53 L.J.Ch. 643; 32 L.T. 44; 32 W.R. 634; 21 Digest 78, *535*.

Farrer v. *St. Catherine's College, Cambridge* (1873), L.R. 16 Eq. 19; 42 L.J.Ch. 809; 28 L.T. 800; 21 W.R. 643; 21 Digest 79, *543*.

Cockerell v. *Barber* (1810), 16 Ves. 461; 33 E.R. 1069, L.C.; 35 Digest 172, *33*.

Peter v. *Stirling* (1878), 10 Ch.D. 279; 27 W.R. 469; 21 Digest 64, 419.

Field v. *Peckett* (*No. 3*) (1861), 29 Beav. 576; 9 W.R. 525; 54 E.R. 751; 24 Digest (Repl.) 742, 7283.

Re Pearce, *Crutchley* v. *Wells*, [1909] 1 Ch. 819; 78 L.J.Ch. 484; 100 L.T. 699; 25 T.L.R. 497; 53 Sol. Jo. 419; 23 Digest (Repl.) 482, *5500*.

Appeal by a legatee from two decisions of Warrington, J., [1914] 1 Ch. 847, and [1915] 1 Ch. at p. 597.

Younger, *K.C.*, *Maugham*, *K.C.*, and *Dighton Pollock* for the legatee.

Sir Robert Finlay, *K.C.*, *A. Jenkins*, *K.C.*, and *R. F. MacSwinney* for the trustees and executors.

Peterson, *K.C.*, *A. J. Spencer* (for *F. H. L. Errington* serving with H.M. forces) for the residuary legatees.

C. Gurdon for other interested parties.

LORD COZENS-HARDY, M.R.—These are appeals from two decisions of Warrington, J., upon the construction and the effect of a bequest of certain specific legacies of great value given by the testator, Sir John Murray Scott, to the present appellant.

The questions arise thus: The will gives various pictures and works of art which were at the time of his will apparently, and certainly at the time of his death, locally situated in Paris. He was a domiciled Englishman, and his will is in the English language. It uses phrases which are perfectly familiar to us in England. The first question is whether, under the clauses, which I shall shortly have to read, the gift of these very valuable chattels in Paris, which are specifically given "free of legacy duty," means not merely free of English legacy duty, to which confessedly they are subject, but whether it means, in addition to that, free of the mutation duty payable according to French law upon chattels which are found at the testator's death in Paris, or elsewhere in France. The will, so far as this question is concerned, is very short. The testator gives to Lady Sackville—then Victoria Sackville-West—

> "for her sole and separate use, and free of legacy duty, all my pictures, engravings, furniture, busts, silver, plate, and works of art of every description, wheresoever situate, except at 5, Connaught Place and 8, Chandos Street, London, or wherever may be situate my London house, or except those bequeathed specifically by this my will or any codicil thereto, and further the sum of £150,000."

What do the words "free of legacy duty" mean? I am not in doubt as to the meaning of those words in this will. They are words which are familiar to every English lawyer. They are words which have been found in many statutes of recent years, and although in the very early statutes the phrase was "duty payable in respect of legacies," how it is possible to say that there is any great distinction between that and "legacy duty" passes my understanding. I think, therefore, unless there is something which enables us to find that the testator has used those words "free of legacy duty" in any other than their proper legal grammatical English sense, we are bound to say that they must have that sense. I cannot see, looking at it carefully, anything in the will which lends any colour to a different interpretation of the will. We have been asked to say, when there is a gift to the National Gallery of some valuable pictures: "True, they were taken under a clause of this will free from legacy duty, but can it have been intended that the testator should have made a gift of these very valuable pictures to the National Gallery, leaving the trustees of the National Gallery to pay the mutation duty on them according to French law?" It does not shock me at all. It seems to me if they were simply given with the words "free of legacy duty," of course, the National Gallery trustees would have to pay the French mutation duty. But to say that the effect of that gift is to put an unnatural meaning on the words used—namely, "free of legacy duty," is what I cannot adopt. Then it has been pointed out, and I think it is worth mentioning, that in the last codicil—the testator made five codicils, I think—he says:

"And in case I shall in my lifetime have made any disposition purporting to operate as immediate gifts inter vivos and by reason of the Finance Act, 1910, or any statutory modification thereof, any death duties shall become payable on my death in respect thereof, then I hereby direct that such duties shall be payable by my executors out of my general personal estate."

He was aware of the distinction according to English law between legacy duty and any other death duties. It shows his acquaintance with English law. And as it has been decided before, and I think quite properly, that a gift free of legacy duty would not apply to succession duty or to estate duty, it is an a fortiori case to say that it cannot apply as a matter of construction to the mutation duty which is payable under French law. Upon that, therefore, which is the main point of the appeal, I entirely concur with the judgment of WARRINGTON, J.

But then we have heard an interesting and elaborate argument on a second point. It is said that it is the duty of an executor, where there is a specific bequest of property which is in a foreign country, to go to that foreign country and to procure the specific article, to pay what is necessary in order to get it, and to bring it back to this country. Each one of us has asked, I think, for a statement by any text writer to support that proposition. I can find none, and it is conceded there is none. Is there anything in principle which can justify it? I think not, for many reasons, but the one that strikes me most is this. When there is a specific legacy of chattels, the first duty of the executor is to consider whether he assents to it or not. If he assents to it, the property passes out of him and is in the specific legatee, and from that moment the executor cannot possibly interfere with the possession of the chattels, cannot claim them from anybody else, and the legatee who has the legal title is the person to recover them, and to do what is necessary, and everything of that kind. Of course, in saying this, I do not mean to assert, or even to imply, that there may not be such conduct on the part of an executor in wilfully and improperly delaying the assent to a legacy as may entitle the specific legatee to claim compensation or damages, pecuniary relief against him, for what would be a breach of trust. But we start in the present case with this finding of the learned judge in the court below, that the executors in this case have acted with perfect propriety, and have carried out their duties according to English law, acting as they have under the direction of the court, a receiver being in possession during a large part of the time. Under those circumstances, there being no authority to support the proposition, I am clearly of opinion that we ought not to hold that it was the duty of the executors towards the present appellant to go to Paris, to pay this mutation duty in order to get possession of the property, and deliver it to the legatee. I may say further, as at present advised I do not see how they could have got the property even if they had gone to Paris, because the French law does not recognise executors as such at all. It only recognises either the specific legatee according to the one view, or the residuary legatee according to the other. That being so, without going into the authorities which have been cited to us, beyond mentioning the recent decision of PARKER, J., in *Re De Sommery, Coelenbier* v. *De Sommery* (1), I think that we must hesitate to regard *Perry* v. *Meddowcroft* (2) (4 Beav. at p. 204) as an authority to which great (if any) weight ought to be attached. I agree entirely with the comments of PARKER, J. ([1912] 2 Ch. at p. 628) upon that case. And I think that in the decision which we are now giving we are not in any way interfering with anything that has been said on this point by any judge to whose judgments our attention has been called.

The third point is this. It is said that even if the legatee is to pay the mutation duty payable in respect of the legacy, there are penalties imposed by French law for delaying the payment of duties for a certain time after the testator's death. There was, of course, a great deal of delay in the present case, because there was very heavy and important litigation as to the validity of the will, and it was only after proceedings were taken in the Probate Division that the will was established. Of course, during that period nothing could be done, and during

A that period no doubt the penalties were running. But the fair meaning of the penalty clause is, I think, that which is plainly put by Warrington, J., in his judgment on this point ([1915] 1 Ch. at p. 597). These penalties are really in substance an extra mutation duty standing exactly on the same footing as the other, and the person who has to pay the mutation duty has, in the events which have happened, also to pay the penalties. If there was any other person liable B to pay these extra duties who had neglected to do so, then the present appellant, when she comes to pay that which has to be paid, might be entitled to claim an indemnity from the other person. But once it is conceded that the executors have only done that which was their obligation, I fail to see how it can be held that there is any obligation upon any person whatever, except upon the present appellant, to pay these duties. It is put by Warrington, J., thus (ibid. at p. 599):

C "It is quite true that she was not placed in possession of her legacy, but the reason for that was a proper reason; she has not been in any way wrongly kept out of her legacy, the executors have committed no wrong against her, and nothing, therefore, seems to me to give rise to any claim for an indemnity. It seems to me that this penalty is as much the mutation duty as the original mutation duty to which my decision of February of this year applied, and that D the legatee has no right to recover the penalty any more than she has the right to recover the mutation duty."

For these reasons I think that the two judgments of Warrington, J., were right in all the points, and that these appeals should be dismissed with costs.

PHILLIMORE, L.J.—I am of the same opinion. As regards the first point, E after what has been said by Warrington, J., in the court below, and by the Master of the Rolls to-day, I can absolve myself from doing anything more than putting my judgment in a very short compass. The testator has used words of art, and it may be from the other parts of the will you may deduce the view that he has used words of art inartificially, unless you say that you must treat those words of art as meaning what they technically do mean. The words "legacy duty," to my F mind, are words of art, and mean duty payable under English or British law. If there was nothing in the way of any duty on the succession but the mutation duty, one might then be driven to suppose that the testator had used a term of art in an inartificial sense. But inasmuch as there is ample to satisfy the words "free of legacy duty," there is no reason for our supposing that they mean more than what they say. What the testator intended, or what he would have done G if he had had the point present to his mind, I cannot guess. I may have my suspicions or my conjectures, but it is not for me to guess, and it is safer to rest upon general law in these matters.

The second point is a different one, and would arise if the words "free of legacy duty" had never been used in this way. It rests upon the contention that it is the duty of executors either to deliver a specific legacy to the legatee at his domicil, H or at least to bring it home to the testator's domicil and let the legatee have it. There really is, it is strange, no authority on the subject, except to a certain extent, the language of Warrington, J., which is up to a point against his own conclusion. Apart from that there is apparently no authority on the subject. There are a number of cases which say that where a chattel is bequeathed, and that chattel is at the testator's death subject to some lien or pledge, at any rate, I one that he has created himself, according to Sir George Jessel, possibly whether he has created it himself or not, as a matter of construction the testator is supposed to have given the chattel free of all lien or pledge. At any rate, to this extent it is the duty of the executors either to redeem the pledge or to give the value of the chattel. That is not the point. Apart from that, there is only this language of Warrington, J., that it is the duty of the executor to deliver it. The argument on behalf of Lady Sackville is that this being a specific legacy, the duty of the executors is to deliver the subject to the legatee, and that any expenses which they may incur in order to do that are charges and expenses incurred by

them in their capacity as executors, and therefore payable out of the general estate of the testator. Stated in that broad way, I think that the contention on the part of the specific legatee is correct. But then the learned judge goes on to show why it does not apply. I have been thinking over that matter and I should be sorry if anything was said here which would make executors chargeable who in an ordinary case went to the expense of packing up a picture or some valuable chattel, and sent it to the home of the legatee in some other part of England, or even some near part of the Continent. One knows that in practice executors are always expected to do that sort of thing, and the residuary legatee who is usually left a picture or some token of that kind, does not expect to have to pay the cost of packing and sending it. In that sort of way it may be very well held that the testator intends, when he gives a bequest of that kind, that it should reach the hands of the specific legatee, if it is only a reasonable matter of packing and transfer, without expense, but beyond that I decline to go. I know of no authority to say that executors are bound to bring a chattel to the testator's domicil, or to bring it from foreign parts in order to deliver it to the legatee, either after having been passed through the testator's domicil or otherwise. If the argument is worth anything, it would mean that wherever chattels are locally situated in some foreign country, and there is no duty of any sort payable on those chattels by reason of the death of the testator, it falls to the executors to redeem them—to ransom them, as it were, from the foreign country—and bring them away and deliver them safely to the legatee. By this time of day, if there was any such obligation, there would have been authority for it, and I decline to hold that there is any such obligation.

With regard to the last matter, I confess that I have a great deal of sympathy with Lady Sackville. I think that it is extremely hard upon her that, in the events which have happened, she would have to pay these penalties, and I have been struggling to see if I can find any ground upon which I could relieve her. But it is not merely a question of relieving Lady Sackville. It involves putting a burden on the residuary legatees, and I cannot find any misconduct either on the part of the residuary legatees or of the executors. At least, I am relieved from inquiring whether there is anything that can be complained of on the part of the executor, by the express admission of Lady Sackville's counsel. In truth, the delay may be divided into two periods: The first is the period for which the executors are naturally not responsible. It is the period during which somebody who contested the will left the whole matter in doubt, and made it necessary to have a receiver, and made it impossible to deliver any of these chattels to the legatees. The second period is a period which I have more doubt about. But counsel for Lady Sackville has said that the executors, in the peculiar circumstances of the case, were entitled to take the opinion of the court before they parted, at any rate, with a great portion of these chattels, because it was very doubtful whether they passed under the will or not. That being so, it is Lady Sackville's misfortune that the testator did not express himself more clearly, and the chattels have had to remain all this time in medio, and therefore, in the events which have happened, it was not possible to free them from the mutation duty or from the penalties which are accessory to that duty.

Before I conclude, that observation leads me to add another. Whatever might be said of a case where the English law applied, and where the assent of the executors is necessary to the obtaining by the specific legatee of his legacy, in a country like France, where the legatee, and the legatee only, is the person who can recover the legacy, it seems to me ridiculous to put upon executors the duty of getting the legacy and bringing it home. Lex neminem cogit ad impossibilia. For these reasons, I agree that these two appeals fail.

JOYCE, J.—In this case, in my opinion, it must be taken that the testator said what he meant, and that he meant simply what he said. In an English will the natural meaning of the term "legacy duty" is a definite well-known thing—

namely, the duty imposed upon legacies by the Legacy Duty Act, 1796—I think there was one earlier—and subsequent Acts relating to the same subject. That is what the term "legacy duty" means, and, in my opinion, it means nothing else. No doubt there might be a case—one can conceive such a case—in which the term "legacy duty" has been used with regard to a subject which is not liable to legacy duty. And I can conceive that it might be held that in certain special circumstances, not that the term "legacy duty" meant "estate duty" or "settlement duty," or some other duty, but that the testator, when he used those words, meant something else, because he must have done so. In the present case, all the bequests are liable to "legacy duty" properly so-called. If the testator, or the draughtsman of his will, when that will was drawn knew about the mutation duty, and when I say "knew," I mean had it in his mind, and intended that also to be paid out of the general estate of the testator it is incredible to my mind that he should not have used language very different from that which he has in fact used. If, on the other hand, he did not have this question of the mutation duty in his mind and so had no definite formed intention on the subject of the manner in which it should be paid, how can we give any other than the natural meaning to the term "legacy duty" from some conjectural notion as to what the testator would probably have done if his attention had been called to the subject of the existence of the mutation duty?

So much for the question of construction. Then, with regard to the second question, no doubt as to a specific bequest of chattels that are in pledge at the time of the testator's death, that pledge must be redeemed out of the testator's estate. But, in my opinion, that rule does not apply to making the residuary legatees liable to pay something which is imposed upon the specific legatee upon or after the death of the testator. There is one other point with reference to the penalties. All I can say is that I agree entirely with what WARRINGTON, J., has said, so that I agree that both these appeals fail.

Appeals dismissed.

Solicitors: *Meynell & Pemberton; Capron & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

STRATFORD-UPON-AVON CORPORATION *v.* PARKER

[KING'S BENCH DIVISION (Lush and Atkin, JJ.), March 4, 5, 1914]

[Reported [1914] 2 K.B. 562; 83 L.J.K.B. 1309; 110 L.T. 1004; 58 Sol. Jo. 473]

Landlord and Tenant—Repair—Breach of covenant—Executor de son tort—Personal liability on covenant.

An executor de son tort does not by the mere fact of intermeddling with a term which was vested in the deceased become liable by privity of estate on the repairing covenants contained in the lease.

Williams v. *Heales* (1) (1874), L.R. 9, C.P. 177, distinguished.

Notes. Referred to: *A.-G.* v. *Parsons*, [1955] 2 All E.R. 466.

As to the rights of an executor de son tort, see 16 HALSBURY'S LAWS (3rd Edn.) 147, 148; and for cases see 23 DIGEST (Repl.) 71.

Case referred to:

(1) *Williams* v. *Heales* (1874), L.R. 9 C.P. 177; 43 L.J.C.P. 80; 30 L.T. 20; 22 W.R. 317; 23 Digest (Repl.) 68, *600*.

Also referred to in argument:

Tremeere v. *Morison* (1834), 1 Bing. N.C. 89; 4 Moo. & S. 603; 3 L.J.C.P. 260; 131 E.R. 1051; 24 Digest (Repl.) 696, *6812*.

Sleap v. *Newman* (1862), 12 C.B.N.S. 116; 6 L.T. 386; 142 E.R. 1087; 24 Digest (Repl.) 697, *6816*.

Rendall v. *Andreae* (1892), 61 L.J.Q.B. 630; 8 T.L.R. 615; 24 Digest (Repl.) 695, *6805*.

Padget v. *Priest* (1787), 2 Term. Rep. 97; 100 E.R. 53; 23 Digest (Repl.) 66, *580*.

Appeal by the plaintiffs, lessors, from the decision of His Honour JUDGE INGHAM sitting at the Stratford-upon-Avon County Court.

The facts are set out in the judgment of LUSH, J.

J. B. Matthews, *K.C.*, *W. H. Riley-Pearson*, and *G. F. Spear* for the plaintiffs.

Disturnal, *K.C.*, and *J. Wylie* for the defendant.

LUSH, J.—This is an appeal by the plaintiffs from the judgment of the learned judge of the Stratford-upon-Avon County Court, and it raises a point of some novelty and of some little difficulty. The plaintiffs were the lessors of some premises of which the mother of the defendant was the assignee. She died some few years ago, and this action was brought against her son as executor de son tort and assignee of his mother upon a covenant to repair contained in the lease. The evidence given in the court below consisted first of all, to some extent, of answers by the defendant to interrogatories administered by the plaintiffs, and secondly of some correspondence, and the facts, so far as the answers to interrogatories were concerned, were shortly these: No letters of administration were ever granted in respect of the estate of the defendant's mother, and she left no will. On the mother's death the rents of the demised premises received from the tenants were collected by the defendant, who had collected them during his mother's lifetime, and were paid by him to his sister, who died in August, 1912. After his sister's death the defendant did not know to whom the property belonged, so what he did was to continue to collect the rents and pay the ground rents to the plaintiffs, retaining the surplus in his own hands on behalf of such persons as might in law be found entitled to the rents. The last answer to the interrogatories, which was also put in, stated that the defendant had never been in possession of the demised premises. What appeared from the correspondence was this: The defendant had paid the ground rent after his mother's death in her name and on her behalf. The plaintiffs were not aware of the death of the defendant's mother until a letter was written by the solicitor for the defendant on Dec. 20, 1912. That letter was written in answer to a letter from the plaintiffs' representative dated Dec. 19, 1912, addressed to the defendant's mother, they thinking she was still alive, which gave her notice that certain work was required to be done by her in accordance with the covenants in her lease, and asking her to inform the plaintiffs who was to do the work and when it would be commenced. In answer the defendant's solicitor wrote the letter of Dec. 20, telling the borough surveyor, who had written on behalf of the plaintiffs, that the defendant's mother had died two years before without leaving any estate, and that since her death the defendant had collected the rents and paid them over to his sister, the letter adding that the defendant did not admit any liability. In answer to that, some six weeks afterwards the town clerk wrote to the defendant's solicitor asking whether the defendant was his mother's executor, and, if not, who her legal personal representatives were, and the letter went on to say that it was quite clear that the estate was liable, and that if the defendant was not one of the executors he had intermeddled in the estate and was liable at least for the amount he had received. The letter continued:

> "Please send me an authority to all the tenants to pay the rents in future to us, so that we may be certain of some compensation for the very bad state the houses have been allowed to fall into."

On Feb. 27, 1913, the defendant's solicitor wrote in reply

> "He (the defendant) tells me that as there was no estate his mother left no will, neither has he taken out letters of administration, and for this reason I do not see that he could give you any legal authority for the tenants to pay their rents to you. At the same time, so far as he is concerned, he has no objection to your taking possession of the houses and, if it will assist you, you could use this letter for that purpose."

On that same day, or within a day or two after the receipt of that letter, the plaintiffs acted on the suggestion contained in it, and took possession of the premises, and from that time received the rents. On these facts the question is whether this action for breach of the covenant to repair contained in the lease lies against the defendant who is sued as I have said as executor de son tort and assignee of the term. The learned judge held that the action would not lie, and gave judgment for the defendant. The short note of his judgment is as follows:

> "In this case I find, as a fact, that defendant acted as agent first for his mother and then for his sister, and since the latter's death plaintiffs (having regard to the facts stated in defendant's answers to interrogatories which they have put in) have not proved that defendant has ever taken possession of the term as his own, or acted or intended to act for himself."

It is quite obvious that the defendant cannot be sued on this covenant, unless he either entered into the covenant or else became liable as covenantor by privity of estate. Of course it may be that, although he did not in fact enter into the covenant or become liable by privity of estate on the covenant, he or any other person may be estopped from denying that he is liable, but estoppel is only a rule of evidence, and if he is estopped from denying the facts he would be, on the facts which must be assumed if not proved against him, in the same position as if he had entered into the covenant. Therefore it is quite right as a proposition to say as I have said that the defendant can only be successfully sued on the covenant if he entered into it, or if he cannot dispute that he did so, or if by privity of estate he became liable upon the covenant because it ran with the land and the estate was vested in him. It is manifest that the defendant did not enter into the covenant. Can he be sued on it by privity of estate? In other words was the term vested in him so that he became liable by privity of estate on the covenants, or is he estopped from disputing these facts? It will be convenient to deal with the latter alternative first, because it was practically admitted by the plaintiffs that there was no estoppel. If it were not admitted it is perfectly plain upon the correspondence that there was none. The defendant never paid the ground rents in his own name; he never did anything in the nature of attorning to the plaintiffs or asserting that he was their tenant. He never even did it by implication, because when he paid the ground rent he did not do it upon the footing that he was the tenant, and so far as the plaintiffs were concerned they never received any ground rent on the footing that the defendant was their tenant. They took it upon the footing that it came from their real tenant, the defendant's mother, and as soon as they ascertained that the mother was dead they acted upon the suggestion made by the defendant and took possession of the premises at once, and if election was necessary upon their part, they elected not to treat the defendant as if he had been their tenant. There could be no estoppel, because the plaintiffs did not alter their position by reason of anything the defendant said or did. Therefore we fall back upon a proposition which may be simply stated thus: Is an executor de son tort, who has done what the defendant did in this case, a person who is liable by privity of estate on the covenants contained in the term vested in the intestate? It seems to me that when one considers the circumstances of the case and the authorities, and when one also considers the true position of an executor de son tort, that he is not liable in circumstances such as these by privity of estate. A lawful executor is,

of course, in an entirely different position. If a testator dies possessed of a term of years the term vests in the executor, but the executor cannot then be personally sued upon the covenants contained in the lease, although in law the term is vested in him by assignment by operation of law, but if he enters and takes possession and enjoys the beneficial occupation, then that entry, coupled with the legal title he has as executor, puts him in the position of an actual assignee of the term, liable upon the covenants by privity of estate as fully as if the term had been assigned to him.

That is the position of a lawful executor, but an executor de son tort has no title to the term by operation of law or otherwise. An executor de son tort, if he intermeddles, becomes subject to the liabilities of an executor, but he has none of the privileges of a legal executor, and does not by operation of law or otherwise become entitled to the term of years vested in a person who has never assigned it to him. It is plain in the present case that this term was never assigned to the defendant. Therefore, if an executor de son tort does enter and receive the rents and intermeddle with the estate, he has not that which the lawful executor has which makes that entry, coupled with his title, equivalent to an assignment of the term. He does nothing but enter and intermeddle, and therefore it seems to me that the defendant in the present case was never possessed of this term, and if he was never possessed of it he never had that privity of estate which would have fastened upon him the same liabilities in respect of this covenant which he would have been under if he had actually entered. I think *Williams* v. *Heales* (1), which was cited as an authority in favour of the plaintiffs, is in reality an authority in support of the defendant's contention. There the facts were very similar to those in the present case. The defendant had undoubtedly intermeddled with an estate, namely a term of years. He had received the rents and paid the ground rent in his own name to the plaintiffs, the lessors of the premises, and the question was whether the plaintiffs were entitled to sue him and treat him as being in the position of covenantor on a covenant to repair. I think the defendant was held by a majority of the court to be an executor de son tort, although the head note says simply:

> "Semble, that the defendant was executor de son tort of the term, but held, beyond all doubt, he had estopped himself from denying that he was assignee."

I agree that, while holding him to be an executor de son tort, his liability is put on the ground of estoppel. The real basis of the decision was that the defendant had so conducted himself between himself and the lessors by paying the rent and otherwise asserting his title to the term that he was estopped from disputing that he was in the position of an assignee. That ground of decision would have been wholly unnecessary if the plaintiffs' contention were right in this case, and it is a ground which is wholly without foundation in the present case, because here there was no estoppel. In my opinion that case goes a long way to support the proposition for which counsel for the defendant contended. The present action was framed in the alternative against the defendant in his capacity as executor de son tort, or as being personally liable on the covenant. There were no assets and the action proceeded on the basis that the defendant was liable upon the covenant. In my opinion the learned judge was quite right in holding that the defendant was not so liable. I think there was in this case no privity of estate, and as there was admittedly no privity of contract the action was rightly dismissed.

ATKIN, J.—I agree. In this case an action was brought against the defendant on double or alternative grounds. It was said firstly that the defendant was liable on the covenants in the lease as executor de son tort of his mother who was for a number of years the assignee of a term. That would not be a personal liability on the part of the defendant, but a liability confined to such assets of the defendant's mother as came into his hands as executor de son tort. The second claim made against the defendant was made against him personally. As

to the first claim made, I think it has been made plain in these proceedings that that ground of claim was not relied upon by the plaintiffs, and therefore, I will say nothing more about it. It would depend upon two things, first, that the defendant was executor de son tort, and, secondly, that he had assets. For good reasons, doubtless, that is not the ground of claim which has been insisted upon by the plaintiffs. As to the second ground of claim, it is said that the defendant is liable because, being an executor de son tort, he entered, and therefore became personally liable upon the repairing covenants. I think it is plain that, so far as an executor is concerned, he is liable for breaches of covenants committed after the death of the testator, provided that he has entered. He would be liable in the ordinary course by reason of privity of estate as assignee of the term under the will when he has taken out probate. But the law has held that that is not sufficient, and that, although he is an assignee by operation of law, the law will not hold him personally liable on the covenants unless, in addition, he has entered. What renders him liable is not entry alone, but the fact that he is assignee of the term at law, coupled with the additional fact of entry. The case of an executor de son tort is said by the plaintiffs to be exactly the same—that as executor de son tort he must be deemed an executor, and if he enters he becomes personally liable. It appears to me that this is a fallacy, because in the case of an executor de son tort there is no term vested in him. He is not an assignee at law, and all that has happened to him is that he has intermeddled with an asset of the estate—namely, the term. That may make him an executor de son tort, but it does not vest the term in him or create a liability by privity of estate. Therefore an essential feature necessary to establish his liability as an executor is absent in the case of an executor de son tort. It appears to me that there was evidence in the present case of a sufficient entry by the defendant to make him personally liable if he was in fact an executor and the estate had been vested in him as assignee at law. But as he was not the real executor the possession of the rents by the defendant and the dealing with them by him were not sufficient to make him personally liable. It is, of course, possible for an executor de son tort or any stranger to make himself personally liable by estoppel as against the landlord, and if such acts are done by an executor de son tort as would create an estoppel between him and the landlord then there is no question that he might be made personally liable upon the covenants. In the present case there is no such estoppel, and the liability of the defendant upon that ground was expressly repudiated by the plaintiff's counsel. In these circumstances it appears to me that there is no ground for saying that the defendant is personally liable in respect of these repairing covenants, and for the reasons that I have given this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Crowders, Vizard & Co.*, for *R. Lunn*, Stratford-upon-Avon; *C. E. Whitehouse*, Birmingham.

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

LENNARD'S CARRYING CO., LTD. *v.* ASIATIC PETROLEUM CO., LTD.

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor), February 26, March 1, 8, 1915]

B

[Reported [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 31 T.L.R. 294; 59 Sol. Jo. 411; 13 Asp.M.L.C. 81; 20 Com. Cas. 283]

Shipping — Carriage by sea — Cargo — Loss by fire caused by unseaworthiness — "Actual fault or privity" of shipowner — Ship owned by company — Responsibility for acts of director managing ship — Merchant Shipping Act, 1894 (57 & 58 *Vict.*, *c.* 60), *s.* 502.

C

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship is not liable to make good to any extent whatever "any loss or damage happening without his actual fault or privity" where any goods are lost or damaged by reason of fire on board the ship.

The appellant company was the owner of a certain ship. L. was the active director of the company, his name was registered in the ship's register, and he took the active part in the management of the ship. The ship, which carried cargo belonging to the respondents, was in an unseaworthy state owing to the condition of the boilers, and as a result the ship became stranded in a gale and the cargo was destroyed by fire.

D

Held: (i) L. was the alter ego of the company and not merely a servant or agent as his was the directing mind and will of the company, and there was a presumption that his action was the action of the company itself within s. 502; (ii) neither L. nor the company had rebutted this presumption and the company had not established that the unseaworthiness arose without its actual fault or privity.

E

Notes. The Merchant Shipping (Liability of Shipowners and Others) Act, 1958, has amended the Merchant Shipping Act, 1894, in some respects. Part VIII of the 1894 Act is extended to certain persons other than the shipowner (ss. 3 and 8 (4) of the 1958 Act), and to unregistered ships and ships in the course of completion of construction (s. 4 of the 1958 Act). The word "sea-going" in s. 502 (1) of the 1894 Act is repealed (s. 8 (1) of the 1958 Act).

F

Applied: *Royal Exchange Assurance Corpn. of London* v. *Kingsley Navigation Co.*, [1923] A.C. 235. Considered: *Tempus Shipping Co.* v. *Louis Dreyfus Co.* (1930), 144 L.T. 13. Applied: *H.M.S. Truculent, The Admiralty* v. *The Divina (Owners)*, [1951] 2 All E.R. 968. Considered *The Hans Hoth*, [1953] 1 All E.R. 218; *The Empire Jamaica, Western Steamship Co.* v. *N.V. Koninklijke Rotterdamsche Lloyd*, [1955] 3 All E.R. 60. Referred to: *Ashton* v. *London and North Western Rail. Co.*, [1918] 2 K.B. 488; *The Bristol City*, [1921] P. 444; *La Compañia Martiartu* v. *Royal Exchange Assurance Corpn.*, [1923] 1 K.B. 650; *Rudd* v. *Elder Dempster & Co.*, [1933] 1 K.B. 566; *Knott* v. *L.C.C.*, [1934] 1 K.B. 126; *Wheeler* v. *New Merton Board Mills, Ltd.*, [1933] 2 K.B. 669; *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R.Rep. 480; *The Napier Star*, [1939] P. 330; *Imperial Smelting Corpn., Ltd.* v. *Joseph Constantine Steamship Line, Ltd., The Kingswood*, [1940] 2 All E.R. 46; *Beauchamp* v. *Turrell*, [1952] 1 All E.R. 719.

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As to the liability of the shipowner in cases of fire, see 30 HALSBURY'S LAWS (3rd Edn.) 295; and for cases see 41 DIGEST 417–419. As to the effect of initial unseaworthiness on the shipowner's liability, see ibid. 408–410; and for cases see 41 DIGEST 428 et seq.

For the Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395. For the Merchant Shipping (Liability of Shipowners and others) Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 1091.

Cases referred to in argument:

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.*, [1912] 1 K.B. 229; 81 L.J.K.B. 129; 105 L.T. 810; 28 T.L.R. 85; 12 Asp.M.L.C. 82; 17 Com. Cas. 6, C.A.; on appeal sub nom. *Norfolk and North American Steam Shipping Co., Ltd.* v. *Virginia Carolina Chemical Co.*, [1913] A.C. 52, H.L.; 41 Digest 418, *2613*.

Ingram and Royle, Ltd. v. *Services Maritimes du Tréport*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 12 Asp.M.L.C. 387; 19 Com. Cas. 105, C.A.; 41 Digest 417, *2609*.

The Fanny (1912), 28 T.L.R. 217; 56 Sol. Jo. 289, C.A.; 41 Digest 919, *8100*.

The Warkworth (1883), 9 P.D. 20; 53 L.J.P. 4; 49 L.T. 715; 32 W.R. 479; 5 Asp.M.L.C. 194; on appeal (1884), 9 P.D. 145, C.A.; 41 Digest 918, *8092*.

Wilson v. *Dickson* (1818), 2 B. & Ald. 2; 106 E.R. 268; 41 Digest 918, *8093*.

Smitton v. *Orient Steam Navigation Co., Ltd.* (1907), 96 L.T. 848; 23 T.L.R. 359; 51 Sol. Jo. 343; 10 Asp.M.L.C. 459; 12 Com. Cas. 270; 8 Digest (Repl.) 131, *848*.

Appeal by the shipowners from a judgment of the Court of Appeal, [1914] 1 K.B. 419, affirming a decision of BRAY, J., in favour of the respondents who were the plaintiffs in this action.

Adair Roche, K.C., Raeburn, and *I. H. Stranger* (for *J. A. H. Wood* serving with His Majesty's Forces) for the appellants.

Maurice Hill, K.C., and *F. D. MacKinnon, K.C.*, for the respondents.

The House took time for consideration.

Mar. 8, 1915. The following opinions were read.

VISCOUNT HALDANE, L.C.—In this case the appellants have, at all events, the satisfaction of knowing that their case has been excellently argued by both the learned counsel who have appeared for them at your Lordships' Bar. The case, which we have now heard fully and as to which we do not think it necessary to trouble the respondents' counsel, is shortly this. The *Edward Dawson* was a tank steamer designed for the carriage of oil in bulk. She was chartered by her owners, the appellants, on a time charter to a company known as the Anglo-Saxon Petroleum Co., and in the course of her employment she proceeded to Novorossisk in the Black Sea. There she loaded in bulk 2,011 tons of benzine, and the bills of lading, six in number, were endorsed by the Anglo-Saxon Petroleum Co. to the Asiatic Petroleum Co., who are the respondents in this case. The benzine has been lost, and the respondents have brought an action against the appellants to recover damages for the loss of their cargo.

The story of the case is in outline this. The *Edward Dawson* was built in 1890, as I have said, for the carriage of oil in bulk, and in 1907 she was bought by the appellants, who spent a good deal of money upon her, and proceeded to use her for certain voyages. In January, 1911, after she had been for a good while at sea, she was overhauled at Birkenhead, and the Bureau Veritas, a well-known agency which issues certificates and keeps a list for the purpose of showing the condition of ships, gave a certificate through Mr. Viehoff, who was their agent at Birkenhead, to the effect that she would have a satisfactory character for another twelve months, but only on condition that her boiler pressure was reduced from 160 lb. to 130 lb. That obviously made a great deal of difference to the energy developing limits of capacity of the ship. Subsequently to that she proceeded on what she has described in the course of the argument as a round voyage. She went to Thames Haven, and at Thames Haven certain repairs were done under the superintendence of a Mr. Clarke to her boilers; she proceeded to New York, and from New York to Barcelona, and after various intermediate voyages she

came to Novorossisk in the Black Sea, where she loaded a cargo of benzine of which I have spoken. She left Novorossisk, and the unsatisfactory condition of her boilers soon became manifest. These boilers leaked; they leaked salt water into the central furnaces, the furnaces became silted up with salt, so that their capacity was diminished, and the result was that when the ship on her way back passed the Straits of Dover and came into the North Sea she was not in a condition to develop such power as was desirable in the event of her encountering heavy head weather. She found herself on Oct. 1 off the Dutch coast near the mouth of the Scheldt. There was a gale blowing, and she hove to and set her head against the gale to prevent herself from being driven on to the lee shore, but she was driven to the leeward and grounded. She first grounded on the Botkill Bank, and after bumping on the bank several times, she got off, but finally grounded in the Scheldt near Flushing. Her port of destination was Rotterdam. She does not appear to have been under adequate control. She had, among other things, burst a tube, which was not unlikely, having regard to wear and tear in excess of the length of life of tubes, which was given in the evidence as only ten years, and to the general condition of her boilers. She burst a tube, she took the ground, she was unable to get off the ground, she bumped, and as the result of bumping the benzine got loose from the tanks, the deck bulged, the tanks were probably cracked, anyhow the benzine began to get into the furnaces, and the result was a conflagration. It was suggested that if the flame had been extinguished by the injection of water, this might have been prevented, but I do not think the evidence upon that point at all satisfactorily established that that could have been secured, or, at any rate, that the operation could have been properly carried out. In that state of things the loss of the cargo took place, and the case came before BRAY, J., who tried it, and BRAY, J., found a number of facts. He found these facts after hearing the evidence on both sides, and I think that his findings of fact were justified. They were these: The first was that the ship when she left Novorossisk was unseaworthy by reason of defects in her boilers. The second finding of fact was that the stranding on the Botkill Bank, just off the mouth of the Scheldt, was caused by the want of steam, which in its turn was caused by the unseaworthy condition of the boilers; and he found the same causes as regards the subsequent stranding in the Scheldt itself. Then in the third place he found that the loss was not caused by any negligence or want of precautions on the part of the engineers, because he does not find it proved that anything they could have done could have altered the consequences. He found that the loss of the cargo was caused by the unseaworthiness of the ship due to the condition of the boiler. Then there are other findings which are findings of mixed fact and law. One of these is that the duty of supervision remained with the managing owners, and that the fault of the managing owners was a fault that affected the company itself.

That last question gives rise to the real question of law which occurs in this case. Taking the facts to be as the learned judge has found them, what is the consequence as regards the liability of the appellants? The appellants are a limited company, and the ship was managed by another limited company, Messrs. John M. Lennard & Sons, and Mr. J. M. Lennard, who seems to be the active director in J. M. Lennard & Sons, was also a director of the appellant company, Lennard's Carrying Co., Ltd. In that state of things, what is the question of law which arises? I think that it is impossible, in the face of the findings of the learned judge, and of the evidence, to contend successfully that Mr. J. M. Lennard has shown that he did not know or can excuse himself for not having known of the defects which manifested themselves in the condition of the ship, amounting to unseaworthiness. Mr. Lennard is the person who is registered in the ship's register and is designated as the person to whom the management of the vessel was intrusted. He appears to have been the active spirit in the joint stock company which managed this ship for the appellants; and under the circumstances the question is whether the company can invoke the protection

of s. 502 of the Merchant Shipping Act to relieve it from liability which the respondents seek to impose on it. That section is in these words:

> "The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases—namely, (1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

Did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. Whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard, therefore, was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happened to be the owner of a ship, merely because it happened to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.

It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so. In that state of the law it is obvious to me that Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action. But Mr. Lennard did not go into the box to rebut the presumption of liability, and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr. Lennard's position was. The memorandum and articles of association were not put in. The only evidence was that of the secretary, Mr. Simpson, who told the court that he was secretary not only to the company, but also to the managing company, and the inference to be drawn is that the officials of the two companies were very much the same and transacted very much the same business. Under the circumstances I think that the company and Mr. Lennard have not discharged the burden of proof which was upon them, and that it must be taken that the unseaworthiness, which I hold to have been established as existing at the commencement of the voyage from Novorossisk, was an unseaworthiness which did not exist without

the actual fault or privity of his own company. If that is so, then the judgment of the majority of the Court of Appeal and of BRAY, J., was right.

There is another point which I have not entered upon, because it was not touched upon in the court below, and that is the question as to whether the terms of the charterparty are such as to exclude the operation of s. 502 altogether. That question remains intact. It is not necessary to deal with it in this case, and I therefore pass it by. For the reasons which I have given, I move that this appeal be dismissed, and dismissed with costs.

LORD DUNEDIN.—I concur, and I have but little to add to what the noble and learned Lord on the Woolsack has said. It appears clearly from the facts, and indeed was eventually admitted by the appellants' counsel, that the loss which had its final outcome in the fire was really due to a set of defects in the steam power in the boilers which constituted unseaworthiness. In the court below at the trial the principal controversy seems to have turned upon whether the fault in allowing the vessel to be unseaworthy was a fault committed by the captain at Novorossisk or was the fault of J. M. Lennard, the registered manager of the ship. I agree with what my noble and learned friend has said that the true view of the facts is that the fault was the fault of Lennard. But before your Lordships' House the chief argument has been, admitting that it was the fault of J. M. Lennard, whether that was actual fault or privity in the sense of s. 502 of the Merchant Shipping Act. The real question, therefore, turns upon what is to be the application of the words there used to a metaphysical conception like an incorporated company who cannot act directly themselves. I do not know that a case will ever arise in which that will need to be treated as a purely abstract proposition. I do not think it arises in this case, and I certainly incline to the opinion that it will be found always to depend upon the particular facts of the case. If it was bound to decide affirmatively in this case, I should be inclined to think that there was enough known about Lennard to show that, to use the appellants' learned counsel's own phrase, he was the alter ego of the company. He was a director of the company. I can quite conceive that a company may, by intrusting its business to one director, be as truly represented by that one director as in ordinary cases it is represented by the whole board. I am quite sure that you cannot at least put as a general proposition in law that it is true that nothing will ever be the actual fault or privity of an incorporated company unless it is the actual fault of the whole board of directors. But I think the true criterion of the case is that which was found and applied by HAMILTON, L.J., in the Court of Appeal that the parties who plead s. 502 must bring themselves within its terms; and, therefore, the question is—Has the company freed itself by showing that this arose without its actual fault or privity? I think it has not. Lennard may have been deputed by the company to do all these things, or, again, there might have been liability upon the ground that Lennard had told the whole body of directors, and that they knew and sent him the money, and so on. Anyway, they have not discharged the onus which was upon them, and I, therefore, concur in the motion which has been made by my noble and learned friend on the Woolsack.

LORD ATKINSON.—I concur.

LORD PARKER OF WADDINGTON.—I concur.

LORD PARMOOR.—I concur.

Appeal dismissed.

Solicitors: *Downing, Handcock, Middleton & Lewis*, for *Bolam, Middleton & Co.*, Sunderland; *Parker, Garrett, & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

GILES *v.* RANDALL

COURT OF APPEAL (Buckley and Pickford L.JJ.), November 17, 18, 1914]

[Reported [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; 59 Sol. Jo. 131]

Costs—Taxation—Standard to be adopted—Terms of settlement - Solicitor and client costs to be taxed if necessary.

By R.S.C., Ord. 65, r. 27 (29): "On every taxation the taxing master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses."

A settlement was agreed of an action brought by the plaintiff against the defendant, and the judgment as drawn up stated that "the plaintiff recover against the defendant £500 and her costs as between solicitor and client to be taxed (if necessary)". On taxation, the taxing master disallowed or reduced in amount a large number of items including charges for instructions for briefs and counsels' fees on the grounds that the latter part of R.S.C., Ord. 65, r. 27 (29), applied, and in effect gave little more than a taxation as between party and party.

Held: the latter part of r. 27 (29) applied and the taxing master had applied the correct standard for taxation.

Notes. Distinguished: *Goodwin* v. *Storrar*, [1947] 1 All E.R. 203. Applied and explained: *Reed* v. *Gray*, [1952] 1 All E.R. 241. Referred to: *Gibbs* v. *Gibbs*, [1952] 1 All E.R. 942; *Re Dargie*, *Miller* v. *Thornton-Jones*, [1953] 2 All E.R. 577; *Francis* v. *Francis and Dickerson*, [1955] 3 All E.R. 836.

As to the amount and allowance of costs as between solicitor and client, see 30 HALSBURY'S LAWS (3rd Edn.) 426–439; and for cases see DIGEST (Practice) 899, 900.

Cases referred to:

(1) *Ryan* v. *Dolan* (1872), I.R. 7 Eq. 92.

(2) *Re Harrison* (1886), 33 Ch.D. 52; 55 L.J.Ch. 768; 55 L.T. 72; 50 J.P. 372; 34 W.R. 645; 2 T.L.R. 671, C.A.; Digest (Practice) 936, *4753*.

(3) *Cavendish* v. *Strutt*, [1904] 1 Ch. 524; 73 L.J.Ch. 247; 90 L.T. 500; 52 W.R. 333; 20 T.L.R. 99; 48 Sol. Jo. 116; Digest (Practice) 936, *4755*.

Also referred to in argument:

Re Ermen, *Tatham* v. *Ermen*, [1903] 2 Ch. 156; 72 L.J.Ch. 492; 88 L.T. 353; 51 W.R. 475; 47 Sol. Jo. 494; Digest (Practice) 947, *4873*.

Appeal from a decision of SCRUTTON, J., on a summons to review taxation.

The taxing master explained why he had disallowed or reduced certain items by saying:

It is well settled that there are various forms of taxation as between solicitor and client. (i) Where the costs are payable by the client to his solicitor or where the costs are payable out of a fund belonging entirely to the party. (ii) Where the costs are payable out of a general common fund. (iii) Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest or where the costs are payable by one party to another. The taxation in the case of (iii), which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed. The opinion was expressed in *Ryan* v. *Dolan* (1) (I.R.

7 Eq. at p. 94) that as to solicitor and client, costs payable by another party the rules are, "liability to the solicitor and fair justice to the opposite party"; but this must now be read with Ord. 65, r. 27, which applies to all taxations (see *Re Harrison* (2)). Regulation 29 of that order precludes the allowance save as against the party who incurred them of costs which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses. I have taxed accordingly. Subject to the above the objections do not involve any question of principle. They relate only to matters of quantum and detail. The allowances and disallowances were made after very much consideration of all the circumstances of the case and after hearing the arguments of counsel on the objections. I have carefully reconsidered my allowances and made further allowances in some instances, and I am of opinion that I have taxed the costs on the proper principle, and made all proper and necessary allowances.

R. J. Sutcliffe for the plaintiff.
W. Whateley for the defendant.

BUCKLEY, L.J.—Before this action came to trial terms were settled between the parties. If we had any right to inquire into the settlement it would probably be found that it was intended that the plaintiff should receive £500 as damages, and not be out of pocket in respect of the costs. That, however, is not the question we have to consider. The terms are in the judgment as drawn up, and the only question is what is the proper taxation of costs under that judgment. That judgment is "that the plaintiff recover against the defendant £500 and her costs as between solicitor and client to be taxed (if necessary)." The words "if necessary" merely mean that if the parties can agree as to costs there shall be no taxation; if they cannot agree, there is to be a taxation. Those words throw no light upon the question upon what principle the costs are to be taxed as between solicitor and client.

There are three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of casts, which is commonly called taxation "as between solicitor and own client." The second is where the costs are to be paid out of a common fund in which the person entitled to the costs and others are interested. The present case does not come within either of those two classes. The third case is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. This case falls within the last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is now too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the Rule Committee. Persons entitled to costs under an order to tax as between solicitor and client probably think that they will get something in the nature of an indemnity.

In these circumstances the taxing master has here taxed the costs upon the footing that the latter part of Ord. 65, r. 27 (29) applies. The history of that sub-rule is as follows: As it stood before the alteration in 1902 it was negative in form, and was confined to costs as between party and party. It ran thus:

"As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear

A to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party."

In January, 1902, this sub-rule was so altered as that the first part was reproduced in an affirmative form and was made to extend to every taxation. It now runs thus

B "On every taxation the taxing master shall allow all such costs, charges, and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party."

The negative character of this part of the old sub-rule disappears and becomes affirmative. So far there is a direction to the taxing master to allow something. Those affirmative words do not include the costs dealt with in the latter part of the C old sub-rule. Those costs are remitted to the latter part of the new sub-rule, which runs thus:

"But save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by D other unusual expenses."

Here I find reproduced under negative words the latter part of the old sub-rule. The meaning is this: The earlier part of the new sub-rule says that the taxing master shall allow a certain class of costs. The latter part says that, except in one particular case, certain costs shall not be allowed. The excepted case is E that of taxation of costs as between a solicitor and his own client. This part of the sub-rule in effect says affirmatively that as between solicitor and own client those costs may be allowed, but that in every other case they shall not. The other cases include taxation as between solicitor and client as distinguished from taxation as between solicitor and own client. Accordingly upon such a taxation as this the costs described in the latter part of sub-r. (29) shall not be allowed. F The taxing master in this case has proceeded on that footing. He says

"The taxation in the case of (iii), which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed."

G That, however, is not very well expressed. "Necessary letters to and attendances on the client" are allowed as between party and party and therefore, though taxation as between solicitor and client gives little more than as between party and party, the letters and attendances there referred to must be letters and attendances beyond those that would be allowed as between party and party. The taxing master further says:

H "Regulation 29 of that order precludes the allowance, save as against the party who incurred them, of costs which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses. I have taxed accordingly."

I The taxing master, therefore, has taxed this bill of costs on the footing that the latter part of sub-r. (29) applies. For the reasons I have given I think that he was right. Except upon a taxation as between solicitor and own client such costs as are there mentioned are not to be allowed.

That is the only question of principle argued before us, and this court does not interfere on questions of quantum. The appeal must be dismissed.

PICKFORD, L.J. I am of the same opinion. The action was settled on the terms that judgment should be entered for the plaintiff for £500 with costs as

between solicitor and client to be taxed (if necessary). I agree that the words "if necessary" are not of any materiality here.

The taxing master has taxed off the bill a large amount, and, from one point of view, I regret that I feel bound to affirm his decision, because I do not think that the plaintiff has got what she supposed she would get when these terms were agreed upon. She accepted the terms of settlement because she thought that she would get all that she would have to pay to her solicitor. She does not, however, get that under the practice as to taxation as it now stands. Logically, costs as between solicitor and client can only mean one thing—namely, such costs as are properly chargeable between a solicitor and his client, and as are properly payable by the client to his solicitor. It seems that it is irrelevant to inquire from what source the payment is to come, or by whom the payment is to be made; the costs ought to be measured in the same way whether the client has made a bargain that he shall receive those costs from someone else or not. But a different rule of practice in fact prevails, and the taxing master must according to that practice look in each case to the source from which the payment is to come. In DANIELL'S CHANCERY PRACTICE (8th Edn.), p. 1078, it is said, dealing with taxation of costs as between solicitor and client, that

> "a distinction is made: first, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund in which the party entitled to costs has only a limited interest; and thirdly, where such costs are payable out of a fund belonging exclusively to such party himself. These distinctions, however, are not made in the order directing the taxation, but only where the order is acted upon by the taxing officer; and if it is intended that the party whose costs are to be paid out of a general fund should be fully indemnified against all expenses, or against any expenses not strictly costs of action, care must be taken to have it so expressed in the ordinary order; as the direction that the costs are to be taxed as between solicitor and client will not, in such a case, be sufficient."

The distinction has been in existence for a long time, and we cannot now disregard it. It is frequently provided against by inserting words in the order giving an indemnity against all costs, or stating that there shall be no taxation of certain items, such as counsel's fees. Under that practice the taxation in this case is not really a taxation as between solicitor and client at all, but is a taxation as against the person who has to pay the costs. The question is what costs are properly chargeable as against him under an order for taxation as between solicitor and client. Is the taxing master right in saying that the second part of Ord. 65, r. 27 (29), applies to this taxation? The first part of the sub-rule applies to all taxations. *Cavendish* v. *Strutt* (3) is relied upon as an authority for saying that the second part of sub-r. (29) only applies to taxation as between party and party. In that case BUCKLEY, J., said ([1904] 1 Ch. at p. 530) that

> "the second part applies only to taxation as between party and party, for by the words, 'save as against the party who incurred the same,' it excepts a taxation as between solicitor and client."

But it is clear what that passage means. The learned judge had in mind a taxation as between solicitor and his own client who had to pay, and he was contrasting that with a taxation as between party and party. He was not considering the different forms of taxation as between solicitor and client. His reference to the words "save as against the party who incurred the same" shows that. According to the practice of taxation which has grown up upon, so far as I can see, no intelligible principle, this taxation is really not a taxation of costs properly chargeable by a solicitor to his client. As soon as one arrives at that conclusion it follows that the case comes within the second part of sub-r. (29), because the taxation here is not a taxation as between a solicitor and his own client, which is the only case excepted out of the second part of the sub-rule. If there had not

been this practice I should have decided otherwise. But the practice applies, and this taxation is really a taxation as against a party who has agreed to pay the costs.

Appeal dismissed.

Solicitors: *Hughes, Bartlett & Thornton*; *Stanley Evans & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re WILLS. WILLS *v.* HAMILTON

[CHANCERY DIVISION (Sargant, J.,), March 16, 1915]

[Reported [1915] 1 Ch. 769; 84 L.J.Ch. 580; 113 L.T. 138; 59 Sol. Jo. 477]

Administration of Estates—Fund for payments of debts, legacies, and testamentary expenses—Delay before payment—Rule in Allhusen *v.* Whittell—*Rights of tenants for life—Rate of interest.*

A testator by his will, dated Dec. 14, 1908, gave his real and personal estate not otherwise disposed of to his trustees in trust to sell and pay out of the proceeds all debts, legacies, funeral and testamentary expenses, annuities, and duties, and to divide the residue into nine equal shares and to invest and pay the income of one-ninth share to each of his three daughters during her life with remainders over. He further authorised his trustees to postpone the sale and conversion of the whole or any part as long as they should think proper, and directed that the income from his estate should after his death be treated as income and no part of it added to the capital. Payments in respect of the estate were not concluded until five years after the testator's death. On a question of the adjustment of the accounts as between the tenants for life and the remaindermen of the daughters' shares and whether a scheme devised by the accountants for the estate should be adopted or not,

Held: (i) the rule in *Allhusen* v. *Whittell* (1) was not excluded by the terms of the will, and, therefore, the tenants for life should be treated as deprived only of such a sum as together with the income on that sum would be sufficient to discharge the liabilities; (ii) the tenants for life were not entitled to the income of any part of the estate which was used for the payment of debts paid after the expiration of the first year: *Re McEuen* (2), [1913] 2 Ch. 704, applied; (iii) the rate of interest ought to be calculated on the average rate of interest in each year since all the figures had been worked out.

Notes. Referred: *Corbett* v. *I.R.Comrs.*, [1937] 4 All E.R. 700.

As to the rule in *Allhusen* v. *Whittell* (1), see 16 HALSBURY'S LAWS (3rd Edn.) 379 et seq.; and for cases see 23 DIGEST (Repl.) 475 et seq.

Cases referred to:

(1) *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest (Repl.) 475, *5459*.

(2) *Re McEuen*, *McEuen* v. *Phelps*, [1913] 2 Ch. 704; 83 L.J.Ch. 66; 30 T.L.R. 44; sub nom. *Re McEwen*, *McEwen* v. *Phelps*, 109 L.T. 701; 58 Sol. Jo. 82, C.A.; 23 Digest (Repl.) 475, *5451*.

Adjourned Summons.

Sir Frederick Wills by his will, dated Dec. 14, 1908, gave his real and personal

estate not otherwise disposed of and therein referred to as his residuary estate to his trustees in trust to sell, call in, convert into money, and out of the proceeds arising from such sale, calling in, and conversion to pay or provide for just debts, funeral and testamentary expenses, legacies, and annuities bequeathed by the will and all the duties directed to be paid, and to divide the residue thereof into nine equal parts and to pay or transfer three-ninth shares to his son Gilbert absolutely and another three-ninths to his son Frederick, and as to one other ninth share to invest the same and hold it upon trust to pay the income thereof to his daughter Edith for her life with restraint from anticipation with a general power of appointment by will with remainder in default of appointment to children at twenty-one or marriage. There was a similar provision for two other daughters, Margaret and Kathleen. By cl. 15 he provided as follows:

> My trustees or trustee may postpone the sale, calling in, or conversion and collection of all or any part of my real and personal estate not specifically devised or bequeathed so long as they or he shall think proper, but such real estate shall for the purpose of transmission be deemed to be of the quality of personalty as from my death, and my trustees or trustee may manage, let upon lease or from year to year such real estate at rack-rental, and may make any outlay for improvements, repairs, insurance, calls upon share premiums on policies or for any other purpose for the benefit of my said real and personal estate which they or he may think proper. And I direct that the income from my estate howsoever invested shall as from my death be treated as income, and no part thereof shall be added to capital.

The testator died on Feb. 18, 1909, and his will was proved on April 21, 1909, and consisted of real and personal estate of great value. All three daughters married and survived the testator. The eldest, Edith, had no issue; the other two had one child each, all of whom appeared as defendants. The payments required to be made out of the residuary estate in respect of debts, legacies, &c., were not concluded until five years from the date of the testator's death, and this summons was taken out by the trustees for the determination of the question how the accounts between the tenants for life and the remainderman of the daughters' shares should be adjusted. It appeared in evidence that from the date of the testator's death the accounts of the estate had been in the hands of Sir William Plender's firm, who submitted the following scheme. That the total residuary estate should be treated as representing two separate funds—namely, (a) the deductible fund, and (b) the net residue fund, after making the deduction—and that no income subsequent to the death should be considered as forming part of the deductible fund. In the absence of a special direction in the will the income arising from the deductible fund, computed from the date of the death to the dates of payment of the liabilities, which it was set aside to discharge, should be added to the net residue of the estate. That the interest on the deductible fund ought to be calculated at the average rate of interest earned by the estate, and not at a hard and fast rate such as 4 per cent. per annum, and that it ought to be calculated over the whole period or periods during which payments and appropriations were made from and out of the deductible fund.

Alexander Grant, K.C., and *R. F. MacSwinney* for the trustees.

Mark Romer, K.C., and *E. Knowles Corrie* for the tenants for life.

E. W. Martelli, K.C., and *H. J. H. Mackay* for the infants.

SARGANT, J.—These are questions arising on the administration of the estate of the late Sir Frederick Wills, and the points at issue, though they involve considerable sums, involve sums which are comparatively small in proportion to the whole amount of the estate and which are only appreciable because of the very large amount of the estate.

The questions arise on the principle of law with regard to the application of the doctrine of *Allhusen* v. *Whittell* (1) as interpreted by myself in *Re McEuen* (2).

The first question I have to decide is whether the rule in *Allhusen* v. *Whittell* (1) is excluded altogether by certain expressions in the will of the testator. In my judgment those expressions are not sufficient to exclude the rule, and it has to be applied in this case. The second question on the summons is whether in applying the rule you ought to form for the purpose of calculation what is called a deductible fund—namely, the fund necessary to pay the liabilities and deprive the tenant for life of income on that deductible fund during the first year—I am only dealing with the first year at present for the purpose of simplicity—and then add the interest on the deductible fund at the end of the year to the capital that is left and give the tenant for life thereafter the income on the capital that is left plus the interest so added to the capital, or whether you ought to treat the tenant for life as deprived only of such a sum as together with the income on that sum will be sufficient to discharge the liabilities. In my opinion the latter is the true principle, although I quite recognise that in many cases the calculation on the former principle would be a slightly easier one. The rule as stated in *Allhusen* v. *Whittell* (1) is clear; it is in the Vice-Chancellor's judgment (L.R. 4 Eq. at p. 302) and it is:

> "That every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts and which is found to be in a proper state of investment,"

and then he says that a sort of equitable book-keeping has to be indulged in by the court for the purpose of arriving at the true result. Here I do not see how the income which the tenant for life is to be entitled to is to be one sum during the first year and a larger sum at the end of the first year. A calculation must be adopted under which the residue will be the same throughout the whole period.

Then comes the question whether the process of *Allhusen* v. *Whittell* (1) is to be continued after the expiration of the first year in cases where, as here, large sums in respect of liabilities—using the term broadly—are expended after the expiration of the first year. It is suggested that during the period between the end of the first year and the time when those liabilities are discharged in the second or third year, the tenant for life is in some way or other to become entitled to a larger income on a larger fund than will alternately be available for the purposes of the tenant for life and the remaindermen. There again the passage I have quoted from *Allhusen* v. *Whittell* (1) seems to me to be decisive. The portion of the estate required for the payment of debts is no more a part of residue, because the debt does not happen to be paid in the first year. Once it is ascertained that a portion of the estate has got to be applied in payment of a debt, whether that debt is payable in the first year or actually paid in the first year or in the second or third year, that portion of the capital is, ex hypothesi, no portion of the residue. It is excluded by the very definition really of the term residue. I think, therefore, that the dictum—I am not quite sure it was a dictum only—that I stated in *Re McEuen* (2) ([1913] 2 Ch. at p. 717) must be applied, and that the tenants for life are not to be entitled to the income of any part of the estate which is used for the payment of debts paid after the expiration of the first year. With regard to that of course the amount of capital the income on which they will lose will be rather less than in the case of debts paid during the first year, because it will be the income on that part of the capital which together with the income of it for a longer period—namely, down to the second or third year would be sufficient to pay the debts.

Then the question arises at what rate the interest ought to be calculated for this purpose. It is, of course, to the advantage of the remaindermen that the interest should be calculated at as high a rate as possible, because that results in a larger portion of the debts being paid out of income and a smaller relative proportion being paid out of capital. The rate of interest earned by the estate varied between 4·9 per cent. during the first year to 5·9 per cent. during the year ending on Mar. 2, 1912, and then it rose suddenly by reason of the falling in of a

reversion and became equal to 9·3 per cent. As a matter of fact that very high rate of interest is not of importance here because so small an amount of debts remained to be discharged in that year, but I think that the strict rule on which counsel for the infants insists is that you must take the average rate of interest in each year. No doubt in the case of most estates that process would not have to be gone through and a much rougher and readier method of calculation would be sufficient, because really the difference in the two methods would be almost infinitesimal; but here, now that all the figures have been carefully worked out, I do not see any difficulty to prevent the very eminent accountants who have been employed from working out the figures on the strict basis. With regard to the payment of estate duty, estate duty itself carries interest of course at a very low rate—3 per cent.—but there again I think in some small cases, or in the case of estates of comparatively moderate size, it might very often be a good rough and ready rule to allow the interest on the estate duty to be paid out of income, and the capital paid out of capital; but strictly it seems to me that the total amount paid for capital and interest on the estate duty ought to be treated as being the debt or liability discharged, and then with regard to that a portion of capital and of income will be supplied on the principle I have stated.

Solicitors: *Adams & Adams*; *Russell-Cooke & Co.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

PYMAN STEAMSHIP CO., LTD. *v.* HULL AND BARNSLEY RAIL. CO.

[COURT OF APPEAL (Lord Reading, C.J., Swinfen Eady, L.J. and Bray, J.), February 16, 1915]

[Reported [1915] 2 K.B. 729; 84 L.J.K.B. 1235; 112 L.T. 1103; 31 T.L.R. 243; 13 Asp.M.L.C. 64; 20 Com. Cas. 259]

Negligence—Contracting out of liability—Exception clause—No liability for any accident or damage howsoever arising—Liability for negligence of servants—Contract for use of dry dock—Negligence of dock owners causing damage to ship.

The defendants, who were dockowners, let the dock under contract to the plaintiffs to enable the plaintiffs to have their ship painted. Under the contract the plaintiffs had to pay dock dues and certain other charges. The plaintiffs' ship was damaged while in the dock owing to the unevenness of the block caps on which she rested, which was due to the negligence of the defendants. By cl. 9 of the defendants' regulations it was provided that: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in, the graving dock, whatever may be the nature of such accident or damage or howsoever arising."

Held: the words "or howsoever arising" in cl. 9 must be construed as having the widest possible application: *Joseph Travers & Sons, Ltd. v. Cooper* (L., ante, p. 104, applied; and cl. 9 was wide enough to exclude liability on the part of the dockowners since what was intended by the parties when they entered into the contract was that the dock should be used by the shipowners

with all its appurtenances but at the shipowners' risk.

Per LORD READING, C.J.: Even if there had been a breach of a fundamental or initial obligation of the contract, cl. 9 was wide enough to cover the failure to perform any such obligation and covered negligence arising from a want of care in the performance of such obligation.

Decision of BAILHACHE, J., [1914] 2 K.B. 788, affirmed.

Notes. Referred to: *Liebigs Extract of Meat Co.*, [1918] 2 K.B. 381; *Reynolds* v. *Boston Deep Sea Fishing and Ice Co.* (1921), 38 T.L.R. 22; *Beaumont-Thomas* v. *Blue Star Line, Ltd.*, [1939] 3 All E.R. 127.

As to the liabilities of harbour authorities, see 30 HALSBURY'S LAWS (3rd Edn.) 829 et seq.; and for cases see 41 DIGEST 975 et seq.

Cases referred to:

(1) *Joseph Travers & Sons, Ltd.* v. *Cooper*, ante, p. 104; [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp.M.L.C. 561; 20 Com. Cas. 44, C.A.; 8 Digest (Repl.) 46, *278*.

(2) *The West Cock*, [1911] P. 208; 80 L.J.P. 97; 104 L.T. 736; 27 T.L.R. 301; 55 Sol. Jo. 329; 12 Asp.M.L.C. 57, C.A.; 41 Digest 676, *5055*.

(3) *Tattersall* v. *National Steamship Co.* (1884), 12 Q.B.D. 297; 53 L.J.Q.B. 332; 50 L.T. 299; 32 W.R. 566; 5 Asp.M.L.C. 206; 41 Digest 496, *3245*.

Also referred to in argument:

Steel v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

Hyman v. *Nye* (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest (Repl.) 96, *239*.

Price & Co. v. *Union Lighterage Co.*, [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 41 Digest 426, *2677*.

Randall v. *Newson* (1877), 2 Q.B.D. 102; 46 L.J.Q.B. 259; 36 L.T. 164; 25 W.R. 318, C.A.; 39 Digest 440, *694*.

The Forfarshire, [1908] P. 339; 78 L.J.P. 44; 99 L.T. 587; 11 Asp.M.L.C. 158; 41 Digest 684, *5132*.

Morris and Morris v. *Oceanic Steam Navigation Co., Ltd.*, (1900), 16 T.L.R. 533; 41 Digest 474, *3061*.

Hart v. *Pennsylvania Railroad Co.* (1884), 112 U.S. 331.

Chartered Bank of India, Australia and China v. *British India Steam Navigation Co., Ltd.*, [1909] A.C. 369; 78 L.J.P.C. 111; 100 L.T. 661; 25 T.L.R. 480; 53 Sol. Jo. 446; 11 Asp.M.L.C. 245; 14 Com. Cas. 189, P.C.; 41 Digest 538, *3653*.

Mersey Docks Trustees v. *Gibbs*, *Mersey Docks Trustees* v. *Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 41 Digest 977, *8665*.

Bede Steamship Co. v. *River Wear Comrs.*, [1907] 1 K.B. 310; 76 L.J.K.B. 434; 96 L.T. 370; 10 Asp.M.L.C. 370, C.A.; 41 Digest 979, *8677*.

Nelson Line (Liverpool), Ltd. v. *Nelson & Sons, Ltd.*, [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 24 T.L.R. 114; 52 Sol. Jo. 170; 10 Asp.M.L.C. 581; 13 Com. Cas. 104, H.L.; 41 Digest 474, *3056*.

Appeal by the shipowners from a judgment of BAILHACHE, J.

Adair Roche, K.C., and *W. N. Raeburn* for the plaintiffs.

Maurice Hill, K.C., and *Burt* (for *Moss-Blundell*) for the defendants.

LORD READING, C.J.—This is an appeal by the plaintiffs from a judgment of BAILHACHE, J., sitting without a jury, who gave judgment for the defendants. The plaintiffs are steamship owners, and the defendants a railway company, who also carry on business as owners of dry docks. The question relates to the defendants' obligation in the capacity of dry-dock owners. The steamship *Marmion* owned by

the plaintiff company, entered the defendants' dry dock, and in consequence of the set of blocks which were provided for the ship to rest upon in the dock not having been evenly placed by those responsible for the working of the dock, damage was caused to the *Marmion's* bottom. The amount of that damage measured in money has been estimated by the learned judge at £284. The question upon which the case has turned is whether or not cl. 9 of the defendants' regulations, which are incorporated in the contract between the plaintiffs and the defendants, excludes the defendants from liability for negligence in the performance of their contract to provide blocks, or for failure to provide blocks, as fit and proper as care and skill could possibly make them. No question arises upon this appeal as to the negligence of the defendants, or as to their failure to perform the obligation to provide fit and proper blocks, or to use blocks which were placed in a fit and proper way so as to support the vessel without causing it damage. The learned judge has found that there was such negligence or failure to perform, and that finding of fact has not been challenged. The learned judge, however, exempted the defendants from liability, and gave judgment in their favour, because he felt bound to give effect to his interpretation and construction of cl. 9 of the regulations, and everything in this appeal turns upon the meaning to be attributed to the words of this cl. 9.

The contract between the parties is for the use of the defendants' graving dock by the steamer *Marmion*, and the plaintiffs further

> "accept, agree to, and undertake to act in conformity with the company's graving dock regulations in force in respect of such user of the dock as per printed copy thereof forming part of this agreement, and engage prior to the vessel leaving the company's dock to pay the graving dock rent, pumping, and user of block caps at the following rates."

Then follow certain rates provided for the pumping, the rent, and the use of the block caps. The regulations which formed part of the contract are: "The company's graving dock must be used subject to their regulations and to the following conditions." Then cl. 9 runs as follows:

> "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into or out of or whilst in the graving dock, whatever may be the nature of such accident or damage, or howsoever arising, nor for loss occasioned by delay in getting vessels into or out of the dock; nor shall the company be liable for any injury to persons employed at vessels while using the graving dock."

Looking at the language of this clause, and given its ordinary significance, the words undoubtedly are wide enough to cover an exemption to the dockowners from all liability arising from the user of the graving dock. I think that when one speaks of the user of the graving dock with all its appurtenances for use as a graving dock, that means the graving dock with block caps, pumps, horizontal shores, trestles, and staging planks, which are all requisites of the user of a graving dock. The word "user" certainly goes far enough. In the first instance it is said that the owner of a vessel using the dock must do so at his own risk. Then the company are not to be responsible for any accident or damage, whatever may be the nature of the accident or damage, or howsoever arising. With reference to these last words "or howsoever arising," there has been undoubtedly some difficulty in arriving at the true view, and as to whether those words are to be construed as meaning arising from any cause whatever, and whether they would be sufficient to release the contractors from liability caused by any negligence. It is sufficient for the purpose of this case to say that, although the point is raised before us as to the meaning of those words for the purpose of saving the point should it be thought desirable to raise it elsewhere, the decision in *Joseph Travers & Sons, Ltd.* v. *Cooper* (1) is binding upon this court, and therefore we are bound

A to hold, and do hold, that those words must be construed as having the widest possible application.

The plaintiffs say that, notwithstanding that they must admit for the purpose of this case that *Joseph Travers & Sons, Ltd.* v. *Cooper* (1) binds this court, and that, therefore, those words must be read with the very widest meaning to which I have already referred, those words "howsoever arising," looking at the contract B as a whole, and bearing in mind its nature, terms, and—they add—the sequence of clauses, this court should come to the conclusion that this clause was intended to have only a limited operation, and that full effect could be given to the words of the agreement, and the language used in that clause, if we so construed it as to limit its operation to accident or damage to the vessel once it has arrived in the graving dock, and for anything that might occur in the graving dock, but that the C clause should not apply to the obligations imposed upon the dockowner to provide proper block caps for use in the dock. They said that it is not necessary that the language should be so construed; that, looking at the decisions to which our attention has been called, the courts have construed, not these words, but somewhat similar words, in a limited sense, and therefore, we should do the same in this case.

D The argument which was addressed to us was that this obligation to provide block caps is, in the language used in the discussion in the case, a fundamental obligation of the contract. Sometimes, it is said, it is a "primary object of the contract," or it is one of the "initial obligations of the contract." I do not propose, in deciding this case, to discuss the exact meaning to be given to those expressions, because it seems to me that their meaning does not arise for our E decision in this case. It seems to me that assuming, as I will for the purpose of the argument, that this obligation to provide blocks and block caps is a fundamental or initial obligation of the contract, the language used in cl. 9 is such that we must read it as covering failure to perform any such obligation, and covering negligence arising from a want of care in the performance of such obligation. F Looking at the clause from the various points of view that have been put forward to us by counsel for the plaintiffs, it seems to me that one must inevitably arrive at the conclusion that what was intended by the parties when they entered into this contract was that the graving dock should be used with all its appurtenances, but it should be used at the owners' risk. The shipowners were to make certain payments for the use of the dock, and for the use of the blocks and other appur- G tenances, but in no case were they to have any claim against the owners of the dock for any accident or damage which might be caused to their vessel. This seems to me to dispose entirely of the case, and to make it unnecessary to discuss the various authorities to which our attention has been called. In all these cases there has been considerable difficulty in arriving at a reconciliation of all the authorities and decisions upon the meaning of clauses in contracts of this descrip- H tion. In truth those decisions turned upon the actual words of the clause. The principle which is to be deduced from them is, I think, as counsel for the plaintiffs rightly contended, that it may be that by the language employed and the subject-matter of the contract one is able to find that the clause was intended by the parties to be read only in the limited sense, and that when one has an absolute obligation, such as, for example, the warranty of seaworthiness in a ship, and a contract of I carriage or affreightment is entered into, one must find from the language of the contract words which indicate that it was intended to exempt the shipowner from liability for breach of that warranty, and that one would not ordinarily read into words of general exemption an extension of the exemption to such an obligation as that. But, even so, it is quite plain that in law the language used may be sufficient to exclude the shipowners even from such an obligation. It may be by express words; it may be by necessary implication to be gathered from the language which has been used in the contract; but in any event you must find in the contract words which would justify the exemption of the shipowner for a breach of

that obligation, and, unless you do find them quite clearly, the courts have said that he is to be held liable.

I only wish to add one word upon an argument addressed to us that because this exemption clause is to be found in cl. 9 of the regulations and the provisions with regard to the blocks, which are to be found in clls. 11 and 12 of the regulations, that therefore we are to infer that the provisions as to the blocks were not included in the exemption in cl. 9, but that we must read that as applying only to the obligations which preceded cl. 9. I think it impossible to give effect to that argument. One clause must succeed the other. If there is to be more than the one clause, there must be some order, and it is impossible to say that because of the numbers that are given to the clauses, or because one clause follows another, therefore you are to eliminate the meaning which you would otherwise give to the words. It seems to me to come back to this: that in this position everything must depend upon the meaning to be given to the words of cl. 9, and if they have the wide application which I think they must have, having regard to the language used in the clause, then it must follow, whatever the position in which we may find the clause, that the dockowners are exempted from this liability. Therefore, in my judgment though, perhaps, not for the same reasons, I agree with the decision of BAILHACHE, J., and think that this appeal must be dismissed.

SWINFEN EADY, L.J.—The plaintiffs' ship suffered damage in the defendants' graving dock. It appears that the tops of the blocks on which the ship *Marmion* rested were uneven in height, and when, after the water was let out of the dock, the ship took the ground, it rested unevenly on those blocks, whereby the frame sustained some strain, and the forward plates were set up and damaged; and in consequence of that the ship sustained damage to the extent of some £284. The question which arises in this action is whether the defendants, the dock company, are liable for the amount of that damage.

The ship entered the graving dock under the terms of a contract in writing, and, in my opinion, the rights of the parties depend upon the true construction of the contract. There is no doubt that the vessel sustained this damage whilst in the graving dock. [HIS LORDSHIP read cl. 9 of the defendants' regulations, and continued:] Primâ facie it is obvious the language of that clause covers the events that have happened here. The ship sustained damage while in the graving dock, and the provision is that, whatever the nature of the accident or damage or howsoever arising, the dock company are not to be liable, and that the owner of a vessel is to use the dock at his own risk. But then it is said that although those are general words of wide import, they are not to be construed in this case so as to exclude the liability of the dockowner for damage, because the damage arises in the present case, it is true, while the vessel was in the dock, but in consequence of a neglect of the defendants to provide proper block caps, and that ought to have been done before the vessel entered the dock, and that there was a fundamental obligation, any obligation which went to the whole root of the contract, to provide block caps in proper position on which the vessel could safely take the ground. Therefore it is like the cases of unseaworthiness, where the obligation of the shipowner is to provide a ship that shall be seaworthy; and reliance was placed on cases that have arisen, mostly cases with regard to ships, where it has been held that the obligation of the shipowner is such that the exemption from damage occurring by particular clauses in the contract extends only to damage that shall arise after the voyage has commenced, and not to damage arising from the unseaworthy condition of the ship which the shipowner supplied. For instance, one of the cases cited, *The West Cock* (2), was a case of towing, and there it was held that the special conditions of exemption for damage related only to defects occurring after the commencement of the voyage and not to a pre-existing defect in the tug. Similarly, *Tattersall* v. *National Steamship Co.* (3) was a case where cattle caught foot-and-mouth disease from being placed on an infected ship which was not seaworthy for that purpose. At the commencement of the voyage the ship

was unfit for the purpose, and therefore the terms of the contract relied upon only related to the carriage of the goods upon the voyage, and the damage arose from the unseaworthy condition of the ship before the commencement of the voyage.

Cases of that kind were prayed in aid in support of the argument in the present case. It seems to me they have no application to it. Here the contract was for the use of a particular dock which is described in the contract. The shipowner was to use that dock at his own risk, and whatever the damage arose from while the vessel was in that dock, in my opinion, it is covered by cl. 9, and the dockowner is exempted from liability. It is not a case of whether the shipowner has or has not to pay for block caps not provided in accordance with the contract. It is not that case at all. It is a case whether the dock company is liable for the damage to the ship by reason of not providing block caps which were suitable and of the requisite height. In my opinion the exemption from damage is comprised in and entirely covered by cl. 9, and on that ground the plaintiffs are not entitled to recover against the owners of the dock, and the appeal should be dismissed.

BRAY, J.—I am of the same opinion. What we have to do here is to construe cl. 9 of the regulations having reference to the remaining clauses of the contract. We have had considerable argument as to what is a fundamental obligation, and as to whether that includes cases where the liability is absolute, or where the liability is only to use reasonable care or all possible care. I think it is unnecessary to go into those considerations. I will assume for the moment here that there was as to the graving dock, and as to the blocks, the duty, and, if you like, the absolute duty, to provide a fit dock and proper block caps put in proper position. I do not say that it is the construction of the contract, but for the purpose of this case I am willing to assume it. I should, however, like to guard myself especially against saying that there was any absolute contract to provide a fit dock here. There was a warranty of some kind. For the purpose of this case I assume it was as wide as possible.

The question which remains is this: Whether cl. 9 of the regulations is wide enough to exempt the defendants from a breach of contract in respect of that liability. The clause begins in these words: "The owner of a vessel using the graving dock must do so at his own risk." The words "owner's risk" and the meaning of those words are now well known, particularly in the contracts of railway companies. Railway companies, in carrying goods, are under certain obligations under the Railway and Canal Acts, and they have to give a choice of two rates. One rate is called the ordinary rate, and the other is called the "owner's risk rate"; and the owner's risk rate covers what is meant by "owner's risk." It means what it says. The clause begins with the words I have read, and then it follows on explaining the meaning of those words, and making sure that they are to include every possible damage:

> "Any accident or damage to a vessel going into or out of or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising."

It is difficult to use wider words than those, and although undoubtedly we must see that the construction that we are proposing to put upon this clause is a clear construction, because ambiguous words are not sufficient, and the words must be clear in order to exempt from a liability which would otherwise enure, yet it seems to me that these words are quite clear so far as regards the graving dock. Now, it is quite true that we must read the words "graving dock" as meaning something more than the dock itself in order to exempt the company here. I think the remaining words of the section are sufficient to show that, because it is "any accident or damage" following the words that I have read. There is cl. 13, which says: "The owner of any vessel using the graving dock will be held responsible to the company should any person employed in connection with the vessel cut, destroy, or injure the walls, floor, or any of the blocks, machines, pitch boilers, cranes, tackle, or other appendages to the graving dock." In my opinion, the

words "graving dock" in cl. 9 include the graving dock and all its appendages. I do not think it is material to notice the exact position of these clauses. I cannot think that it could have been the intention of the parties that the defendants should be exempted from all liability for any defect in the dock in carrying on the business of the dock, and that, although they are exempt from that liability with regard to the dock, are yet to be liable in respect of such small things as these block caps. In my opinion the decision of BAILHACHE, J., was right.

Appeal dismissed.

Solicitors: *Botterell & Roche*, for *Botterell, Roche & Temperley*, West Hartlepool; *Davenport Cunliffe & Blake*, for *Moss, Lowe & Co.*, Hull.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

STEEDMAN *v.* DRINKLE AND ANOTHER

[PRIVY COUNCIL (Viscount Haldane, Lord Parker of Waddington and Lord Sumner), December 7, 21, 1915]

[Reported [1916] 1 A.C. 275; 85 L.J.P. 79; 114 L.T. 248; 32 T.L.R. 231]

Specific Performance—Sale of land—Express provision in agreement that time of the essence—Payment by instalments on specified dates.

Sale of Land—Contract—Forfeiture—Relief—Right to keep all instalments paid if purchaser in default of instalment.

By an agreement in writing for the sale of land the purchaser agreed to pay a certain sum by way of deposit and the balance by instalments on specified dates. It was further agreed that, if the purchaser failed to pay an instalment, the vendor would be at liberty to cancel the agreement without notice and retain by way of liquidated damages any payments already made by the purchaser and all improvements made on the premises. Alternatively, the vendor could proceed to another sale and the purchaser would make up any deficiency in price together with costs, charges and expenses.

Held: (i) a decree of specific performance would not be granted as the parties had expressly provided in their agreement that time was to be of the essence of their bargain: *Kilmer* v. *British Columbia Orchard Lands, Ltd.* (1), [1913] A.C. 319, distinguished; (ii) the stipulation as to forfeiture was a penalty and relief would be granted.

Notes. Applied: *Brickles* v. *Snell*, [1916] 2 A.C. 599. Considered: *Mussen* v. *Van Diemen's Land Co.*, [1938] 1 All E.R. 210; *Stockloser* v. *Johnson*, [1954] 1 All E.R. 630.

As to specific performance of contracts where time is of the essence, see 31 HALSBURY'S LAWS (2nd Edn.) 402–405; and for cases see 42 DIGEST 511–514. As to relief against penalties and forfeitures, see 14 HALSBURY'S LAWS (3rd Edn.) 620–623; and for cases see 20 DIGEST 514–521.

Case referred to:

(1) *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A.C. 319; 82 L.J.P.C. 77; 108 L.T. 306; 29 T.L.R. 319; 57 Sol. Jo. 338, P.C.; 20 Digest 517, *2439*.

Also referred to in argument:

Stickney v. *Keeble*, ante, p. 73; [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664, H.L.; 42 Digest 511, *768*.

Re Dagenham (Thames) Dock Co., Ex parte Hulse (1873), 8 Ch. App. 1022; 43 L.J.Ch. 261; 38 J.P. 180; 21 W.R. 898, L.JJ.; 20 Digest 516, *2438*.

Snell v. *Brickles* (1914), 49 S.C.R. 360; revised sub nom. *Brickles* v. *Snell*, [1916] 2 A.C. 599; 86 L.J.P.C. 22; 115 L.T. 568, P.C.; 42 Digest 513, *779*.

Appeal from a judgment of the Supreme Court of Saskatchewan (Nov. 15, 1913) which reversed a decision of NEWLANDS, J., in an action for specific performance of a written agreement for the sale of land. The facts are set out in the judgment.

Wallace Nesbitt, *K.C.*, and *A. M. Stewart* (both of the Canadian Bar) for the appellant.

Sir Robert Finlay, *K.C.*, and *Malcolm Macnaghten* for the respondents.

Dec. 21, 1915. **VISCOUNT HALDANE.**—This is an appeal from the Supreme Court of Saskatchewan reversing the judgment of NEWLANDS, J., who had dismissed an action for specific performance. The facts were shortly these: James Campbell White agreed by writing, dated Dec. 9, 1909, to sell 160 acres of land in the province to one Loveridge for 16,000 dollars, of which 1,000 dollars were paid on signing the agreement, and the balance was payable in annual instalments on Dec. 1 in each year. Loveridge entered into the agreement on behalf of the respondent, John C. Drinkle, who, along with one Hair, was the real purchaser. In January, 1910, the interest of Hair under the agreement was acquired by the respondent W. R. Drinkle, and on Jan. 24, 1910, Loveridge assigned the agreement to the respondents. Just before this date White died intestate. On April 18, 1910, letters of administration to his estate were granted to Steedman, the appellant, in the province of Ontario, and on May 25, 1911, the grant was re-sealed in the province of Saskatchewan. On July 22, 1910, the appellant, as administrator, purported to approve the assignment.

The material provisions of the agreement, in addition to those already stated, were that the instalments of purchase money and interest thereon were payable at Hamilton, in the province of Ontario; that the purchaser would cultivate the land in manner specified, and would pay the instalments as they fell due on the days mentioned. It was further provided that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor. On payment of the sums of money mentioned, with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments. It was further agreed that in case the purchaser should make default in any of the payments to be made the vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges and expenses to be borne by the purchaser. In case the vendor thought fit to declare the contract void under these provisions, he might make a declaration by notice to the purchaser, addressed to a post office mentioned. It was also provided that time was to be considered as of the essence of the agreement. No assignment was to be valid unless approved by the vendor or his agent.

The first deferred instalment, falling due on Dec. 1, 1910, was not paid. The appellant thereupon, by his solicitors, gave notice cancelling the agreement. The respondent, W. R. Drinkle, thereupon, on Dec. 21, tendered the amount due, but the appellant declined to receive it, and repeated this refusal, whereupon another and formal tender was made a few days later. The respondents then brought the

action in which this appeal arises, claiming specific performance, and in the alternative relief from forfeiture under the terms of the agreement. NEWLANDS, J., thought that the appellant was entitled, under the terms of the agreement providing that time should be of its essence, to cancel it on the default which had been made. He was willing to relieve the respondents from the forfeiture of the amount paid under the agreement. The respondents, however, did not accept this offer, and appealed. The Supreme Court held that the case was governed by the decision of this Board in *Kilmer* v. *British Columbia Orchard Lands, Ltd.* (1), in which it was held on a somewhat similar agreement that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for a penalty and should be relieved against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it believed to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture.

As to the relief from forfeiture, their Lordships think that the Supreme Court were right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court were wrong in reversing the judgment of NEWLANDS, J. Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach. In the case referred to this appears to have been what happened. For *Kilmer* v. *British Columbia Orchard Lands, Ltd.* (1) was an appeal in which the facts were that the company had sold land for a price to be paid in instalments at specified dates with a clause of forfeiture, in default of punctual payment, both of all rights under the agreement and of all payments already made. Time was, as in the present case, declared to be of the essence of the agreement. Default in punctual payment having occurred the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counter-claimed for specific performance. This Board held that as regards the company's claim, the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms. So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board, it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counter-claimed.

In the present case there has been no such agreement to extend time, nor anything that amounts to waiver of the right to treat time as of the essence. While, therefore, the court below was, in the present case, right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their Lordships are of opinion that there was justification for decreeing

specific performance. They think that the respondents should, even at this late stage, be relieved from forfeiture of the sums paid by them under the agreement as proposed by the learned judge who tried the case. For this purpose the respondents should have liberty to apply to the court of first instance. For the rest, the judgment of the Court of Appeal should be reversed, and the claim for specific performance dismissed, the appellant to have his costs here and in the courts below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Blake & Redden*; *Stanley Evans & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

PRINCESS THURN AND TAXIS *v.* MOFFITT

[CHANCERY DIVISION (Sargant, J.), October 16, 1914]

[Reported [1915] 1 Ch. 58; 84 L.J.Ch. 220; 112 L.T. 114; 31 T.L.R. 24; 59 Sol. Jo. 26]

Alien—Enemy—Right to sue—Licence to remain in this country during war—Registration under Aliens Restriction Act, 1914.

"When persons are allowed to remain [in this country] either for a specified time after the commencement of war or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country": HALL'S INTERNATIONAL LAW (6th Edn.) p. 388.

Both the plaintiff and the defendant claimed to be the wife of Prince Victor of Thurn and Taxis. The plaintiff claimed an injunction restraining the defendant from continuing certain alleged libels consisting of statements that she (the defendant) was the real wife of the prince. The defendant counterclaimed for similar relief. After the declaration of war between Great Britain and Austria in 1914 the plaintiff registered under the Aliens Restriction Act, 1914, as an alien. The defendant applied for an order that all proceedings by the plaintiff be stayed on the grounds: (i) that the plaintiff was an alien enemy and not entitled to relief; and (ii) that, owing to there being a state of war between this country and Austria, she was unable to obtain certain material evidence.

Held: the statement of law in HALL'S INTERNATIONAL LAW (6th Edn.), p. 388, was correct; the plaintiff having registered herself under the Act of 1914 was entitled to enforce her claim as the registration amounted at least to a licence to remain in this country; as there was no evidence on the second ground the application was dismissed.

Notes. Section 1 of the Aliens Restriction Act, 1914, has been amended by s. 3 (3) of the British Nationality Act, 1948.

Approved: *Porter* v. *Freudenberg*, *Kreglinger* v. *Samuel and Rosenfeld*, *Re Merten's Patents*, post. Applied: *Schaffenius* v. *Goldberg*, post, p. 387. Followed: *Krauss* v. *Krauss and Orbach* (1919), 35 T.L.R. 637. Referred to: *Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft*, [1919] A.C. 291; *Re N. V. Gebr. Van Udens Scheepvaart en Agentuur, Maatschappij and Sovracht*, [1941] 3 All E.R. 419; *Netz* v. *Ede*, [1946] 1 All E.R. 628; *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 2 All E.R. 434; *Hirsch* v. *Somervell*, [1946] 2 All E.R. 430.

As to the right of an alien to sue, see 1 HALSBURY'S LAWS (3rd Edn.) 499, 501–502; and for cases see 2 DIGEST (Repl.) 241 et seq. For the Aliens Restriction Act, 1914, see 1 HALSBURY'S STATUTES (2nd Edn.) 691. For the British Nationality Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 141.

Case referred to:

(1) *Wells* v. *Williams* (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 242, *440*.

Also referred to in argument:

Janson v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 277, *646*.

Boulton v. *Dobree* (1808), 2 Camp. 163, N.P.; 2 Digest (Repl.) 242, *441*.

Application by a defendant.

The facts are set out in the headnote and in the judgment.

Maurice Barnett for the defendant.

H. A. McCardie for the plaintiff.

SARGANT, J.—This is an application by the defendant to stay all proceedings by the plaintiff in this action on two grounds—first, because the plaintiff is alleged to be an alien enemy, and therefore disentitled to any relief in the courts of this country, and secondly, because the defendant alleges that she is unable to obtain certain material evidence during the continuance of the war.

The first point is of some general importance. There certainly seems to be a general impression that during the continuance of a state of war an alien enemy as such is not entitled to any relief at law as a plaintiff in the courts of this country. The facts of the case, so far as material, appear from the pleadings. By her statement of claim, the plaintiff, Leda Eleanor, described as "Princess Thurn and Taxis (the wife of Victor Prince of Thurn and Taxis)," stated that she was the wife of Victor Prince of Thurn and Taxis, hereditary magnate of Hungary, and was married to him on Nov. 1, 1911, being at that time resident in the United States of America; that the defendant, an unmarried woman residing in London, had written and published a number of libels intended to mean that the plaintiff was not the legal wife of Prince Victor but was living in adultery with him and was falsely and fraudulently assuming a name and title to which she had no right; and claimed an injunction to restrain the defendant from continuing the alleged libels or in any way acting so as to expose the plaintiff to liability or the risk of litigation in respect of any act or default of the defendant and damages. The defendant by her defence denied these statements in the statement of claim and in the alternative pleaded justification and alleged that the plaintiff was not the lawful wife of Prince Victor, but that he in fact was legally married to her (the defendant) on Oct. 12, 1906; she made similar allegation of libel against the plaintiff to those made against her, and also counter-claimed for an injunction and damages.

It is not contended that Prince Victor is an alien enemy as being a subject of Austria Hungary, or that he is abroad and probably engaged in fighting against this country; but although that may be the case so far as Prince Victor is concerned, the plaintiff, who was originally an American lady and has on the view of the facts put forward by her become an alien enemy by virtue of her marriage, resides in the United Kingdom and has duly registered herself under the recent Act and Order in Council. Under that Act and Order the alien enemy suffers certain restrictions upon his ordinary rights of movement; the Secretary of State may order his deportation, and so on, and there can be no doubt that the effect of such registration is to amount at least to a licence to the person to remain in this country; indeed, as I gather from the provisions of the order, the permission really amounts to a command to the alien enemy not to depart from this country without some special leave for the purpose. The law applicable to the circumstances is.

in my opinion, correctly stated in HALL'S INTERNATIONAL LAW (6th Edn.), p. 388, as follows:

"When persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."

That passage is supported by the leading case of *Wells* v. *Williams* (1). That being so, I rather gathered that counsel for the defendant admitted that if Prince Victor had himself been resident in this country and had been registered under the Act the result would have been that the plaintiff would have been entitled to maintain this action, and though he afterwards somewhat receded from this position he certainly adduced no argument to induce me to depart from the statement of the law to which I have referred. Inasmuch, therefore, as the plaintiff is coming to insist on a right which is individual to herself, she has, in my opinion, by virtue of her registration and by virtue of the permission thereby granted to her to reside in this country a clear right to enforce that right in the courts of this country notwithstanding the existence of the state of war. So far, therefore, as regards the general ground on which this application is based I overrule the objection raised by the defendant.

Upon the second point no real evidence has been adduced before me and I also overrule that.

Solicitors: *Harrington, Edwards & Cobban*; *Carter, Harrison & Armstrong.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

SCHMITZ *v.* VAN DER VEEN & CO.

[KING'S BENCH DIVISION (Rowlatt, J.) January 22, February 1, 5, 1915]

[Reported 84 L.J.K.B. 861; 112 L.T. 991; 31 T.L.R. 214]

Trading with the Enemy—Goods sold and delivered before war—Proceeds of sale to be shared by British subject and enemy alien—No benefit to enemy while such—Greater security to enemy of ultimately recovering his share.

The plaintiff claimed for the price of goods sold and delivered to the defendants before the outbreak of war between Great Britain and Germany on Aug. 4, 1914. The goods had been obtained from a German firm for sale by the plaintiff on the terms that any excess over a stipulated price which was obtained on their sale should be divided between the plaintiff and the German firm.

Held: as the sum claimed by the plaintiff had accrued before the war and as there was no intention that the enemy alien, while such, should benefit from the payment, the plaintiff was entitled to recover, although the position of an enemy alien might be improved by his acquiring further security that he would ultimately recover his share of the money.

Notes. The Trading with the Enemy Act, 1914, has been repealed.

Considered: *Stockholms Enskilda Bank Aktiebolog* v. *Schering, Ltd.*, [1941] 1 All E.R. 257; *Weiner* v. *Central Fund for German Jewry*, [1941] 2 All E.R. 29. Referred to: *Tingley* v. *Müller*, [1917] 2 Ch. 144; *Sovracht* (V/O) v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N.V. Gebr.*), [1943] 1 All E.R. 76.

For cases on rights, duties and disabilities of enemy aliens in general, see

2 DIGEST (Repl.) 212 et seq., and for cases on suits by British subjects representing or jointly interested with alien enemies, see ibid. 249.

Cases referred to:

(1) *Flindt* v. *Waters* (1812), 15 East 260; 104 E.R. 842; 2 Digest (Repl.) 250, *509*.

(2) *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23; 101 E.R. 415; 2 Digest (Repl.) 254, *548*.

(3) *Bristow* v. *Towers* (1794) 6 Term Rep. 35; 101 E.R. 422; 2 Digest (Repl.) 254, *549*.

(4) *Kensington* v. *Inglis* (1807), 8 East 273; 103 E.R. 346; 2 Digest (Repl.) 255, *552*.

(5) *De Tastet* v. *Taylor* (1812), 4 Taunt. 233; 128 E.R. 318; 2 Digest (Repl.) 281, *684*.

(6) *Daubuz* v. *Morshead* (1815), 6 Taunt. 332; 128 E.R. 1062; 2 Digest (Repl.) 222, *337*.

Also referred to in argument:

Anthon v. *Fisher* (1795), 3 Doug.K.B. 166; 99 E.R. 594; 2 Digest (Repl.) 243, *455*.

Flindt v. *Scott*, *Flindt* v. *Crockatt* (1814), 5 Taunt. 674; 128 E.R. 856; 2 Digest (Repl.) 282, *695*.

Feise v. *Bell* (1811), 4 Taunt. 4; 128 E.R. 227; 2 Digest (Repl.) 283, *701*.

Harman v. *Kingston* (1811), 3 Camp. 150; 2 Digest (Repl.) 212, *261*.

Shepeler (*Schepeler*) v. *Durant* (1854), 14 C.B. 582; 23 L.J.C.P. 140; 2 W.R. 467; 2 C.L.R. 729; 139 E.R. 240; sub nom. *Chepeler* v. *Durant*, 23 L.T.O.S. 79; 2 Digest (Repl.) 250, *506*.

Kershaw v. *Kelsey* (1868), 100 Mass. 561.

Janson v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 255, *553*.

Hagedorn v. *Bell* (1813), 1 M. & S. 450; 105 E.R. 168; 2 Digest (Repl.) 216, *295*.

Antoine v. *Morshead* (1815), 6 Taunt. 237; 1 Marsh. 558; 128 E.R. 1025; 2 Digest (Repl.) 254, *544*.

Willison v. *Patteson* (1817), 1 Moore, C.P. 133; 7 Taunt. 439; 129 E.R. 176; 2 Digest (Repl.) 254, *546*.

Ex parte Boussmaker (1806), 13 Ves. 71; 33 E.R. 221; 2 Digest (Repl.) 243, *457*.

Furtado v. *Rogers* (1802), 3 Bos. & P. 191; 127 E.R. 105; 2 Digest (Repl.) 254, *550*.

Le Bret v. *Papillon* (1804), 4 East 502; 102 E.R. 923; 2 Digest (Repl.) 250, *508*.

M'Connell v. *Hector* (1802), 3 Bos. & P. 113; 127 E.R. 61; 2 Digest (Repl.) 249, *496*.

Action brought by the plaintiff for the price of goods sold and delivered to the defendants.

By s. 1 of the Trading with the Enemy Act, 1914:

"(1) Any person who during the present war trades or has, since the fourth day of August, 1914, traded with the enemy within the meaning of this Act shall be guilty of a misdemeanour. . . . (2) For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy. Provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy."

By s. 5 of the Trading with the Enemy Proclamation, dated Sept. 9, 1914

"From and after the date of this proclamation the following prohibitions shall have effect . . . and we do hereby accordingly warn all persons resident, carrying on business or being in our dominions: (1) Not to pay any sum of money to or for the benefit of an enemy."

A. H. Spokes for the plaintiff.

G. W. H. Jones and *O'Malley* for the defendants.

Cur. adv. vult.

Feb. 5, 1915. **ROWLATT, J.**, read the following judgment.—In this case the plaintiff, who is a naturalised British subject resident here, sued the defendants, a London firm, for £105 2s. 8d., the price of goods sold and delivered. The first defence was that the plaintiff was not entitled to sue, the contract, so it was contended, being made by him only as agent for a foreign manufacturer, one Arnz, resident in Germany. I decided at the original hearing that the defence failed, the contract being between the plaintiff and the defendants. It was then said that the plaintiff could not recover on the ground that, though the plaintiff might be the principal in the contract with the defendants, nevertheless the relations between him and Arnz were such that the action was for the benefit of Arnz, an alien enemy, and so not maintainable. It was contended for the plaintiff that this point was not open to the defendants, on the ground that by the order made on the Ord. 14 proceedings they were limited to the defences set up by their affidavit, of which this was not one. The order, however, which was in the common form, left it open to me to give leave to raise further points, and, as counsel for the plaintiff in opening had glanced at and endeavoured to discount this defence, and as, moreover, making a payment for the benefit of the enemy is under the recent Acts and proclamations a criminal offence, I thought I ought to hear the objection. As counsel for the plaintiff was not, however, fully prepared I adjourned the case for further argument, and this took place on Feb. 1, when many authorities were cited.

It appears that the arrangements between the plaintiff and Arnz were that the plaintiff ordered from Arnz goods, umbrella silks, for which he had previously obtained orders himself from customers in England, sometimes adding some more in anticipation of being able to place them after arrival. The goods were consigned to the plaintiff by Arnz in bulk, and the plaintiff appropriated and delivered them to the various buyers. The plaintiff was at liberty to sell them at any price he chose above a certain minimum. The excess was divided equally between the plaintiff and Arnz, and the plaintiff also received 3 per cent. commission. The plaintiff was only to pay Arnz if and when he himself received payment, Arnz thus taking the risk of the buyers' default, though of course the plaintiff's share of profit and commission were at his own risk. The course of business was for the plaintiff, when he had collected a certain amount, to send Arnz a cheque for it. He kept a ledger account with Arnz, in which he debited himself with these receipts and credited himself with the cheques to Arnz. Every six months he credited himself in this account with share of profits and commission to date. From these facts it appears to me to be clear that inasmuch as a payment to the plaintiff created an obligation on his part, which would not have arisen without it, to remit the money paid to Arnz, subject to his own claim for half profits and commission, the action was clearly in one sense for the benefit of Arnz. He would obtain the benefit of Schmitz becoming accountable or indebted (it matters not which) to him for the money, which no one was before. He would not, however, obtain the benefit of the payment in the sense of a benefit by way of payment unless Schmitz not only became liable to but did in fact remit.

Certain things are well settled. In the first place, an alien enemy cannot maintain an action in our courts, not because his enemy character constitutes a defence to his claim, but because it deprives him of locus standi. He is, while that character lasts, under a temporary disability to sue. Yet the cause of action,

if otherwise good, is unaffected. But, secondly, in some cases the enemy character does affect the cause of action, as where it is upon an insurance of enemy ships or goods. It being the object of the Crown to destroy the commerce of the enemy, a contract to indemnify him against such loss is or becomes illegal, and there is no cause of action. In such a case, even if the broker, a British subject, sues and the policy was underwritten before the war, the action still fails, and fails finally, not because the beneficiary is an enemy, but because the cause of action is bad. This, as was pointed out in *Flindt* v. *Waters* (1), was the real ground of the decisions in *Brandon* v. *Nesbitt* (2) and *Bristow* v. *Towers* (3). It is essential to distinguish carefully between these two cases—i.e., that where the cause of action is unexceptionable, but the plaintiff as an alien enemy is temporarily and personally incapable of being received as a plaintiff, and that where the cause of action, whoever puts it forward, fails in itself and fails finally. It cannot be put more clearly than in the words of LORD ELLENBOROUGH in *Flindt* v. *Waters* (1) where he says (15 East at p. 265):

> "The defence of alien enemy must be accommodated to the nature of the transaction out of which it arises; it may go to the contract itself on which the plaintiff sues and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal in respect to the capacity of the party to sue upon it."

Where the cause of action is unexceptionable though the person interested is an enemy, as where the claim accrued before he became an enemy (as in *Flindt* v. *Waters* (1)), or where he was licensed by the Crown to trade (as in *Kensington* v. *Inglis* (4) and *De Tastet* v. *Taylor* (5)), there is no objection to an action being brought upon it for the benefit of the alien enemy by one who is not himself an alien enemy, provided of course he is otherwise entitled to sue in his own name. So where a subject of the realm or alien friend sues on bills of which he is holder, but as trustee for an alien enemy in respect of part of the proceeds, he can recover the whole: *Daubuz* v. *Morshead* (6). There is no incapacity in the plaintiff and no defence pleadable to the merits. If there is any objection it is at a later stage—namely, as to the payment over of the proceeds after the action by the plaintiff to the enemy. As LORD ELLENBOROUGH said (to refer once more to *Flindt* v. *Waters* (1)) and as GIBBS, C.J., said in *Daubuz* v. *Morshead* (6) the Crown might seize the money in the plaintiff's hands. It would indeed be wholly unreasonable, especially where the plaintiff is himself interested in part of the proceeds of the action, to let the defendant keep the money in hand, and the cases referred to show it is not the law. It is true that in *Brandon* v. *Nesbitt* (2) LORD KENYON did say that an action would not lie "by or in favour of" an alien enemy, but after *Flindt* v. *Waters* (1) that cannot be taken as universally true. In the present case the plaintiff's claim, in which an alien enemy is interested, accrued before the war, and, so far as the common law rule goes, he is entitled to recover. I only wish to guard myself by pointing out that I say nothing as to what would be the position if an alien enemy, while such, put a subject of the realm in a position to sue for his benefit—e.g., by endorsing a bill to him merely for collection, or assigning a debt to him under the Supreme Court of Judicature Act, 1873. In such cases it might be said that the plaintiff's title failed as created by an illegal transaction with the enemy. But I say nothing about that.

It remains to consider the effect of the Trading with the Enemy Act, 1914, and the proclamation of Sept. 9, which makes it a criminal offence to make a payment to or for the benefit of an enemy. If payment of the debt now sued for, by the defendant to the plaintiff under the circumstances existing between the plaintiff and Arnz which I have already detailed, would be a payment for the benefit of the enemy within the meaning of the proclamation, I could not give a judgment which would have the effect of bringing about that payment. In my opinion, however, no crime is committed by making a payment to a third person which merely improves the position of an enemy by giving him further security that he

will ultimately recover the money, and without intention that the enemy, while such, shall benefit by it as a payment. In the present case the plaintiff expresses his willingness to submit to a stay of execution until he shall have taken out and brought to a hearing a summons under the Trading with the Enemy Amendment Act, 1914, for the vesting of this money in the custodian, and I shall make that order. I am by no means clear that even if the plaintiff had not consented it would not have been my duty to take the same course in order to make it quite certain that the judgment of the court would not work an offence against the statute. But it is unnecessary for me actually to decide that. I do not know whether upon the summons of the plaintiff the Chancery Division can or will make any order, or whether any or what other measures can or will be taken to prevent the money going to Arnz pending the war. My functions are confined to securing the necessary delay by suspending execution, as already mentioned.

Solicitors: *Biddle, Thorne, Welsford & Gait*; *Cohen, Dunn & Co.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

LEMY *v.* WATSON AND ANOTHER

[KING'S BENCH DIVISION (Lord Reading, C.J., Darling and Avory, JJ.), July 27, 28, 1915]

[Reported [1915] 3 K.B. 731; 84 L.J.K.B. 1999; 114 L.T. 140; 80 J.P. 17; 31 T.L.R. 612; 13 L.G.R. 1323; 25 Cox, C.C. 232]

Merchandise Marks—False trade description—Description applied before 1887—*Lawfully applied before* 1887—"*Lawfully and generally applied*"—*Merchandise Marks Act*, 1887 (50 *&* 51 *Vict.*, *c.* 28), *s.* 18.

By s. 18 of the Merchandise Marks Act, 1887: "Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied . . ."

"Generally" means that the description was in use before 1887 to the knowledge of the public and not merely to the knowledge of members of the trade.

"Lawfully" in this section means that where there has been a conventional trade description and the use of it has been lawful in the widest sense of the term, that is protected; the section is not restricted merely to requiring that there has been no infringement of the criminal law.

Per AVORY, J.: "Lawfully and generally applied to goods of a particular class to indicate the particular class" means a description which was applied in such circumstances at the time of the passing of the Act as was not calculated to mislead the public or the purchaser—a description which the purchasing public have come to recognise as being a description of goods the nature of which they perfectly well understand, e.g., a Bath bun although the bun was not made in Bath.

Notes. Referred to: *Re Concord Canning Co.'s Trade Mark* (1932), 49 R.P.C. 323.

As to the Merchandise Marks Acts, see 10 HALSBURY'S LAWS (3rd Edn.) 685–697; and for cases see 43 DIGEST 239 et seq. For the Merchandise Marks Act, 1887, see 25 HALSBURY'S STATUTES (2nd Edn.) 1113.

Case referred to:

(1) *R.* v. *Butcher* (1908), 99 L.T. 622; 72 J.P. 454; 24 T.L.R. 797; 52 Sol. Jo. 716; 21 Cox, C.C. 697; 1 Cr. App. Rep. 54, C.C.A.; 43 Digest 243, *868*.

Also referred to in argument:

Holmes v. *Pipers, Ltd.*, [1914] 1 K.B. 57; 83 L.J.K.B. 285; 109 L.T. 930; 78 J.P. 37; 30 T.L.R. 28; 12 L.G.R. 25; 23 Cox, C.C. 689, D.C.; 43 Digest 242, *865*.

Fowler v. *Cripps*, [1906] 1 K.B. 16; 75 L.J.K.B. 72; 93 L.T. 808; 70 J.P. 21; 54 W.R. 299; 22 T.L.R. 73; 50 Sol. Jo. 45; 4 L.G.R. 9; 21 Cox, C.C. 52, D.C.; 43 Digest 244, *875*.

Kirshenboim v. *Salmon and Gluckstein*, [1898] 2 Q.B. 19; 67 L.J.Q.B. 601; 78 L.T. 658; 62 J.P. 439; 46 W.R. 573; 14 T.L.R. 395; 42 Sol. Jo. 538; 19 Cox, C.C. 127, D.C.; 43 Digest 243, *872*.

Budd v. *Lucas*, [1891] 1 Q.B. 408; 60 L.J.M.C. 95; 64 L.T. 292; 55 J.P. 550; 39 W.R. 350; 7 T.L.R. 242; 17 Cox, C.C. 248, D.C.; 43 Digest 244, *876*.

Wood v. *Burgess* (1889), 24 Q.B.D. 162; 59 L.J.M.C. 11; 61 L.T. 593; 54 J.P. 325; 38 W.R. 331; 16 Cox, C.C. 729, D.C.; 43 Digest 240, *846*.

Gridley v. *Swinborne* (1888), 52 J.P. 791; 5 T.L.R. 71; 43 Digest 239, *845*.

Marshall v. *Ross* (1869), L.R. 8 Eq. 651; 39 L.J.Ch. 226; 21 L.T. 260; 17 W.R. 1086; 43 Digest 326, *1468*.

Special Case stated by the London quarter sessions.

The respondents were found guilty by a metropolitan magistrate of selling Norwegian brisling or sprats under a false trade description, namely, "sardines," contrary to the Merchandise Marks Act, 1887, s. 2 (1) (d). Quarter sessions held that the description "Norwegian sardine," while false in fact, was not false in law, and that in any case the respondents were entitled to be exonerated under s. 2 (2) of the Act as they had acted innocently.

Sir Robert Finlay, K.C. (*Kerly*, K.C., and *Bodkin*, with him), for the appellant.

Walter, K.C. (*H. A. Colefax* and *H. Curtis Bennett*, with him), for the respondents.

LORD READING, C.J.—The respondents were summoned for having unlawfully sold goods to which they had applied a false trade description—namely, "sardines," and they were convicted after a long hearing before SIR JOHN DICKINSON, the chief magistrate. They appealed to the court of quarter sessions, and in the result the Court of Quarter Sessions differed from SIR JOHN DICKINSON and quashed the conviction, thus allowing the appeal. But they have stated a Case for the opinion of this court, and the points involved are no doubt of considerable importance, both to those engaged in this trade and to members of the public who purchase and consume sardines.

The case made by the appellants, representing the French society, is that a sardine is a small pilchard which is prepared in oil, packed in a tin in a way with which we are all familiar, and then sold in this tin as a tin containing sardines. The appellant says that the respondents have packed a fish known as brisling, which is the Norwegian name for a sprat, or, without being too precise, some fish like a sprat, which then is prepared in oil in a similar fashion to the preparation of sardines in France, packed in tins, and sent over to this country and sold under the trade description of "Norwegian Sardines." The appellant says that the respondents have no right to use the term "sardines" at all, and that they commit an offence by so doing. The respondents have contended before us, not that they are entitled to use the term "sardines" simpliciter—that they have not claimed—but that they are entitled to use the term "sardines" if accompanied by the local prefix, that is, "Norwegian"—their contention being that "Norwegian sardines" is a conventional term, a conventional description of the goods which they have been selling under this description, that this conventional description was in use and was applied before the Merchandise Marks Act, 1887, was passed, and conse-

A quently, relying on s. 18 of that statute, that they have not committed any offence, but are justified in the use and application of the term "Norwegian sardines."

It is worthy of observation that in the lengthy and considered judgment of the court of quarter sessions, which we have before us, it is impossible to disentangle from that judgment a definite finding of fact that the term "Norwegian sardines" B was generally applied as a trade description to these Norwegian brislings or sprats, prepared and packed as I have described, before the year 1887. There are undoubtedly in this judgment sentences, I might even say many sentences, which by themselves would lead to the conclusion that it was the intention of the court of quarter sessions so to find; but immediately one is confronted with many other sentences which indicate that they cannot possibly have intended to come to that C conclusion. It appears to me, having considered this judgment both with the very able assistance of the learned counsel who have been before us and by studying it for myself, that the court of quarter sessions had halted at that finding. It was said that the description was false in fact but not false in law, and I understand the whole of the judgment, after the consideration that I have given to it, to mean this, that these Norwegian brislings or sprats so prepared and packed could not D properly be described under the Merchandise Marks Act, 1887, as Norwegian sardines. They were not sardines in fact because they were not the small pilchard which really is the sardine proper, and even with the prefix "Norwegian" it was false in fact to say that these fish so prepared were Norwegian sardines. It is true they were Norwegian, but they were not sardines. That is what I understand the finding to be when it says that the description was false in fact. But then the E court says that notwithstanding that the description was false in fact it is not false in law, and having regard to the observations of the deputy chairman, and also to the way the Case is stated, I come to the conclusion that what is meant is that but for s. 18 this would have been a false trade description, but because of s. 18 and of the facts and circumstances of the case it is not a false trade description. The question to my mind resolves itself really into whether or not F it is established that either by the finding of fact, or from the facts as stated even though it may not be a definite finding of fact to that effect, the trade description applied was one which had been applied lawfully and generally to these goods or to indicate the particular method of manufacture of these goods.

Quarter sessions came to the conclusion that, although there had been a very small trade done before 1887, there was a trade which existed from 1884 or earlier G in these Norwegian brisling, and that the fish so prepared and packed, as I have stated, were then sold as Norwegian sardines and described as Norwegian sardines, and it is contended that the court has found (and I think there is justification for saying that the court has intended to find) that that meant that the trade description had been applied generally to the goods of this class under s. 18. That, of course, would not be sufficient. It must be both lawfully and generally applied. H I am not, however, satisfied that upon this evidence it was open to the court to come to the conclusion that the trade description was one that had been generally applied to these goods. It is worthy of notice that it is said that there had only been a very small trade, but what is left out of consideration altogether in the judgment of the quarter sessions, which, in my view, entitles me to differ from them in the conclusion of fact, is that they have not taken into consideration I at all the members of the public—that is, the purchasers—but have dealt entirely with this case as if it were a matter for the trade only—that is, for sellers or manufacturers and dealers—as distinguished from the purchasers, who are the public.

It seems to me that the whole object of this statute was to protect the public against descriptions which might be given by the trade or members of the trade, which were false. But it is not sufficient to establish, as I will take it it was established in this case, that in the trade itself—that is, among the members who were carrying on the trade for a short time apparently before 1887—these

Norwegian sprats or brisling were described as "Norwegian sardines." One may well pause to inquire, why were they described as sardines? Obviously it appears to be clear from what has happened since this description was adopted that it is a term which at any rate lent itself to a very ready sale, and those in the trade preferred to call Norwegian sprats "Norwegian sardines," and they preferred to call them by that name because they got a better sale, and they got a better sale because people did not know that they were buying Norwegian sprats. That, in my view, is the true meaning of what has happened in this case, and the consequence of it is that the finding of fact by the quarter sessions is one which I find myself quite unable to accept, and I differ from it because I think that the court has wrongly directed itself in law upon this point. I agree with the view put forward by counsel for the appellant, which is founded on the observation of LORD ALVERSTONE, C.J., in *R.* v. *Butcher* (1), in which he says at the end of his judgment, in dealing with this very section—s. 18:

> "It was that evil to which the Act was directed. What it did was to say that those well-known conventional descriptions which had been applied to various classes of goods should be protected."

In an earlier part he had said:

> "What is intended to be protected under this section is a trade description, lawfully and generally applied to goods of a particular class or manufactured by a particular method to indicate the particular class or method of manufacture of such goods."

That is almost in terms stating the words of the statute. He gives it this meaning, that the object of that section was to protect the conventional description, such as "Brussels carpet," which is the instance given, and other secondary meanings which have grown up in the course of time, and of which instances have been given during the argument. I am quite satisfied that there cannot be a conventional description or secondary meaning unless those who were parties to it —that is, both sellers and purchasers—agree. There can be no conventional description which is made by the trade to which the public is not a party. There can, in my view, be no secondary meaning for the purposes of this section to which, again, the public is not a party. I come to the conclusion, therefore, that the court was wrong when it decided that this trade description had generally been applied before 1887.

I do not, however, rest my decision upon that alone. The court of quarter sessions also came to the conclusion that lawfully in s. 18 meant without committing a criminal offence, or without having committed or become liable for a criminal offence under the Act. In my judgment that is giving much too restricted a meaning to the word "lawfully." I do not think it was intended by the use of that term to say that if the conventional meaning is adopted and—provided that there has been no infringement of the criminal law—has been generally applied, then the trade description was to be protected. In my opinion, what was meant was that where there has been a conventional trade description and the use of it has been lawful in the widest sense of the term, that is protected, but the section is not restricted merely to requiring that there has been no infringement of the criminal law. That being, as it seems to me, the meaning of the section, I am satisfied again that the court of quarter sessions was wrong in its conclusion upon that point.

The Case is so stated that if we come to the conclusion that the court was wrong in its construction of s. 18, the appeal must be allowed and the conviction restored. From what I have said it follows not only from the way in which the Case is stated, but also from the way in which the case has been argued and presented before us, that the conclusion at which SIR JOHN DICKINSON arrived was the right one, and that the quarter sessions was wrong. For these reasons I think that this appeal must be allowed and the conviction restored.

DARLING, J.—I have come to the same conclusion, though I admit that my opinion wavered a good deal during the argument. The question, as it seems to me, is whether it is legitimate to offer for sale sprats caught and prepared in Norway in a manner which makes them look like what are commonly sold as sardines, and to sell them by the name of "Norwegian sardines." It could not possibly be right, and it would be an offence against the law concerning trade marks and trade descriptions to do this unless it has been rendered lawful by s. 18 of the Act of 1887. Section 18 says that no offence will be committed in regard to a trade description although that trade description may not be accurate, provided the description in question has been before 1887 lawfully and generally applied. With regard to the word "applied," upon consideration I do not think that can be limited, seeing that the word before it is "generally," to the application of the term by the person who puts the trade mark upon the goods nor to the person who takes the goods from the manufacturer with the trade mark—that is to say, I do not think it can be limited to people in the trade. The using of this inaccurate trade description will not be excused unless it was done before 1887 both lawfully and generally. With regard to the word "lawfully," I was impressed for some time by the argument of counsel for the respondents that "lawfully" meant not unlawfully in the criminal sense; but, having regard to all the matters with which this statute was dealing and with the other words used, I do not think we can give it that limited meaning. There are many things unlawful which are not merely forbidden by a criminal statute or by the common law as to criminal offences, and I think that a good instance is shown by the use of such a term where a person is charged that he did something "without lawful excuse." You could show that he had done the act without a lawful excuse, although you could not show that he had committed any criminal act or rendered himself liable to fine or imprisonment. I think that the word "lawfully" in this section is used in that sense, that he must show that he lawfully did it, that the word was lawfully applied, and that it was generally applied. I do not think that much question arises in the present case about the word "lawfully," because I think it is made much clearer that the term "Norwegian sardines" in this particular case cannot be said to have been "generally" applied. I have tried to think what "generally" here means, and there are cases already decided in this court which show that the description must have become a conventional term. It comes, therefore, to this. The term must be an erroneous one, otherwise the question does not arise—if it is an exact description the question cannot arise—it must be an erroneous term consecrated by common use. That is my notion of what would be a good definition of the expression "generally applied." There are many such terms, erroneous terms, consecrated by common use. One which has been mentioned in the course of the argument, a glaring instance, is the term "Bombay ducks," as applied to an Indian fish, and it is agreed that if anybody ordered Bombay ducks and somebody supplied him with ducks from Bombay, the contract to supply Bombay ducks would be broken and not fulfilled. Another obvious instance is eau de Cologne. Whatever that may be, it certainly is not water from the Rhine; and if eau de Cologne were ordered and one simply supplied a gallon of water from Cologne that would not fulfil the contract. Another instance where anybody would understand what was meant is if one speaks of Roman pearls. They are not pearls with which any oyster has had anything to do, nor do I know that they are Roman. They indicate something which is probably neither Roman nor a pearl, just as it was said by a well-known historian that the Holy Roman Empire had for its chief characteristics that it was neither holy, nor Roman, nor an empire. One other instance occurs to me of a term consecrated by common user, which does not indicate the true fact, and that is when people speak, as they commonly do, of the judicial ermine, meaning merely any white fur when worn by a judge. These have become conventional terms, and are, I think, instances of a trade description lawfully and generally applied, but I come to the conclusion that they are generally applied for this reason, that they are not limited, and that the words are not to be

applied merely as between those who produce the article and those who buy it for the purpose of retailing it to the public. I think that is what the statute means, and that "generally applied" in s. 18 must include all those who may buy the article or may possible buy it or talk about it. It must be a word adopted into the language in the same way as the words in the instances I have indicated are adopted into the language.

Therefore, seeing that there is no excuse for the selling of these things as Norwegian sardines unless the excuse can be found in s. 18 of the Merchandise Marks Act, 1887, I think that the decision of quarter sessions, which went upon a really different interpretation of the statute from that which I have indicated was the right one, was wrong and should be reversed.

AVORY, J.—I am of the same opinion. The respondents to this appeal were originally charged before the chief magistrate at Bow Street with the offence of selling goods to which the false trade description of "sardines" was applied, and the case appears to have proceeded before the chief magistrate upon these lines, that the description of "sardines" was falsely applied to these goods, and the chief magistrate decided the case upon that ground, and found as a fact that the trade description "sardine" was not at the passing of the Merchandise Marks Act, 1887, a trade description lawfully and generally applied to goods of a particular class.

Upon appeal to quarter sessions the respondents appear to have abandoned any contention that "sardines" could be lawfully applied as a trade description, and to have contended that they had not sold these goods under that trade description, but that they had sold them under the description of "Norwegian sardines." The appellant appears to have contested the case at quarter sessions on those lines, accepting the contest apparently on those lines as to whether these goods could properly be described as Norwegian sardines.

My own view, looking at the tin which has been produced before us, is that the respondents were liable to be convicted of selling these goods under the trade description of "sardines," and if the case had proceeded at quarter sessions upon that point alone, apparently they would have had no ground for upsetting the decision of the chief magistrate. But dealing with the case as it is presented to us now, whether the respondents were applying a false trade description to these goods in describing them as "Norwegian sardines," I have come clearly to the conclusion that the quarter sessions in this case were wrong in law in the construction which they put upon s. 18 of the Merchandise Marks Act, 1887. If there had been in this Special Case an express finding of fact by quarter sessions in the terms of s. 18 that the trade description "Norwegian sardines" was lawfully and generally applied to goods of a particular class to indicate the particular class in the year 1887, I doubt whether this court could have interfered, but I agree with what has been said by my Lord and my brother DARLING, that when one looks at this case, somewhat complicated as it is, it is impossible to say that there is any definite finding of fact in the terms of that s. 18. I think that quarter sessions were wrong in their view of the law, and I think that counsel for the respondents was wrong in his contention that the word "lawfully" in s. 18 means only something which is not contrary to the criminal law. My own impression is that the deputy chairman of quarter sessions went even further and construed it to mean anything which does not render the person doing it liable to be convicted of obtaining goods by false pretences. That appears to me to be the view which he really took of that word "lawfully." But in either view, in my opinion, it was wrong.

I will only add what I think is the true meaning of this expression "lawfully and generally applied to goods of a particular class . . . to indicate the particular class." In my view it means a description which is applied under such circumstances at that time, namely, in 1887, as was not calculated to mislead the public or the purchaser. I think that view is borne out by the latter part of the section because there is a proviso to this exception. Having excepted out of the operation of the

Act a trade description which is lawfully and generally applied to goods to indicate the particular class, the section provides that where such trade description includes the name of a place or country and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, then there must be added to the trade description the name of the place in which the goods were actually made or produced. That seems to me to show that the idea running through this section is that the description which is contemplated in the earlier part is one which is not calculated to mislead; in other words, a description which the purchasing public have come to recognise as being a description of goods the nature of which they perfectly well understand, such, for instance, as the case put during the argument of the Bath bun, where everybody in 1887 knew that it did not mean a bun that was made in Bath. Counsel for the respondents in supporting his contention was driven to say that traders who before 1887 had been in the habit of selling chicory as coffee, would be protected if they could show that it had been the habit generally among the traders to sell chicory as coffee. In my opinion this section was not intended to have any such effect; in other words, it was not intended to perpetuate error, or to protect dishonest trading. The very object of the whole statute was the contrary. For these reasons I agree that the judgment of the quarter sessions must be reversed and the conviction restored.

Appeal allowed.

Solicitors: *Halse, Trustram & Co.*; *Radford & Frankland*, for *Maugham & Hall*, Newcastle-on-Tyne.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

SAVILL *v.* DALTON

[COURT OF APPEAL (Lord Reading, C.J., Pickford, L.J., and Bray, J.), February 19, May 14, 1915]

[Reported [1915] 3 K.B. 174; 84 L.J.K.B. 1583; 113 L.T. 477; 59 Sol. Jo. 562; [1915] H.B.R. 154]

Bankruptcy—County court—Order by county court judge—Enforcement by action brought in High Court.

An order made by a county court in the exercise of its bankruptcy jurisdiction may be enforced by action in the High Court.

So held by LORD READING, C.J., and SWINFEN EADY, L.J., BRAY, J., dissenting.

Notes. Section 100 of the Bankruptcy Act, 1883, has been replaced in identical terms by s. 103 of the Bankruptcy Act, 1914. The earlier Bankruptcy Rules have been revoked and the present rules are to be found in the Bankruptcy Rules, 1952. R.S.C., Ord. 62, r. 24, is now replaced by R.S.C., Ord. 42, r. 24. A rule equivalent to Ord. 25, r. 2, of the County Court Rules, 1903, is not contained in the County Court Rules, 1936, but the relevant rules are stated expressly to be applicable to both orders and judgments.

As to the bankruptcy jurisdiction of county courts, see 2 HALSBURY'S LAWS (3rd Edn.) 253; and for cases see 4 DIGEST (Repl.) 41–43. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Berkeley* v. *Elderkin* (1853), 1 Ex.B. 805; 22 L.J.Q.B. 281; 21 L.T.O.S. 74; 17 J.P. 568; 17 Jur. 1153; 1 W.R. 305; 1 C.L.R. 416; 118 E.R. 638; 18 Digest (Repl.) 447, 704.

(2) *Austin* v. *Mills* (1853), 9 Exch. 288; 23 L.J.Ex. 40; 22 L.T.O.S. 171; 18 J.P. 24; 18 Jur. 16; 2 W.R. 107; 2 C.L.R. 411; 156 E.R. 123; 13 Digest (Repl.) 440, *657*.

(3) *Furber* v. *Taylor*, [1900] 2 Q.B. 719; 69 L.J.Q.B. 898; 83 L.T. 308; 48 W.R. 689, C.A.; 13 Digest (Repl.) 463, *866*.

(4) *Godfrey* v. *George*, [1896] 1 Q.B. 48; 65 L.J.Q.B. 249; 44 W.R. 245; sub nom. *Godfrey* v. *G.*, 73 L.T. 599; 40 Sol. Jo. 117, C.A.; 30 Digest (Repl.) 199, *416*.

(5) *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q.B. 428; 68 L.J.Q.B. 801; 81 L.T. 206; 47 W.R. 577; 43 Sol. Jo. 602, C.A.; 30 Digest (Repl.) 199, *420*.

(6) *R.* v. *Northallerton County Court Judge*, [1898] 2 Q.B. 680; 68 L.J.Q.B. 24; 79 L.T. 327; 47 W.R. 68; 15 T.L.R. 9; 43 Sol. Jo. 10; 5 Mans. 300, C.A.; affirmed sub nom. *Skinner* v. *Northallerton County Court Judge*, [1899] A.C. 439; 68 L.J.Q.B. 896; 80 L.T. 814; 63 J.P. 756; 15 T.L.R. 433; 6 Mans. 274, H.L.; 4 Digest (Repl.) 41, *357*.

(7) *Re Pickard, Ex parte Official Receiver*, [1912] 1 K.B. 397; 81 L.J.K.B. 330; 105 L.T. 832; 56 Sol. Jo. 144; 19 Mans. 58, D.C.; 4 Digest (Repl.) 42, *360*.

(8) *Re Boyd, Ex parte McDermott*, [1895] 1 Q.B. 611; 64 L.J.Q.B. 439; 72 L.T. 348; 2 Mans. 166; 14 R. 364, C.A.; 4 Digest (Repl.) 97, *874*.

(9) *Grant* v. *Easton* (1883), 13 Q.B.D. 302; 53 L.J.Q.B. 68; 49 L.T. 645; 32 W.R. 239, C.A.; 11 Digest (Repl.) 527, *1402*.

Also referred to in argument:

The Delano, [1895] P. 40; 64 L.J.P. 8; 71 L.T. 544; 43 W.R. 65; 11 T.L.R. 23; 39 Sol. Jo. 42; 7 Asp.M.L.C. 523; 6 R. 810, C.A.; 1 Digest (Repl.) 273, *1750*.

Re A Bankruptcy Notice, Ex parte Official Receiver, [1895] 1 Q.B. 609; 64 L.J.Q.B. 429; 2 Mans. 164; 14 R. 362, C.A.; 4 Digest (Repl.) 97, *871*.

Norwich Corpn. v. *Norwich Electric Tramways Co., Ltd.*, [1906] 2 K.B. 119; 75 L.J.K.B. 636; 95 L.T. 12; 70 J.P. 401; 54 W.R. 572; 22 T.L.R. 553; 50 Sol. Jo. 499; 4 L.G.R. 1114, C.A.; 42 Digest 749, *1728*.

Re Chinery, Ex parte Chinery (1884), 12 Q.B.D. 342; 53 L.J.Ch. 662; 50 L.T. 342; 32 W.R. 469; 1 Morr. 31, C.A.; 4 Digest (Repl.) 11, *13*.

Norton v. *Gregory* (1895), 73 L.T. 10; 11 T.L.R. 439; 14 R. 735, C.A.; 30 Digest (Repl.) 199, *415*.

Seldon v. *Wilde*, [1911] 1 K.B. 701; 80 L.J.K.B. 282; 104 L.T. 194, C.A.; 30 Digest (Repl.) 199, *417*.

Re Barrett, Ex parte Reynolds (1885), 15 Q.B.D. 169; 54 L.J.Q.B. 351; 53 L.T. 448; 33 W.R. 715; 1 T.L.R. 433; 2 Morr. 147, C.A.; 4 Digest (Repl.) 12, *17*.

Appeal by the defendant from a decision of HORRIDGE, J., in an action brought by a trustee in bankruptcy.

A county court judge in the exercise of his bankruptcy jurisdiction made an order for an inquiry by the registrar as to the value of a bankrupt's property received by the defendant and for payment to the trustee in bankruptcy of the amount found due. The trustee brought an action in the High Court upon this order and HORRIDGE, J., gave judgment in his favour.

Newbolt, K.C., and *Tindale Davis* for the defendant.
Frank Mellor for the plaintiff.

Cur. adv. vult.

May 14, 1915. The following judgments were read.

LORD READING, C.J.—The plaintiff, the official receiver and trustee of the estate of a bankrupt, brought this action in the High Court upon an order made by the judge of the county court at Reading in the exercise of the jurisdiction in bankruptcy conferred upon the county court by the Bankruptcy Act, 1883. On

July 17, 1913, the county court judge made an order for an inquiry by the registrar as to the value of the bankrupt's property received by the defendant, as to the amount of the book debts collected by him, and for payment by the defendant to the official receiver of the amount found due upon the inquiry. The registrar held the inquiry and reported that a sum of £291 2s. 1d. was due after giving credit to the defendant for the amount paid by him. The sum of £291 2s. 1d. included £112 10s. reported by the registrar to be due by the defendant for depreciation of outstanding book debts. At the hearing of the action judgment was given for the amount claimed, £291 2s. 1d.

The defendant's appeal has been argued upon two grounds—namely (i) that no action is maintainable upon an order of the county court; (ii) that the order was bad on the face of it as to £112 10s., inasmuch as the registrar had no jurisdiction to report on the depreciation of the book debts. The first point depends upon the interpretation of the language of s. 100 of the Bankruptcy Act, 1883 [now s. 103 of the Bankruptcy Act, 1914.] There is no doubt that, apart from orders made by the county court judge in the exercise of bankruptcy jurisdiction, no action could be brought upon an order made by the judge in the county court. Before the Bankruptcy and Deeds of Arrangement Act, 1913, s. 16 (1) (now embodied in the Bankruptcy Act, 1914, s. 1 (1) (g)), a notice in bankruptcy could not be issued upon the order of the county court judge inasmuch as that order, even though final, was not a final judgment. In order to enforce the order of the county court judge the official receiver brought this action in the High Court to recover a final judgment for the sum found due by the defendant. On behalf of the defendant it is contended that no action could be brought upon the order. *Berkeley* v. *Elderkin* (1) and *Austin* v. *Mills* (2) decided that an action would not lie upon a judgment of the county court. In the later case of *Furber* v. *Taylor* (3) the Court of Appeal decided that an action would not lie upon an order of the county court. As was observed in that case, it was clear law prior to the Judicature Acts and the making of Ord. 62, r. 24, of the Rules of the Supreme Court that an action would not lie upon an order of a superior court as distinguished from a judgment; but that since the making of Ord. 62, r. 24, an action could be brought upon an order of a superior court, as this rule provides that every order of the court may be enforced in the same manner as a judgment to the same effect: see *Godfrey* v. *George* (4) and *Pritchett* v. *English and Colonial Syndicate* (5). The decision in *Furber* v. *Taylor* (3) was that, as there was no such rule in the county court, the action would still not lie on the order of a county court. Subsequently in 1903 a new county court rule, Ord. 25, r. 2, was passed, and it was contended that the effect of this rule is the same as that of Ord. 62, r. 24, of the Rules of the Supreme Court, and that consequently an action can now be brought upon the order of the county court judge. I cannot agree with this contention. The difference is that before the making of Ord. 62, r. 24, an action could be brought upon a judgment of the High Court, and by Ord. 62, r. 24, it can now be brought upon an order of the High Court. But the law that an action cannot be brought upon a judgment of the county court (*Berkeley* v. *Elderkin* (1)) has not been altered. It is still the law, and the effect of Ord. 25, r. 2, of the County Court Rules, 1903, is only to make an order enforceable as a judgment. As the authorities stand, apart from an order made in bankruptcy, no action will lie upon either an order or a judgment made in the county court.

That conclusion does not, however, decide the present case, as the order under consideration is an order made in bankruptcy. By s. 100 of the Bankruptcy Act, 1883, [now s. 103 of the Bankruptcy Act, 1914,]

> "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, have all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in manner prescribed."

This section confers upon the county court judge, when sitting in bankruptcy, not only all the ordinary powers of the county court, but also all the powers and the

jurisdiction of the High Court. The section makes the county court for this purpose a branch of the High Court sitting for the convenience of the public in a county court. The county court judge, when sitting in bankruptcy, is not limited to the exercise of the powers given to the county court judge in ordinary matters within his jurisdiction, but is invested for this purpose with all the powers of a High Court judge. I think this is the natural and ordinary meaning of the words of the section. In any event I read the judgment of the House of Lords in *Skinner* v. *Northallerton County Court Judge* (6) as a decision to this effect. LORD HALSBURY says ([1899] A.C. at p. 441):

> "In respect of bankruptcy the statute has given all the powers and jurisdiction which the High Court possesses to a county court sitting in bankruptcy . . . the statute itself has made the county court the High Court for this purpose."

In *Re Pickard, Ex parte Official Receiver* (7) PHILLIMORE, J., when considering the extent of the powers and jurisdiction of the judge of the county court sitting in bankruptcy to commit for contempt, was of opinion that the county court judge had the same power to enforce obedience of orders made by him in the bankruptcy jurisdiction of his court as a judge of the High Court. The order made could not be supported under the County Court Rules, but PHILLIMORE, J., nevertheless upheld the validity of the order on the ground that it complied with the Bankruptcy Rules regulating the mode in which the power of the High Court to commit should be exercised, and that the county court judge had all the powers of the High Court for this purpose.

By r. 93 of the Bankruptcy Rules, 1886, every order of the court may be enforced as if it were a judgment to the same effect. "The court" means the court having jurisdiction in bankruptcy (s. 168 of the Act of 1883 [now s. 167 of the Bankruptcy Act, 1914]). The object of this rule was to make all orders made by the court in bankruptcy as enforceable as judgments. The words of s. 100, "and the orders of the court may be enforced accordingly in manner prescribed," mean that the order of court, notwithstanding, that it is an order of the county court, shall be equivalent for the purpose of enforcement to an order of the High Court. By the statute the county court in bankruptcy can made orders as if it were the High Court, and when made these orders are to be enforceable to the same extent as orders of the High Court. In my view the legislature, when conferring upon the county court for the purpose of bankruptcy jurisdiction all the powers and jurisdiction of the High Court, meant also to give to orders of the county court the same degree of enforceability as appertains to orders of the High Court. The result, in my opinion, is that, as an action can be brought to enforce an order of the High Court, an action can be brought to enforce an order of the county court made in bankruptcy, and the first point taken by the defendant therefore fails.

I do not feel pressed by the practical difficulties which it is suggested may follow from this interpretation of the statute. The county court will continue to enforce its orders made in bankruptcy as they have hitherto been enforced. When necessary it can in addition enforce them as if it was the High Court enforcing a High Court order. The amount of the judgment must, however, be reduced by the sum of £112 10s. This sum represents the amount which the registrar found due as damages for depreciation of book debts which should have been collected by the defendant. The order of July 17, 1913, did not provide for any such inquiry or payment of any such amount. That order was limited to an inquiry by the registrar as to the value of the bankrupt's property recovered by the defendant and of the book debts collected by him, and to payment of the amount found due upon such inquiry. It was no part of the order that an inquiry should be made as to depreciation of the outstanding book debts which the defendant had failed to collect, or that payment should be made of any amount found due in respect of such depreciation. The result is that the registrar's report as to £112 10s. on the face of it travels beyond the order made by the county court judge for inquiry and payment, and cannot be supported. The judgment must be varied by reducing the

amount from £291 2s. 1d. to £178 12s. 1d., and to that extent the appeal must be allowed. As neither party has succeeded except in part there will be no order as to the costs of the appeal.

SWINFEN EADY, L.J.—The first question which arises upon this appeal is whether an action may be brought upon an order of a county court judge made in the exercise of his bankruptcy jurisdiction. It was conceded in argument, and indeed cannot be disputed, that, if an order be made by a registrar or judge of the High Court in the exercise of bankruptcy jurisdiction, an action may be brought upon the order in the same manner as it may be brought upon an order of the High Court made in the exercise of its ordinary jurisdiction; as to which see *Re Boyd, Ex parte McDermott* (8), where it was held by the Court of Appeal that a judgment obtained upon an interlocutory order for costs made in an action in the Queen's Bench Division is a final judgment for the purpose of founding upon it bankruptcy proceedings. An order of the High Court is not a judgment, but under Ord. 62, r. 24, every order of the court may be enforced in the same manner as a judgment. By the Bankruptcy Act, 1883, s. 100, [now s. 103 of the Bankruptcy Act, 1914.]

> "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, have all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in manner prescribed."

In my opinion the effect of this section is to make the orders of a county court in bankruptcy enforceable as the orders of a court having all the powers and jurisdiction both of the High Court and of the county court, otherwise the orders would not be enforceable "accordingly," but only as orders made in the exercise of the ordinary jurisdiction of the county court. It is also to be borne in mind that the orders are to be enforced "in manner prescribed," and the rules prescribe (r. 91) that it shall be the duty of the high bailiff of a county court to execute warrants and other process, and in the case of the High Court such officers or officer as the court may direct. By r. 93 of the Bankruptcy Rules, 1886, every order of "the court"—i.e., by s. 168 (1) of the Act of 1883, [now s. 167 of the Bankruptcy Act, 1914,] of the court having jurisdiction in bankruptcy under the Bankruptcy Act—may be enforced as if it were a judgment of the court to the same effect. As the county court has the same jurisdiction as the High Court for the purposes of bankruptcy, I see no ground for drawing any distinction between the force and effect or mode of enforcement of the orders made by them respectively, except so far as a different manner is or may be prescribed. *Re Pickard, Ex parte Official Receiver* (7) shows that the orders made by a county court judge exercising bankruptcy jurisdiction may be enforced in a manner not within the ordinary County Court Rules. Again, in *Skinner* v. *Northallerton County Court Judge* (6) both the Court of Appeal and the House of Lords pointed out that the Bankruptcy Act has made the county court the High Court for the purpose of bankruptcy jurisdiction, and a proceeding before it is to be treated as equivalent to, and as if it were, a proceeding before the High Court. By the Bankruptcy Act, 1914, s. 1 (1) (g), passed since this action has been pending, a bankruptcy notice may now be founded upon a final order as well as a final judgment, so it will in future no longer be necessary to bring an action upon a final order with a view to instituting proceedings in bankruptcy. In my judgment the present action is maintainable.

The second question raised by the appeal has reference to the amount for which judgment was given. On July 17, 1913, an order was made by the county court judge, in the exercise of his bankruptcy jurisdiction, that Sydney Dalton, the defendant herein, do pay to the official receiver the value of certain property of the bankrupt received by him, and the amount of book debts of the bankrupt collected by him, and by the same order an inquiry was directed to be made by one of the registrars of the court as to the value of the bankrupt's property received by the said Sydney Dalton, and as to the amount of the said book debts collected by him.

By the same order Sydney Dalton was ordered to pay to the official receiver within fourteen days after the date of the registrar's report the amount thereby found to be the value of the said property and the amount of the said book debts. By a report dated Aug. 7, 1913, the registrar found that there was due upon the footing of the said inquiry from Sydney Dalton to the official receiver the balance or sum of £291 2s. 1d. This balance, however, includes a sum of £112 10s., about which the question arises. An application was made by Sydney Dalton to the judge on Aug. 11 that the matter might be further considered by the registrar, but as on the further appointment before the registrar Sydney Dalton did not appear, and the registrar merely confirmed his previous report, nothing now turns upon this incident. The present action is by the official receiver and trustee to recover the said sum of £291 2s. 1d. found due by the report. In my opinion the judgment is erroneous as to £112 10s., part of the said sum of £291 2s. 1d. The sum of £112 10s. is not any part of the amount which by the order of July 17, 1913, the defendant was ordered to pay. It does not represent any property of the bankrupt received by him, or any book debts collected by him, beyond which the order to pay did not extend, but some alleged depreciation of book debts, not within the order of July 17, 1913, and not forming any part of the matter referred for inquiry to the registrar, and for which, so far as I can gather, the defendant is under no liability whatever. At all events, it is sufficient to say that it is not within the terms of the order, upon which alone the judgment is founded. The judgment under appeal must be varied by reducing the amount of it to £178 12s. 1d., that is, by allowing the appeal to the extent of £112 10s. As each party has partly succeeded and partly failed, there should be no order as to the costs of the appeal.

BRAY, J.—The questions for our decision are two: First, whether an action can be brought on an order of a county court judge exercising his bankruptcy jurisdiction. Second, whether the order of the county court judge on which the action was founded was bad on its face, and how far that constitutes a good defence.

The first question is one of considerable importance, and may be divided into two: Can an action be brought on an order or judgment of a county court judge exercising his ordinary jurisdiction? If not, can an action be brought when the order is one made by the judge when exercising his bankruptcy jurisdiction? As long ago as 1853 there were two decisions, one of the Court of Queen's Bench consisting of four judges, and one of the Court of Exchequer following it, that no action could be brought on a county court judgment. The main ground of the decision was this, that the Act of 9 & 10 Vict., c. 95, created a new court, and where new rights are given with specific remedies the remedy is confined to those specifically given: *Berkeley* v. *Elderkin* (1); *Austin* v. *Mills* (2). Since then there have been two further County Courts Acts, the Act of 1856 and the Act of 1888, but except by s. 49 of the Act of 1856 and s. 151 of the Act of 1888 there is no provision dealing with the matter. Section 49 of the Act of 1856 and s. 151 of the Act of 1888, which are in the same terms, provide for the removal by certiorari of a county court judgment into the High Court when the amount exceeds £20 and there are no goods of the debtor on which execution can be levied. At the end of each section are the words "but no action shall be brought upon such judgment." I think counsel for the defendant was right in his suggestion as to why the words were inserted. It was well known that no action could be brought on county court judgments, and the words were inserted to make it clear that the section did not give any such right when the case had been removed by certiorari into the High Court.

In *Furber* v. *Taylor* (3) it was decided that no action could be brought on an order of the county court, but it was pointed out by the court that there was no rule in the county court corresponding with Ord. 62, r. 24, in the High Court. In 1903 a new rule was made—see Ord. 25, r. 2, of the County Court Rules, 1903—to the same effect as Ord. 62, r. 24, and it was argued that the effect of the new rule was the same as that of Ord. 62, r. 24—namely, to allow an action to be brought on an order of the county court. The answer to that is that Ord. 62, r. 24, enabled an action

to be brought on an order of the High Court, because it provided:

> "Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect";

and an action always could be brought on a judgment in the High Court; but that, as no action could be brought on a judgment in the county court, Ord. 25, r. 2, could not have that effect. It is impossible to suppose that it was intended that an action might be brought on a county court order, though it could not be brought on a county court judgment. The object of the rule was to extend Ord. 25, r. 1, which only allowed one means of enforcing an order—namely, that of s. 146—and to allow to an order all the other means of enforcing a judgment, as, for instance, garnishee proceedings or the appointment of a receiver. In *Furber* v. *Taylor* (3) the two decisions in 1853, to which I have before referred, were cited, but nothing was said by the court which suggested that they were not still good law. The reasons given in those decisions apply equally to the County Court Acts, 1888. There is no record of any action having been brought either on a county court judgment or on a county court order, and I have come to the clear conclusion that no such action can be brought.

If, then, no action can be brought on an order or judgment of the county court in its ordinary jurisdiction, can an action be brought on an order made in its bankruptcy jurisdiction? The most important section of the Bankruptcy Act, 1883, to be considered is s. 100 [now s. 103 of the Bankruptcy Act, 1914] (HIS LORDSHIP read the section, and continued.) I will deal with the earlier part of this section presently. It is the latter part which provides for the enforcement of bankruptcy orders in the county court. "Manner prescribed" means prescribed by the rules, and it is r. 93 that prescribes the manner of enforcement. It is in these words: "Every order of the court may be enforced as if it were a judgment of the court to the same effect." "The court" by s. 168 means "the court having jurisdiction in bankruptcy under this Act." Section 92 provides that the courts having jurisdiction in bankruptcy shall be the High Court and the county courts (save certain excluded county courts). Section 95 contains provisions as to the court in which the petition shall be presented—namely, in certain cases it is to be presented to the High Court, and in all other cases to the county court where the debtor resides or carries on business. Section 97 provides for transfers from one court to another. It is plain from these provisions that in any particular bankruptcy one court and one only (subject to transfer) has jurisdiction. This may be the High Court or any one of the county courts. If there is jurisdiction in one of the county courts there is none in the High Court unless and until a transfer is made. In this bankruptcy it was the Reading County Court and no other that had jurisdiction in bankruptcy. "The court," therefore, in this case was the Reading County Court. "May be enforced" must mean may only be enforced because no other manner is prescribed. It is not one of the ways in which an order may be enforced, but the way. "As if it were a judgment of the court to the same effect." "The court" must bear the same meaning as before, i.e., the Reading County Court, because that is the court having jurisdiction. It cannot mean the High Court, because that court has no jurisdiction in the matter. As there are, so far as I am aware, no judgments in bankruptcy, "a judgment of the court" means an ordinary judgment of the Reading County Court. If we apply r. 93, therefore, to the present case, it prescribes that the order in this case is to be enforced as if it were an ordinary judgment of the Reading County Court to the same effect. This is what one would expect. It is the court in which the order is made that should enforce it, and this court is to enforce it in the same way as it would enforce any order or judgment of its own to the same effect. Order 25 of the County Court Rules contains elaborate provisions as to the various modes of enforcing county court judgments, and the effect of r. 93 is that an order in bankruptcy made by any county court may be enforced in any of the ways provided by Ord. 25 of the County Court Rules. That

is the "manner prescribed" referred to in s. 100 of the Bankruptcy Act, 1883 [now s. 103 of the Bankruptcy Act, 1914]. A

So far, the answer to the question we have to decide seems to me fairly plain. Reliance, however, was placed on the word "accordingly." It is said that that means "as if it were an order of the High Court," or "with all the powers and jurisdiction of the High Court," and, therefore, that the county court judge has the same powers of and jurisdiction in enforcing orders as if he were a judge of the High Court. If this be so, the section and rule together as applicable to this case would read thus: "And the order of the Reading County Court may be enforced as if it were an order of the High Court in manner prescribed, i.e., as if it were a judgment of the Reading County Court to the same effect." This seems to be an impossible construction. I think it is equally impossible to read the section as giving the county court judge the power of enforcing an order in both ways, i.e., in the same manner as a High Court order or judgment and in the same manner as a county court order or judgment. The procedure in the two courts differs in several important particulars. The mode of execution on goods is quite different. In the High Court the solicitor of the execution creditor takes out a fi. fa. and directs the sheriff to proceed. In the county court the court keeps control of the process and directs the high bailiff. The sheriff pays the money he receives to the execution creditor. The high bailiff pays it into court. It is impossible that the legislature could have intended that an order in bankruptcy could be enforced in both these ways or in either of them at the option of the execution creditor, and yet it must be so if every order is to be enforced as if it were a High Court order or judgment and also as if it were a judgment of the county court. Is the execution creditor who has obtained a bankruptcy order in the county court to be at liberty to issue a fi. fa. directed to the sheriff of any county where the judgment debtor may have goods? Is the præcipe to be entitled in the county court or the High Court? May he apply in judge's chambers to a High Court judge or master, say, for the appointment of a receiver? What jurisdiction has a High Court judge or master in a proceeding which is in the county court? Is the judgment creditor to be at liberty to issue a writ of elegit, and, if so, will it be a proceeding in the High Court or the county court? The county court cannot issue a writ of elegit, and there are no rules for regulating the procedure under such a writ. Surely this cannot be. Why should a county court order in bankruptcy be enforceable both as a county court judgment and a High Court judgment, and a High Court order in bankruptcy only as a judgment in the High Court? If this had been intended, would it not have been expressly so stated in the rule? whereas the rule contemplates that the manner in which an order in bankruptcy is to be enforced depends upon the court which has jurisdiction in the matter. In my opinion the first part of s. 100 provides for the making of orders, and gives the county court judge all the powers and jurisdiction of the High Court to make orders, and the latter part of the section deals with enforcing orders, and the word "accordingly" may be read as "according to the terms thereof," or "so as to give effect to the powers and jurisdiction so exercised"; but whatever it may mean it cannot, I think, mean as if it were an order or judgment of the High Court; and yet, unless it is so read, no action can be brought on such an order. It is to be observed further that it is not the powers and jurisdiction of the High Court than enable an order or judgment of the High Court to be enforced by action. The judge of the High Court can neither withhold from (unless he stays execution) nor give to the judgment creditor the right to bring an action. The right arises from the supposed or implied contract between the parties that they will obey the judgment: see *Grant* v. *Easton* (9); a contract which does not exist in the case of the county court judgment, because the legislature, when it created the county courts, chose to confine the remedies to those specifically given: see *Berkeley* v. *Elderkin* (1). B C D E F G H I

I have, however, to deal with two authorities which were cited to us. The first case was *Re Pickard, Ex parte Official Receiver* (7). The headnote goes, I think,

too far. PHILLIMORE, J., decided the case on the ground that it was not a process by way of attachment, but a process by way of motion for contempt: see [1912] 1 K.B. at p. 402. He said, however (ibid. at p. 403):

> "I see no provision either in the Bankruptcy Acts or in the Bankruptcy Rules for the exercise of the power of attachment. But even if the order may be enforced by attachment it can none the less be enforced by committal."

His attention was not called to r. 93, and at most what he said was only a dictum. Rule 93 says that every order may be enforced as if it were a judgment of the county court, and attachment is one of the ways of enforcing a county court order: (see Ord. 25, r. 57). So that whatever may be the true construction of s. 100 of the Bankruptcy Act, [now s. 103 of the Bankruptcy Act, 1914,] I think that the court may enforce its order by warrant of attachment, though, as the court rightly decided, it may also punish for contempt of court under the express power given by s. 24 (4). Punishment for contempt of court is not enforcement of an order. It is punishment for disobedience. PHILLIMORE, J., says later that the court in the exercise of its ordinary jurisdiction has the power to attach. It seems to me that all that was necessary for the decision of that case and all that the learned judges really decided was that the county court judge had power to commit for contempt of court, and that process being different from a process by attachment Ord. 25, rr. 57–63, did not apply. BUCKNILL, J., decided the case on the same ground, saying that the bankrupt had been guilty of a contempt of court for having wilfully failed to comply with s. 24 (4) of the Bankruptcy Act, and might be punished accordingly. In my opinion this case does not assist the plaintiff. Nor in my opinion does *Skinner* v. *Northallerton County Court Judge* (6). That case decided that the county court judge had made the order in question under the jurisdiction given to him by the earlier part of s. 100, and consequently certiorari to quash it did not lie. No question arose as to the enforcement of an order or as to the construction of the latter part of s. 100 or r. 93, and my judgment depends upon what is the true construction of that rule which prescribes the manner in which county court orders in bankruptcy are to be enforced. I have made inquiries as to the practice with reference to the enforcement of the orders of the county court made in bankruptcy, and I understand that they are always enforced in the same way as ordinary county court judgments, and never as High Court judgments. It would revolutionise the whole practice if we were to hold that they were enforceable in the same manner as High Court orders, and, as far as I can see, without any advantage. Most of the orders are for small amounts, and all the reasons given by the judges in *Berkeley* v. *Elderkin* (1) are applicable. If a High Court action could be brought on every county court order in bankruptcy it would be most oppressive on the execution debtor. The option to the execution creditor to enforce it either as a High Court order or as a county court order would be equally oppressive.

In my opinion, this action fails and the appeal succeeds, and the proper order to be made would be that judgment should be entered in the action for the defendant with costs, but as the expense of the appeal has been wholly caused by the defendant not attending at the trial or raising the point there, I think he should pay the costs of this appeal. Holding this view, it becomes unnecessary for me to decide whether the plaintiff can recover the whole of the amount claimed, and I prefer not to express an opinion on this point. My doubt is whether, if this order is to be treated, contrary to the opinion I have expressed, for all purposes as a High Court judgment, the High Court can say that it is bad on the face of it or refuse to issue execution on it while it remains unreversed, and when in fact an application to set aside the findings of the registrar has failed.

Judgment varied.

Solicitors: *W. H. Martin & Co.*, for *F. A. Sarjeant*, Reading; *Edgar & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re WEDGWOOD. ALLEN *v.* WEDGWOOD

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), October 14, 15, 29, 1914]

[Reported [1915] 1 Ch. 113; 84 L.J.Ch. 107; 112 L.T. 66; 31 T.L.R. 43; 59 Sol. Jo. 73]

Charity—Benefit to community—Protection and benefit of animals.

A testatrix left the capital and income of her residuary estate to W. absolutely subject to a secret trust that the money should be used at W.'s absolute discretion for the protection and benefit of animals.

Held: this was a valid charitable trust for a general public purpose beneficial to the community, as it tended to promote public morality by checking the innate tendency to cruelty.

Re Cranston, Webb v. *Oldfield* (1) (1898), 1 I.R. 43, applied.

Notes. Explained and distinguished: *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] All E.R.Rep. 158. Considered: *National Anti-Vivisection Society* v. *I.R.Comrs.*, [1947] 2 All E.R. 217. Referred to: *Lord Nuffield* v. *I.R.Comrs.*, *Goodenough* v. *I.R.Comrs.* (1946), 175 L.T. 465; *Animal Defence and Anti-Vivisection Society* v. *I.R.Comrs.* (1950), 66 (pt. 2) T.L.R. 1091; *Baddeley* v. *I.R.Comrs.*, [1953] 2 All E.R. 233.

As to trusts for the protection of animals, see 4 HALSBURY'S LAWS (3rd Edn.) 230–231; and for cases see 8 DIGEST (Repl.) 348–349.

Cases referred to:

(1) *Re Cranston, Webb* v. *Oldfield*, [1898] 1 I.R. 431; 8 Digest (Repl.) 352, **131.*

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(3) *London University* v. *Yarrow* (1857), 1 De G. & J. 72; 26 L.J.Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 3 Jur.N.S. 421; 5 W.R. 543; 44 E.R. 649, L.C. & L.JJ.; 8 Digest (Repl.) 348, *285.*

(4) *Tatham* v. *Drummond* (1864), 4 De G.J. & Sm. 484; 5 New Rep. 24; 34 L.J.Ch. 1; 11 L.T. 324; 10 Jur.N.S. 1087; 13 W.R. 61; 46 E.R. 1006, L.C.; 8 Digest (Repl.) 348, *286.*

(5) *Armstrong* v. *Reeves* (1890), 25 L.R.Ir. 325; 8 Digest (Repl.) 349, **126.*

(6) *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370.*

(7) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

(8) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879.*

(9) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 8 Digest (Repl.) 440, *1306.*

(10) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, *291.*

(11) *Marsh* v. *Means* (1857), 30 L.T.O.S. 89; 21 J.P. 725; 3 Jur.N.S. 790; 5 W.R. 815; 8 Digest (Repl.) 421, *1117.*

(12) *Re Vallance* (1876), 2 Seton's Judgments, 7th Edn., 1304; 8 Digest (Repl.) 348, *287.*

Also referred to in argument:

Re Douglas, Obert v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 348, *290.*

A.-G. v. *Wherwood* (1750), 1 Ves. Sen. 534; 27 E.R. 1188, L.C.; 8 Digest (Repl.) 504, *2245.*

Re Joy, Purday v. *Johnson* (1888), 60 L.T. 175; 5 T.L.R. 117; 8 Digest (Repl.) 414, *1072.*

Appeal from a decision of WARRINGTON, J.

By her will, dated June 26, 1913, Frances Julia Wedgwood, who died on Nov. 26, 1913, appointed Judge Wilfred Baugh Allen and Cecil Wedgwood to be her executors and trustees, and devised and bequeathed all the residue of her real and personal estate upon trusts for conversion, and upon further trust (subject to the payment of certain sums and the setting aside of other sums to secure certain annuities) for Cecil Wedgwood absolutely. The testatrix had expressed a wish to Cecil Wedgwood that he would apply the residue for the protection and benefit of animals and he agreed to do so. She said she had been advised that it would be difficult to draft a trust giving him the latitude that she desired, and that the best method of carrying out her wishes would be to leave the residue to Cecil Wedgwood absolutely. An originating summons was taken out by Judge Wilfred Baugh Allen to which Cecil Wedgwood and one of the next-of-kin were made defendants asking for the determination of the following questions and for the following relief: (i) Whether under the circumstances the gift in the will contained of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood was an absolute gift to him beneficially or was subject to any secret trust. (ii) If the gift was subject to any secret trust, whether such trust was a good and valid charitable trust or not; and, if not a good and valid charitable trust, whether such secret trust was validly created or was too vague and uncertain and had consequently failed for uncertainty. (iii) That directions might be given to the plaintiff and the defendant Cecil Wedgwood as executors of the will as to how they should dispose of the residuary estate. (iv) That if and so far as necessary the real and personal estate of the testatrix might be administered by the court. The summons was adjourned into court and came on to be heard before WARRINGTON, J., on April 1, 1914. It appeared from the evidence of the defendant, Cecil Wedgwood, that in 1908 the testatrix had asked him to act as executor and trustee together with the plaintiff, Wilfred Baugh Allen, and that she wished him to undertake a further trust which was to apply the residue of her estate for the protection and benefit of animals. Subsequently she said she would leave him the residue absolutely and wished him to have a free hand to use it for the benefit of animals as circumstances might arise. He suggested he might help forward the movement for the humane slaughtering of animals and the movement to provide municipal abattoirs and she agreed that those were the sort of purposes she would like to have forwarded, and that he was to expend either income or capital. She wished him to have an absolutely free hand, trusting in his judgment and honour.

WARRINGTON, J., nevertheless made a declaration that upon the true construction of the will and in the events which had happened, the gift in the will contained of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood was an absolute gift to him beneficially and was not subject to any secret trust. His Lordship did not, therefore, decide the other questions which were asked by the summons, as they did not arise having regard to his decision on the first question. From that decision the defendant Bertram H. Wedgwood appealed, asking by his notice of appeal that it might be declared that upon the true construction of the will and in the events which had happened, the gift was subject to a secret trust, and that such secret trust was not a good or valid charitable trust but was void for perpetuity and/or uncertainty, and had failed accordingly. There was a cross-appeal by the Attorney-General that he intended to contend that the order of WARRINGTON, J., should be discharged or varied, and that in lieu thereof it should be declared that upon the true construction of the will and in the events which had happened the gift was subject to a

secret trust, and that such secret trust was a good and valid trust for charitable purposes; and that all necessary and proper directions should be given for the purposes of carrying out such trust into effect, or that such further or other order should be made in the premises as to the court might seem fit.

Henry Terrell, K.C., and *W. H. Salter* for the defendant.
Clauson, K.C., and *J. E. Harman* for the plaintiff.
Austen-Cartmell for the Attorney-General.

The court came to the conclusion that the evidence showed that the bequest was not an absolute gift to the defendant, but was subject to a secret trust, and reserved judgment on the question whether a valid charitable trust had been created.

Cur. adv. vult.

Oct. 29, 1914. The following judgments were read.

LORD COZENS-HARDY, M.R.—It having been decided that Cecil Wedgwood takes the residuary estate not beneficially but upon a secret trust, it remains to consider what is the trust and whether it is charitable. The terms of the trust are "for the protection of animals" or "for the protection and benefit of animals." The movement for the humane slaughtering of animals and the provision of municipal abattoirs were mentioned as the sort of purpose the testatrix would like to have forwarded.

The word "charity" has a much wider meaning in law than it has in popular speech. The courts have held that the particular objects mentioned in the Statute of Elizabeth (43 Eliz., c. 4)—viz.: (i) Relief of the poor; (ii) Religion; (iii) Education; are not exhaustive. By analogy a large class of other objects has been included. LORD MACNAGHTEN's judgment in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2) is perhaps the leading authority. But I am content to adopt what was said by FITZGIBBON, L.J., in *Re Cranston, Webb* v. *Oldfield* (1) ([1898] 1 I.R. at p. 446):

> "Any gift which proceeds from a philanthropic or benevolent motive and which is intended to benefit an appreciably important class of our fellow creatures, including animals, and which will confer the supposed benefit without contravening law or morals, will be charitable."

It may be, and indeed I think it is, true that there has been a tendency to enlarge the meaning of the word "charity," and that gifts have within the last fifty years been supported as good charitable gifts which 150 years ago would not have been supported. The authorities are very numerous. I need refer to only a few. In *London University* v. *Yarrow* (3) it was held that a trust for the benefit of animals useful to man was good, and there was a clear intimation of opinion that the limitation to domestic animals was not necessary. In *Tatham* v. *Drummond* (4) the establishment of a slaughter-house for horses was held to be charitable, though the gift failed as it involved the purchase of land. The Society for the Prevention of Cruelty to Animals, the Society for the Abolition of Vivisection, and a Home for Lost Dogs are instances in which the doctrine has been extended.

In my opinion, it is not possible for us to hold that this trust for the protection of animals is not a good charitable purpose. Apart from authorities which are binding upon us, I should be prepared to support the trust on the ground that it tends to promote public morality by checking the innate tendency to cruelty. In the language of HOLMES, L.J., in *Re Cranston, Webb* v. *Oldfield* (1) ([1898] 1 I.R. at p. 457):

> "Gifts, the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation, are charitable. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty."

I desire also to mention the judgment of Chatterton, V.C., in *Armstrong* v. *Reeves* (5), especially the passage (25 L.R.Ir. at p. 341) where he points out that objects of general mercy to animals of all kinds, whether useful to man or not, are charitable.

There must be a declaration that the trust in the terms which I have mentioned is a good charitable trust. The selection of the particular mode of applying the fund, both principal and income, will rest with Mr. Cecil Wedgwood during his life. The costs of all parties of this appeal must be provided for out of the residue, as in the court below.

KENNEDY, L.J.—In this case the court has already pronounced its decision that the bequest of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood, constituted not an absolute gift to him beneficially, but was subject to a secret trust. The question reserved for further consideration was whether or not such trust was a good and valid charitable trust. It is a trust for the protection and benefit of animals. We know from the evidence that two objects which, in the opinion of the testatrix, would come within the purview of her generosity were the more humane slaughtering of animals and the establishment of municipal abattoirs. It was contended by counsel for the defendant on behalf of the next-of-kin that this is too wide, too vague and too uncertain.

A review of the relevant authorities shows, I think, that during the past century there has been a growing tendency to enlarge the area of purposes which will be treated by courts of equity as charitable purposes, whilst still in theory only those objects of general public utility are charitable, in the legal sense of the term, which either are included in or are analogous to the objects mentioned in the preamble of the 43 Eliz., c. 4: see especially the judgment on this point of Rigby, L.J., in *Re Nottage*, *Jones* v. *Palmer* (6). In the course of his judgment in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2) ([1891] A.C. 531 at p. 583) Lord Macnaghten took from the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham* (7) (10 Ves. 522 at p. 532) a classification of the objects within which all charity to be administered in the Court of Chancery must fall into four divisions—i.e., trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Sir Samuel Romilly, as Lindley, L.J., points out in *Re Macduff*, *Macduff* v. *Macduff* (8), rightly described the fourth division within which counsel for the Attorney-General argues that this trust falls, as the most difficult. Holmes, L.J., in the Irish case of *Re Cranston*, *Webb* v. *Oldfield* (1) ([1898] 1 I.R. at p. 452) said:

> "I don't know a better classification, and yet it is obvious that the fourth head is altogether vague and indeterminate."

Fitzgibbon, L.J., in the same case, said:

> "The essential attributes of a legal charity are, in my opinion, that it should be unselfish—that is, for the benefit of other persons than the donor; that it shall be public—that is, that those to be benefited shall form a class worthy in numbers or importance of consideration as a public object of generosity; and that it shall be philanthropic or benevolent—that is, dictated by a desire to do good."

In *Goodman* v. *Saltash Corpn.* (9) Lord Cairns, in the course of his speech, speaking of a condition that the free inhabitants of ancient tenements in the borough of Saltash should have a right of dredging for oysters in the estuary, said that such a condition would create that which in the very wide language of our courts is called a charitable—that is to say, a public trust or interest for the benefit of the free inhabitants of ancient tenements. Chitty, J., in *Re Foveaux*, *Cross* v. *London Anti-Vivisection Society* (10) said ([1895] 2 Ch. at p. 504):

> "To be a charity there must be some public purpose—something tending to the benefit of the community,"

and he adds a little later in his judgment:

"In examining the purposes of any particular trust the court has taken a liberal rather than a narrow view of the subject."

The Master of the Rolls in Ireland in 1898, in *Re Cranston, Webb* v. *Oldfield* (1) ([1898] 1 I.R. at p. 435) said:

"We have gone much further than the words of the statute [the first Irish Poor Law Act of Elizabeth I] and the tendency of late years has been, where a testator dedicates part of his property towards an object which is not illegal in itself, to give effect to the intention unless there is some coercive reason to the contrary."

It would be easy to cite cases illustrating this attitude of liberality; but, turning now to the decisions on gifts expressed to be, in one way or another, for the benefit of animals, which are the decisions particularly pertinent to the consideration of the question before us, we find, I think, sufficient authority for maintaining, as I hold that we ought to maintain, the validity of the gift, general as its terms are in the present case. The earlier cases, of which there are several, are cited in the arguments of counsel, and in the judgment of CHITTY, J., in *Re Foreaux, Cross* v. *London Anti-Vivisection Society* (10), to which I have already referred, and it is unnecessary to refer to them at length. It is, however, I think, having regard to the argument addressed to us by counsel for the defendant, material and right to note that the validity of the gift as a charitable gift has not been affirmed only in cases in which the animals for whose benefit the gift was bequeathed were domestic animals or animals useful to man. Gifts to the Royal Society for the Prevention of Cruelty to Animals, and to the Society for the Protection of Animals liable to Vivisection, have been held good charitable gifts, and in neither case are the purposes of the named society limited to useful or domestic animals.

In *Marsh* v. *Means* (11) and in *Re Vallance* (12), both of which are referred to by CHITTY, J., the object appears to have been the prevention of cruelty to animals generally. Towards the close of his judgment he adds ([1895] 2 Ch. at p. 507):

"Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men."

In the Irish case of *Armstrong* v. *Reeves* (5), CHATTERTON, V.-C., in the course of his judgment said in reference to cruelty to animals (25 L.R.Ir. at p. 341):

"In my opinion it is for the benefit of the public that such cruelty should be prevented, and that any society for the prevention of cruelty to animals, whether domestic animals or not, is within the scope of charitable institutions."

In *Re Cranston, Webb* v. *Oldfield* (1), to which I have referred, HOLMES, L.J., used very similar language ([1898] 1 I.R. at p. 457):

"There is really no difference amongst thoughtful and civilised men on this subject. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty."

It was contended in the argument addressed to us against the validity of this particular bequest as a charitable gift that it fails on account of such vagueness and generality of expression as would justify its application by the trustee to the protection and maintenance of noxious animals, and he instanced, if I remember rightly, lions and tigers. Now, it is quite true, as laid down by LINDLEY, L.J., in *Re Macduff, Macduff* v. *Macduff* (8) ([1896] 2 Ch. at pp. 463, 464), that when we are dealing with general words we must consider whether there is such an indica-

tion of purpose or of trust that the court, if called upon to execute it, can see what it has to do—can see the limits of its own powers. But, at the same time, I can entertain no doubt that if the court should now be asked to say whether the trustee under this bequest for the protection and benefit of animals was fulfilling his duty in expending the fund upon the preservation of beasts of prey or mad dogs, the court would not find any difficulty as to the answer which is dictated by reason and common sense. There are, I suppose, very few, if any, charities of a wide character, such as to take an imaginary case, a charity for the relief of poor mechanics, in regard to which it would not be easy for ingenuity to suggest difficulties of discrimination. In my opinion, the secret trust contained in the will of Miss Wedgwood is a valid charitable trust.

SWINFEN EADY, L.J.—It has already been decided that Mr. Cecil Wedgwood does not take the residue beneficially, but that it is subject to a secret trust. There remains the question whether it has been validly given upon trust, or whether the next-of-kin have become entitled. The trust was to apply the residue "for the protection of animals" or for the "protection and benefit of animals," the testatrix having assented to the suggestion that the movement for the humane slaughtering of animals, and the movement for providing municipal abattoirs in the place of ordinary slaughter-houses were the sort of purposes, among others, which she would like to be supported. The object of the trust being thus ascertained and defined the question arises, is this a valid charitable trust? In my opinion it is. It is a gift for a general public purpose, beneficial to the community. A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals; and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race. That such purposes are eminently charitable, in the accepted legal sense of that term, is amply established by the cases to which the Master of the Rolls has referred.

In *Re Foveaux*, *Cross* v. *Anti-Vivisection Society* (10) CHITTY, J., decided that certain societies for the suppression and abolition of vivisection were charities within the legal definition of the term "charity." He said ([1895] 2 Ch. at p. 507):

> "Cruelty is degrading to man, and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit humanity."

Those observations, in which I entirely concur, equally apply to the trust constituted by the testatrix in the present case, which in my opinion is a valid charitable trust.

LORD COZENS-HARDY, M.R.—The form of order that is proposed on behalf of the Attorney-General has been handed to me and I will read it: "Discharge the order of WARRINGTON, J., in so far as it declares that upon the true construction of the will of the above-named testatrix Frances Julia Wedgwood and in the events which have happened the gift in the said will contained of the residuary real and personal estate of the said testatrix to the defendant Cecil Wedgwood was an absolute gift to him beneficially and was not subject to any secret trust." That is right, of course. Then: "And in lieu therefore declare that the said gift was not an absolute gift to the defendant Cecil Wedgwood beneficially, but was subject to the trust for the application thereof as to both capital and income for the protection and benefit of animals in such manner as he shall think fit, and that such trust is a good and valid trust for a public and charitable purpose"—that is right. Then: "And the Attorney-General not at present asking for a scheme or for the administration of the said testatrix's estate, and the defendant Cecil Wedg-

wood by his counsel undertaking to furnish proper accounts of the said testatrix's estate to the Attorney-General, and to render to the Attorney-General an annual account and statement of the application of the trust fund and the income thereof, liberty to the Attorney-General to apply for administration or otherwise."

Appeal allowed.

Solicitors: *Waterhouse & Co.*; *Treasury Solicitor.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

JUREIDINI *v.* NATIONAL BRITISH AND IRISH MILLERS' INSURANCE CO., LTD.

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor), July 20, 21, December 14, 15, 1914.]

[Reported [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205]

Arbitration—Award condition precedent to right of action—Action brought without reference to arbitration—Defence—Repudiation going to substance of contract.

Insurance—Arbitration clause in policy—Action on policy without reference to arbitration—Defence that claim fraudulent.

By cl. 12 of an insurance policy it was provided that, if a claim should be fraudulent or the loss or damage should be caused by the wilful act or with the connivance of the insured, all benefit under the policy should be forfeited. By cl. 17 of the policy it was further provided that, if any difference arose as to the amount of loss or damage, the dispute was to be submitted to arbitration and it was a condition precedent to any right of action or suit upon the policy that an award by an arbitrator as to the amount of the loss or damage should be obtained first. The appellant insured his stock in trade against loss by fire with the respondents, the policy of insurance including the above clauses. The appellant having made a claim under the policy for loss caused by a fire, the respondents alleged that the loss was caused by the felonious acts of the appellant and that the claim was fraudulent. The appellant brought this action upon the policy and the respondents contended that the condition as to arbitration had to be fulfilled before an action could be brought.

Held: in view of cl. 12 of the policy, the allegation that the claim was fraudulent, if made out, went to the very root of the matter; when there was a repudiation which went to the substance of the whole contract, the person setting up that defence was not entitled to insist on a subordinate term of the contract being enforced; and, therefore, the appellant's action was competent although the dispute had not been referred to arbitration.

Scott v. *Avery* (1) (1856) 5 H.L.Cas. 811 distinguished.

Notes. Distinguished: *Woodall* v. *Pearl Assurance*, [1918–19] All E.R.Rep. 544; *Macaura* v. *Northern Assurance Co., Ltd.*, [1925] A.C. 619; *Freshwater* v. *Western Australian Insurance Co.*, [1932] All E.R.Rep. 791; *Stevens & Sons* v. *Timber and General Accident Insurance Association, Ltd.*, [1933] All E.R.Rep. 806; *Toller* v. *Law Accident Insurance Society, Ltd.*, [1936] 2 All E.R. 952; *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337. Referred to: *Wall* v. *Rederiaktiebolaget Luggude*, [1915] 3 K.B. 66; *Sanderson* v. *Armour* (1922), 91 L.J.P.C. 167; *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] All E.R.Rep. 51; *Jones* v.

Birch Bros., Ltd., [1933] All E.R.Rep. 251; *Locker and Woolf, Ltd.* v. *Western Australian Insurance Co.* (1935), 79 Sol. Jo. 574.

As to arbitration as a condition precedent, see 22 HALSBURY'S LAWS (3rd Edn.) 257–258, and ibid. vol. 2, 17–21; and for cases see 2 DIGEST (Repl.) 443 et seq.

Cases referred to:

(1) *Scott* v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, *290.*

(2) *Caledonian Insurance Co.* v. *Gilmour*, [1893] A.C. 85; 57 J.P. 228; 9 T.L.R. 146; 1 R. 110, H.L.; 2 Digest (Repl.) 473, *332.*

Also referred to in argument:

London and North Western and Great Western Joint Rail. Cos. v. *Billington, Ltd.*, [1899] A.C. 79; 68 L.J.Q.B. 162; 79 L.T. 503; 15 T.L.R. 97 H.L.; 8 Digest (Repl.) 239, *1529.*

O'Connor v. *Norwich Union Life and Fire Insurance Society*, [1894] 2 I.R. 723; 28 I.L.T. 95; 2 Digest (Repl.) 493, **336.*

Trainor v. *Phœnix Fire Assurance Co.* (1891), 65 L.T. 825; 8 T.L.R. 37; 2 Digest (Repl.) 471, *321.*

Johannesburg Municipal Council v. *Stewart & Co.*, [1909] S.C. 860; reversed, [1909] W.R. 161; 2 Digest (Repl.) 448, **149.*

Appeal by the assured from a decision of the Court of Appeal setting aside a judgment of DARLING, J., sitting with a special jury by which judgment was entered for the appellant for £543 2s. upon two policies of insurance issued by the respondents. The policies contained, inter alia, the following clauses:

"(12) If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or if the insured or anyone acting on his behalf shall hinder or obstruct the company in doing any of the acts referred to in condition 11; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of condition 17 of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited."

"(17) If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required to do so in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators, or umpire respectively; and in the event of the death of an arbitrator or umpire another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The cost of the reference and the award shall be in the discretion of the arbitrator, arbitrators, or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action

or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained."

The Court of Appeal (VAUGHAN WILLIAMS, FARRELL and KENNEDY, L.JJ.) set aside the judgment on the ground that no action was maintainable until there had been an arbitration to assess the amount of the damage.

Gordon Hewart, K.C., Sylvain Mayer, K.C., and *Owen Evans* for the appellants. *J. B. Matthews, K.C., Holman Gregory, K.C.*, and *P. B. Durnford* for the respondents.

The House took time for consideration.

Dec. 15, 1914. The following opinions were read.

VISCOUNT HALDANE, L.C.—I believe your Lordships are unanimously of opinion that this case ought to be disposed of upon the preliminary point.

Shortly described, the nature of the case was this. The appellants, who were plaintiffs in the action in the court below, took out various policies of insurance with insurance companies, of whom the respondents were one, and it has been agreed that as these policies were substantially in the same form, the present action should be taken as a test action and should dispose of them. The insurance was over property at Costa Rica, and the form of the policy was a policy over stock of textiles and hardware and other non-hazardous merchandise the property of the insured on the premises of a certain store at a certain place in Port Limon, in Costa Rica, and the insurance under the particular policy sued on, the policy which was taken as the test case, was for £800. Then there were certain conditions, and two of them are of importance. Condition 12 I will read. It is in these terms:

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured"

—I need not read certain further conditions which follow, but the consequence at the end of this clause is that all benefit under this policy shall be forfeited in the cases I have described and in the other cases. Then cl. 17 of the policy says that if any difference arises as to the amount of loss or damage, the difference is to be submitted to arbitration, and it is

"expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage, if disputed, shall be first obtained."

What happened was this. There was a loss occasioned by fire at Port Limon and the appellants made a claim under the policy, and the respondents took up the ground that the loss was caused by the felonious acts of the appellants. They charged them with arson, and said that the claim was a fraudulent one. That was obviously a case which, if made out, went to the very root of the matter, because cl. 12 of the policy, which I have read, says that if the claim be a fraudulent one and damage be occasioned by any wilful act, then all benefit under the policy is to be forfeited, and that attitude was again taken up by the respondents, because when the action was brought by the appellants on which this appeal arises, the respondents in their defence took this ground, and maintained that the appellants were not entitled to claim under the policy.

No doubt it is true that the policy contained an arbitration clause with a very stringent addition to it to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all, and if an action had been brought upon a policy containing such a clause and no more had happened, then, on principle and on authority, the claim could not have been maintained without

A fulfilling the condition precedent, because by the law of this country you can make most contracts which you desire, and, among others, a contract that you will not come under liability under a contract unless that liability is defined in a particular way, if necessary, by an arbitrator, and *Scott* v. *Avery* (1) is a decision of this House to the effect that that is the law. But in *Scott* v. *Avery* (1) the action was brought upon a contract containing such a clause, and to the B declaration a plea was put in raising this term of the contract, that the action could not be maintained because the plaintiff had contracted he should have no cause of action unless there had been a previous arbitration, and that the plea was demurred to, and this House ultimately decided, after consulting the judges, who differed very much in opinion (the decision was a final decision), that the demurrer was not a good demurrer, that the plea was a good one, and that the C action could not be maintained. That was, in effect, a decision upon a demurrer. But the present case, as I have already pointed out, is different. There has been in the proceedings throughout a repudiation on the part of the defendants of liability based upon charges of fraud and arson, the effect of which is that the right to all benefit under the policy is forfeited, but one of the benefits is the right to go to arbitration under this contract and to establish your claim in the D way which may to some people seem preferable to proceedings in the courts, and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract. Speaking for myself, when there is repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced. As I have said, E this is not a case like *Scott* v. *Avery* (1). It is a case in which the consequences with which we are dealing arise from the fact of the repudiation. When the case went to trial, it was heard before DARLING, J., and a special jury, and the jury found that the case of fraud and arson had broken down and found for the plaintiffs upon those issues, and the learned judge gave judgment, not that the case should go to arbitration, but for £3,000, and I think that that was probably F right, the arbitration clause having gone with the repudiation. The respondents appealed to the Court of Appeal on two grounds: first that the arbitration clause was a bar to the action; and, secondly, for a new trial on the ground that the verdict was against the weight of evidence, and also on the ground there was further evidence which ought to be taken into account. The second ground was sought to be made good on a notice of motion which I gather was out of G time, but which under the special circumstances it was hoped the Court of Appeal would none the less give leave to entertain.

The Court of Appeal has never disposed of the motion for a new trial on either of the grounds which I have indicated. It has only disposed of the case on the footing that the arbitration clause is a bar, a conclusion which, for the reasons I have already indicated, I am unable to concur in. I am therefore of opinion H that the judgment of the court below, the Court of Appeal, must be reversed, and that this case should go back to be disposed of by the Court of Appeal on the motion for a new trial, and I think that the most convenient form in which to put our judgment will be this: To restore the judgment of DARLING, J., without prejudice to any application that the respondents may make to the Court of Appeal with a view to restoring and disposing of the notice of appeal which relates to I the new trial, and that the judgment of DARLING, J., should be stayed for a month with a view to such application. I am of opinion also that the respondents should pay the costs here and I think in the Court of Appeal also, and I move your Lordships accordingly.

LORD DUNEDIN.—I concur. I certainly have not got the slightest idea that in pronouncing the judgment we are about to give we are in the faintest way throwing any doubt upon the decision of this House in the case of *Scott* v. *Avery* (1). That decision in *Scott* v. *Avery* (1) was again upheld by the House in a

more recent case of *Caledonian Insurance Co.* v. *Gilmour* (2), where the Lord Chancellor (LORD HERSCHELL) put the matter in a single sentence when he said ([1893] A.C. at p. 90):

> "The question is . . . where the only obligation created is to pay a sum ascertained in a particular manner, where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the courts can enforce the obligation without reference to such ascertainment."

Personally I should rather like to reserve my opinion as to what would have been the effect if the parties in this case, instead of pleading as they did, had pleaded in this way, "We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not, and had gone on to say: "But in the event of that being negatived, we wish this ascertainment of actual damage to be ascertained by arbitration." I should like to reserve my opinion on whether they might not have said so with effect. The very clear argument of counsel for the respondents tried to make out that if he once showed that at a certain time in Costa Rica a certain difference had arisen, then that brought into full operation the effect of the condition precedent in cl. 17 as being applicable to all suits. I do not think that that view can be maintained, because cl. 17 provides for the case of a difference arising as to the amount of loss, and then says:

> "It shall be a condition precedent to any right of action or suit upon this policy that the award of such arbitrator, . . . of the amount of the loss or damage, if disputed, shall be first obtained."

I think it is perfectly clear that that clause necessarily refers to an existing difference, not a historical difference, and it seems to me that when the attitude was taken up by these parties which was taken up in the letters that have been read to me, which the learned Lord Chancellor has referred to, in England, that they repudiated the claim altogether and said there was no liability under the policy whatsoever, that necessarily cut out the effect of cl. 17 as creating a condition precedent against all forms of action. I therefore concur in the motion which has been made by the noble and learned Lord on the Woolsack.

LORD ATKINSON.—I concur on this short ground. I think cl. 17 refers to existing disputes and differences about the amount of loss claimed, and in a contract on indemnity such as this is I do not think that clause has any application whatever, when the person to indemnify says: "You yourself brought about the destruction of the goods that were insured for an indemnity for which you claim," and insists upon a clause which provides that in that state of circumstances all benefit under the policy is forfeited. I therefore think that the order should be made which has been suggested by my noble friend on the Woolsack.

LORD PARKER OF WADDINGTON.—I agree.

LORD PARMOOR.—I concur. The respondents raised an issue on which, if they had succeeded, the appellants would have forfeited all benefit under the policy. This, in my opinion, would have included that benefit that would have been forfeited under cl. 17 of the contract, the policy. At the same time, I should like to express my own opinion that no difference would have arisen as regards matters that could have come under cl. 17, and therefore the clause did not in any case apply.

Appeal allowed.

Solicitors: *Fielder, Jones & Harrison*, for *C. T. Rhodes & Son*, Halifax; *Andrews, Ogilvie & Fisher.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

DUNLOP PNEUMATIC TYRE CO., LTD. *v.* SELFRIDGE & CO., LTD.

HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor), March 23, 25 and April 26, 1915]

[Reported [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 886; 31 T.L.R. 399; 59 Sol. Jo. 439]

Contract—Enforcement—Right of third party to sue on contract—Consideration not moving from promisee.

By a contract dated Oct. 12, 1911, D. & Co. agreed to purchase goods from the appellants and undertook not to re-sell them below the appellants' current list price except to genuine trade customers to whom they could sell at a discount. In such a case they agreed, as the appellants' agents, to exact from such customers a similar undertaking. On Jan. 2, 1912, the respondents, who were such customers, agreed to purchase goods of the appellants' make from D. & Co. and gave the required undertaking to maintain the current list price. On the respondents breaking this agreement the appellants sued them for breach of contract.

Held: (i) the agreement of Jan. 2, 1912, entered into by the respondents was made with D. & Co. only; the appellants were not parties to that contract as no consideration moved from them to the respondents; and they, therefore, could not sue on it: (ii) the appellants could not claim that the agreement had been made by D. & Co. on their behalf as undisclosed principals as this was inconsistent with the express terms of the contract; and, therefore, they could not enforce the contract of Jan. 2, 1912.

Per **Curiam:** Even if the appellants were undisclosed principals for D. & Co. no consideration moved from them to the defendants and the contract would also be unenforceable.

Per VISCOUNT HALDANE, L.C.: In the law of England certain principles are fundamental. One is that only a person who is party to a contract can sue on it. Our law knows nothing of a jus quæsitum tertio arising by way of contract. . . . A second principle is that, if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request.

Notes. By the Restrictive Trade Practices Act, 1956, a price maintenance agreement may be enforced against a person who is not a party to it. Section 25 (1) provides: "Where goods are sold by a supplier subject to a condition as to the price at which those goods may be re-sold, either generally or by or to a specified class or person, that condition may . . . be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been a party thereto." The case is reported here on its general application to the law of contract.

Considered: *Drive Yourself Car Hire Co. (London), Ltd.* v. *Strutt*, [1953] 2 All E.R. 737; *Green* v. *Russell*, [1959] 2 All E.R. 525. Followed: *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*, [1960] 2 All E.R. 737. Referred to: *Barker* v. *Stickney*, [1919] 1 K.B. 121; *The Lord Strathcona*, [1925] P. 143; *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York*, [1932] All E.R.Rep. 527; *Harrier* v. *Armstrong*, [1933] All E.R.Rep. 778; *Smith* v. *River Douglas Catchment Board*, [1949] 2 All E.R. 179; *Re Austin Motors Co.'s Agreements*, [1957] 3 All E.R. 62.

As to rights and liabilities of strangers to the contract, see 8 HALSBURY'S LAWS (3rd Edn.) 66–68; and for consideration, see 8 HALSBURY'S LAWS (3rd Edn.) 113–121. For cases see 12 DIGEST (Repl.) 233 et seq.

Case referred to:

(1) *Humble* v. *Hunter* (1848), 12 Q.B. 310; 17 L.J.Q.B. 350; 11 L.T.O.S. 265; 12 Jur. 1021; 116 E.R. 885; 1 Digest (Repl.) 738, *2808*.

Also referred to in argument:

Phelps v. *Prothero* (1855), 16 C.B. 370; 24 L.J.C.P. 225; 1 Jur.N.S. 1170; 3 C.L.R. 906; 139 E.R. 801; 1 Digest (Repl.) 660, *2304*.

Frith v. *Frith*, [1906] A.C. 254; 75 L.J.P.C. 50; 94 L.T. 383; 54 W.R. 618; 22 T.L.R. 388, P.C.; 1 Digest (Repl.) 799, *3260*.

Clifford v. *Turrell* (1841), 1 Y. & C.Ch.Cas. 138; 14 L.J.Ch. 390; 9 Jur. 633.

Appeal by the plaintiffs in the action from an order of the Court of Appeal (1914), 83 L.J.K.B. 923, reversing a decision of PHILLIMORE, J., in their favour.

Younger, K.C., and *Disturnal, K.C.*, for the appellants.

Sir Robert Finlay, K.C., *L. Sanderson, K.C.*, and *Herbert L. Tebbs* for the respondents.

The House took time for consideration.

April 26, 1915. The following opinions were read.

VISCOUNT HALDANE, L.C.—In my opinion this appeal ought to fail. Prior to Jan. 2, 1912, Messrs. Dew had entered into a contract with the appellants to purchase a quantity of tyres and other goods from them at the prices in their list, in consideration of receiving certain discounts. As part of their contract, Messrs. Dew undertook, among other things, not to sell to certain classes of customers at prices below the current list prices of the appellants. They were, however, to be at liberty to sell to a class of customer that included the respondents at a discount which was substantially less than the discount they were themselves to receive from the appellants, but in the case of any such sale they undertook, as the appellants' agents in this behalf, to obtain from the customer a written undertaking that he similarly would observe the terms so undertaken to be observed by themselves. This contract was embodied in a letter, dated Oct. 12, 1911. On Jan. 2 the respondents contracted with Messrs. Dew, in terms of a letter of that date addressed to them, that, in consideration of the latter allowing them discounts on goods of the appellants' manufacture which the respondents might purchase from Messrs. Dew, less in point of fact than the discount received by the latter from the appellants, the respondents, among other things, would not sell the appellants' goods to private customers at prices below those in the appellants' current list, and that they would pay to the appellants a penalty for every article sold in breach of this stipulation. The learned judge who tried the case has held that the respondents sold goods of the appellants' manufacture supplied through Messrs. Dew at less than the stipulated prices, and that the question is whether, assuming his finding to be correct, the appellants, who were not in terms parties to the contract contained in the letter of Jan. 2, can sue them.

In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quæsitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.

In the case before us, I am of opinion that the consideration, the allowance of what was in reality part of the discount to which Messrs. Dew, the promisees, were entitled as between themselves and the appellants, was to be given by Messrs. Dew on their own account, and was not in substance, any more than in form, an allowance made by the appellants. The case for the appellants is that they permitted and enabled Messrs. Dew, with the knowledge and by the desire of the respondents, to sell to the latter on the terms of the contract of Jan. 2, 1912. But it appears to me that even if this is so the answer is conclusive. Messrs. Dew sold to the respondents goods which they had a title to obtain from the appellants independently of this contract. The consideration by way of discount under the contract of Jan. 2 was to come wholly out of Messrs. Dew's pocket, and neither directly nor indirectly out of that of the appellants. If the appellants enabled them to sell to the respondents on the terms they did, this was not done as any part of the terms of the contract sued on. No doubt it was provided as part of these terms that the appellants should acquire certain rights, but these rights appear on the face of the contract as jura quæsita tertio, which the appellants could not enforce. Moreover, even if this difficulty can be got over by regarding the appellants as the principals of Messrs. Dew in stipulating for the rights in question, the only consideration disclosed by the contract is one given by Messrs. Dew, not as their agents, but as principals acting on their own account.

The conclusion to which I have come on the point as to consideration renders it unnecessary to decide the further question as to whether the appellants can claim that a bargain was made in this contract by Messrs. Dew as their agents; a bargain which, apart from the point as to consideration, they could therefore enforce. The form of the contract which we have to interpret leaves the appellants in this dilemma, that if they say that Messrs. Dew contracted on their behalf, they gave no consideration, and if they say they gave consideration in the shape of a permission to the respondents to buy, they must set up further stipulations, which are neither to be found in the contract sued upon nor are germane to it, but are really inconsistent with its structure. That contract has been reduced to writing, and it is in the writing that we must look for the whole of the terms made between the parties. These terms cannot, in my opinion, consistently with the settled principles of English law, be construed as giving to the appellants any enforceable rights as against the respondents. I think that the judgment of the Court of Appeal was right, and I move that the appeal be dismissed with costs.

LORD DUNEDIN.—I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations, I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was right. I am content to adopt from a work of SIR FREDERICK POLLOCK (POLLOCK ON CONTRACTS (8th Edn.)), to which I have often been under obligation, the following words as to consideration:

> "An act of forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable" (ibid. at p. 175).

The agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce he must show consideration, as above defined, moving from

Dunlop to Selfridge. In the circumstances, how can he do so? The agreement in question is not an agreement for sale. It is only collateral to an agreement for sale, but that agreement for sale is an agreement entirely between Dew and Selfridge. The tyres, the property in which upon the bargain are transferred to Selfridge, were the property of Dew, not of Dunlop, for Dew under his agreement with Dunlop, held these tyres as proprietor, and not as agent. What then did Dunlop do, or forbear, to do, in a question with Selfridge? The answer must be, Nothing. He did not do anything, for Dew, having the right of property in the tyres, could give a good title to anyone he liked, subject, it might be, to an action of damages at the instance of Dunlop for breach of contract, which action, however, could never create a vitium reale in the property of the tyres. He did not forbear in anything, for he had no action against Dew which he gave up, because Dew had fulfilled his contract with Dunlop in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed. To my mind, this ends the case. That there are methods of framing a contract which will cause persons in the position of Selfridge to become bound, I do not doubt. But that has not been done in this instance, and, as Dunlop's advisers must have known of the law of consideration, it is their affair that they have not so drawn the contract. I think the appeal should be dismissed.

LORD ATKINSON.—The action out of which this appeal arises was brought by the appellants against the respondents to restrain the latter from selling or offering for sale certain goods manufactured by the appellants on terms other than those specified in a certain agreement, dated Jan. 2, 1912, alleged to have been entered into between the respondents and the appellants through Messrs. A. J. Dew & Co. as the agents of the latter, and to recover the liquidated damages made recoverable by the terms of this agreement in respect of the breaches thereof complained of, and for an account of the goods sold in violation of the same.

The main facts of the case are undisputed. [His lordship stated the facts and continued:] The only conditions of the contract necessary to refer to are, first, a provision that Dew & Co. should not sell or offer for sale any Dunlop motor tyres, covers, or tubes to any other person, firm, or company at prices less than these list prices; but should be at liberty to allow to persons legitimately engaged in the motor trade (other than co-operative societies) a discount not exceeding ten per cent. off such list prices, plus the authorised scale of rebates on the net values of the purchases of the aforesaid goods, and further, that in case of any sale of the same to any such traders as aforesaid, Dew & Co. should, as the appellants' agents, obtain from the trader a written undertaking that he would similarly observe the list prices, terms, and conditions of sale on any resales made by him, whether to private customers or other traders, would forward these undertakings to the appellants on demand, and would not allow such trade discounts to any of the persons aforesaid without previously obtaining such a written undertaking; and, second, a condition that Dew & Co. should pay £5 for every tyre, cover, or tube sold or offered for sale in breach of the conditions of the contract. This agreement was an agreement for the sale and purchase of the appellants' goods, with certain contractual restrictions on the purchaser's right of resale. Dew & Co., unless restrained by injunction, could sell the goods they had purchased from the appellants to any sub-vendee on any terms they pleased, subject to this, that they exposed themselves to an action for breach of contract at the appellants' suit if they did not observe the terms of the agreement. But they did not require the special consent of the appellant to any particular resale made in conformity with the terms of the agreement. That consent was given in anticipation the moment the agreement was entered into. Dew & Co. were then clothed with absolute authority to resell on the terms specified in the agreement. The appellants had no power to prohibit or restrain them from doing so. I think it may be fairly assumed that the respondents were aware of the nature of this agreement between Dew & Co. and the appellants. When one turns to the contract relied

upon—namely, the letter dated Jan. 2, 1912, drawn up by Dew & Co., and signed on behalf of the respondents by A. Horsfield—it is clear that Dew & Co. did introduce into it in substance all the stipulations they were bound by their contract with the principals to introduce. They did nothing which that contract did not authorise. They merely exercised their right to re-sell on the terms prescribed. It was contended by the appellant's counsel, as I understood them, that the discount of ten per cent. having been given to the respondents, it must be taken that the appellants gave a specific and special consent to this particular contract with the respondents, and that that special consent constituted a consideration, moving from the appellants to the respondents, sufficient to support the contract contained in the letter of Jan. 2, 1912, as a contract between the appellants and the respondents. In my opinion, that contention is entirely unsustainable.

It was also urged on behalf of the appellants that it was competent for the latter to show that Dew & Co. entered into this contract of Jan. 2, 1912, as agents for undisclosed principals, namely, the appellants in the present action. Even if that were so, and the appellants were to be treated as parties to the contract contained in this letter, it does not get over the difficulty. The contract is as to them a nudum pactum, since no consideration moves from them to the respondents, or to any other person or body at the respondents' request. I confess that the inclination of my opinion is that this case comes within the principle of the decision in *Humble* v. *Hunter* (1), and that consistently with the terms of the letter itself the appellants cannot claim to be principals on whose behalf Dew & Co. contracted as their agents. KENNEDY, L.J., has pointed out in his judgment (83 L.J.K.B. at p. 929) the different stipulations in the contract which are irreconcilable with the supposition that Dew & Co. did not contract as principals. But however this may be, it is, I think, clear that no consideration moved from the appellants to support any contract made with them and the respondents, and I prefer to base my judgment on that ground. I think, therefore, that the judgment appealed from was right, and this appeal be dismissed with costs here and below.

LORD PARKER OF WADDINGTON.—Even assuming that the undertaking upon which this action is founded was given by the respondents to Messrs. A. J. Dew & Co. as agents for the appellants, and was intended to enure for their benefit, the appeal cannot succeed unless the undertaking was founded on a consideration moving from the appellants, and in my opinion there was no such consideration. The appellants did not give or give up anything on the strength of the undertaking. They had sold tyres to Messrs. A. J. Dew & Co. on the terms that the latter should not re-sell them at prices less than those specified in the appellants' price list, except that Messrs. A. J. Dew & Co. were to be at liberty to allow to persons legitimately engaged in the motor trade a certain discount off such price list if they, as agents for the appellants, obtained from such persons a written undertaking such as that upon which this action is founded. In re-selling these tyres to the respondents, and obtaining from the respondents the undertaking in question, Messrs. A. J. Dew & Co. admittedly committed no breach of contract. The sale was, of course, a good consideration for the undertaking moving from Messrs. A. J. Dew & Co., but the appellants, in whose favour the undertaking was given, being in the position of volunteers not parties to the contract of sale, cannot sue on it. The case was argued on behalf of the appellants as though what was done by Messrs. A. J. Dew & Co. would have been unlawful but for the leave and licence of the appellants, and that such leave and licence, though general in form, must be taken as given on the occasion of each sale, in consideration of the undertaking. I cannot accept this contention. In the first place, it is wrong to speak of an exception from a restrictive contract as importing any leave or licence at all. But for any contract to the contrary, Messrs. A. J. Dew & Co. were entitled to re-sell the goods supplied to them by the appellants

upon any terms they might think fit, and in re-selling as they did there was no breach of any restrictive contract. Even, however, if the sale can be considered as lawful only by licence of the appellants, the licence was given once for all in their contract to Messrs. A. J. Dew & Co., and was not given as part of the terms upon which any particular sale was allowed. The appeal fails on this ground and should be dismissed with costs.

LORD SUMNER.—There are two instances of sale and delivery complained of in this case. The steps in the Jameson transaction are as follows. Those in the other, the Strauss transaction, are similar and need not be analysed. On Oct. 12, 1911, Messrs. Dew & Co., motor accessory factors, contracted with the appellants, the Dunlop Pneumatic Tyre Co., in terms of the latter's price-maintenance agreement then current. By this Messrs. Dew & Co. became bound (inter alia) to buy from the Dunlop company motor tyres, covers, tubes, and sundries to the net value of £2,000 before the expiration of September, 1912, and the appellants became bound, if the contract continued to subsist, as it did, to sell and deliver such goods up to that value, whenever reasonably required to do so. On Dec. 21, 1911, a Captain Jameson thought fit to ask the respondents, Messrs. Selfridge & Co., Ltd., who are described as wholesale and retail merchants, for their lowest price for a Dunlop motor tyre, grooved and non-skid, 815 by 105. Their answer was that, on receipt of his order, such a tyre would be procured and the price would be £5 18s. 2d., which was the appellants' list price, less 7½ per cent. On Jan. 1, 1912, Captain Jameson sent to the respondents an order for the tyre, and also the money for it, and on the same day the order was accepted, and delivery of the tyre was promised for the following day. In fact, on Jan. 2 the respondents ordered this tyre from Messrs. Dew & Co. by telephone. Messrs. Dew & Co., in turn, ordered it by telephone from the appellants; it was delivered by them to Messrs. Dew & Co., and they sent it to the respondents who delivered it to Captain Jameson. Of course the respondents did not mention Captain Jameson to Messrs. Dew & Co., nor did Messrs. Dew & Co. mention the respondents to the appellants. So far the respondents had signed no price-maintenance agreement. They had been pressed to do so, and no doubt knew that the reason why they were being pressed by Messrs. Dew & Co. was because the appellants, in turn, strictly required them to obtain these agreements from those of their customers to whom they sold. Within two or three days of Jan. 3 they did sign such an agreement, dating it Jan. 2, and delivering it to Messrs. Dew & Co., to whom it was addressed, a week or so afterwards. It is for breach of this agreement that the appellants sued.

The parties have been desirous of knowing their reciprocal rights and duties, if any, arising out of this agreement, and have accordingly raised two broad questions: (i) Is there any agreement between these parties at all? (ii) If so, is there any consideration moving from the appellants to support it and make it bind the respondents to them? But for this there would have been a good deal to be said for the proposition that a bargain and sale, clearly complete before this agreement was signed or dated, could be no breach of it, and that the performance of that bargain by delivery of the goods after the price-maintenance agreement was made, could hardly be a ground for the grant of an injunction. The true question, however, is that of consideration; but both parties seem to have been somewhat slow to realise it. The statement of claim averred that the considerations for the agreement were those therein mentioned, which was an averment of a demurrable cause of action, since the expressed consideration moved only from Messrs. Dew & Co., and were not available to the appellants. The defence, even though amended and re-amended, never took the point on which this appeal turns, but only alleged want of consideration, in so far as the agreement purported to refer to Dunlop tyres purchased from persons other than Messrs. Dew & Co.

Let it be assumed without discussion that the agreement which the respondents

A signed speaks from its date, Jan. 2. Let it be assumed also that evidence was admissible to add an unexpressed consideration moving from the appellants to the expressed consideration moving from Messrs. Dew & Co. Let it be assumed further (though this is a large assumption) that the terms of the instrument do not so designate Messrs. Dew & Co. as the principals and the only contracting parties as to shut out proof that the appellants were their undisclosed principals. B After all, what consideration moved from the appellants? As the point is not insisted on that Messrs. Dew & Co. sold and delivered to the respondents first, and procured their written undertaking only afterwards, I think that Messrs. Dew & Co. exactly performed the conditions of their agreement with the appellants. The firm of Selfridge & Co. was the "trader" within that agreement, and Messrs. Dew & Co. duly obtained that firm's written undertaking to the intent therein C described. The undertaking was in the appellants' own form, and Messrs. Dew & Co. did not contract even by implication that the undertaking which they would obtain should be binding. The respondents signed what they were asked to sign, but nothing precluded them from saying afterwards that it was nudum pactum. At first they thought and said that they were bound, but this did not alter their position or the appellants', or supply a consideration where none existed before. D They made no request for the tyre to the appellants, for they did not know that Messrs. Dew & Co. had not got it in stock, or, if they knew, they did not constitute Messrs. Dew & Co., their agents, to ask the appellants for it. Messrs. Dew & Co. asked for it by virtue of their agreement to buy up to £2,000 worth of goods, and so it was that the appellants delivered it. Messrs. Dew & Co. did not mention to the appellants that so far no written undertaking had been signed by their E customer, and the appellants, knowing nothing, waived nothing. The appellants, as alleged promisees, neither did nor suffered nor forebore anything, nor promised to do any of these things, or anything at all, in exchange for the undertaking purporting to be given by the respondents. It was contended that consideration might be found in the fact that the appellants, who could sell or not sell their own proprietary products, as they chose, only enabled the respondents to get the F tyres by agreeing to supply Messrs. Dew & Co., and only agreed to supply them on the restrictive terms in question. This breaks down as soon as it is examined. To this transaction the respondents were strangers. It happened before they received or gave any order. The delivery of the tyres by the appellants was in performance of an obligation unknown to the respondents (though I daresay they could have surmised it if it had been any business of theirs) and prior to their G appearance on the scene. In this transaction nothing moved from the appellants to the respondents. It would have been the same if the other firm had not existed. The appellants have sued on a nudum pactum.

The appellants' "distributing organisation" has been before your Lordships' House before, and I do not suppose you have heard the last of it now. I think it better, accordingly, to express no opinion on any of the other questions that have H been raised, since this one decides the case, and the others may occur again. Much may be said both ways on the right of the appellants to come forward as undisclosed principals upon the contract in question. I express no opinion except that I do not wish to be supposed entirely to assent to the broad proposition, apparently suggested in some of the judgments of the Lords Justices, that a contract, in which one and the same party contracts both on his own behalf and for I an undisclosed principal, is a legal impossibility. So stated, I think the proposition somewhat too wide. If no more is meant than what SWINFEN EADY, L.J., puts (83 L.J.K.B. at p. 931): "Where a party contracts in his own name, an undisclosed principal cannot sue on the contract if the terms are such as import that the person apparently contracting is the real and only principal," it is not open to objection. I think that the appeal should be dismissed.

LORD PARMOOR.—The main question in this appeal is whether it is competent for the appellants to bring an action to enforce certain conditions in a

contract made between the respondents and Messrs. A. J. Dew & Co. The appellants are manufacturers and Messrs. A. J. Dew & Co. are factors and dealers in motor tyres, covers, or tubes. It is the object of the appellants to enforce and maintain certain general conditions and prices in the sale of their motor tyres, covers, or tubes, and it may be assumed that it is important for their business to attain this object. The appellants are not in form parties to the contract which they seek to enforce. They claim to be undisclosed principals. If they can prove this, they get over the first difficulty. Unless the appellants can prove that they are undisclosed principals, they fail at the outset, since the stipulations, which they seek to enforce, are not of such a character that a person, not a party to the contract, has a right to bring an action to enforce them. There is no question that parol evidence is admissible to prove that the plaintiff in an action is the real principal to a contract; but it is also well established law that a person cannot claim to be a principal to a contract, if this would be inconsistent with the terms of the contract itself. KENNEDY, L.J., in his judgment in the Court of Appeal states his conclusion that it would be inconsistent with the terms of the contract itself to admit the claim of the appellants to be regarded as undisclosed principals with a consequent right to bring an action to enforce certain of its conditions. I agree with this conclusion, and it is sufficient to dispose of the case.

The main difficulty in the way of the appellants is that, apart from any question of form, they cannot show that there is any consideration sufficient to support a contract as between themselves and the respondents. On Oct. 12, 1911, the appellants entered into a contract with Messrs. A. J. Dew & Co. that in consideration of discounts and rebates being allowed off the appellants' current price list, they would purchase from the appellants goods to the quantity therein mentioned. There were several conditions attached to the contract, among them the following:

> "We will, as your agents in this behalf, in the case of any sale of your tyres, covers, or tubes to a trader obtain from such trader a written undertaking that he will similarly observe your list prices, terms, and conditions of sale current at the time of sale in any re-sales by him."

In accordance with this obligation, Messrs. A. J. Dew & Co. did make a contract with the respondents that they would similarly observe the appellants' prices, terms, and conditions of sale current at the time of any sale by them. There is no dispute that the respondents did not observe the conditions attached to their contract with Messrs. A. J. Dew & Co. The appellants, in their action, claimed an injunction and damages at the rate of £5 for each and every tyre, cover, or tube sold by the respondents in breach of the said agreement. I understood counsel for the appellants to say that under the contract between themselves and Messrs. A. J. Dew & Co. of Oct. 12, 1911, the appellants reserved some control over the sale of their goods by Messrs. A. J. Dew & Co. to third parties, and that in this respect there was consideration moving from the appellants to the respondents sufficient to support a contract. I am of opinion that no such control was reserved to the appellants, and that Messrs. A. J. Dew & Co., without any further authority or licence from the appellants, had a full right as factors or dealers in the appellants' goods to sell them to the respondents. It may well be that the appellants under their contract with Messrs. A. J. Dew & Co. have the power to prevent the supply of the appellants' goods to any person whose supplies the appellants' request Messrs. A. J. Dew & Co. to suspend, but this is a wholly different proposition from a claim to be entitled to bring an action against the purchasers of goods sold by Messrs. A. J. Dew & Co. in the course of their business. If Messrs. A. J. Dew & Co. had full power to sell the goods in question to the respondents, as factors or dealers, it is, I think, clear that the appellants were not in a position to give, and did not give, any consideration which could support a contract between themselves and the respondents, and that the action

fails. I abstain from discussing what remedy Messrs. A. J. Dew & Co. might have on their contract with the respondents, or whether the appellants might not have attained their object in some other way; it is sufficient to say that the appellants cannot succeed in their present action and that the appeal fails.

Solicitors: *John B. & F. Purchase*; *Nunn, Popham & Starkie.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

SIDNEY *v.* NORTH EASTERN RAIL. CO.

[KING'S BENCH DIVISION (Avory, Rowlatt and Shearman, JJ.), April 30, May 1, 4, 7, 1914]

[Reported [1914] 3 K.B. 629; 83 L.J.K.B. 1641; 111 L.T. 677]

Compulsory Purchase—Purchase money—Compensation—Special adaptibility—Railway purposes—Special value arising from part of public railway being on land—Enhanced rent on renewal of lease.

In 1851, by a lease expiring on Mar. 25, 1913, a freeholder demised to colliery owners two pieces of land on which a colliery railway was constructed. A small railway company acquired the interest of the licensees in the railway, but not that of the landowner. Subsequently, the North Eastern Railway Co. absorbed the smaller railway and ran their main lines over the land. In 1890 compulsory powers were obtained to take the land, and in 1893 a notice to treat was served upon the landowner. Arbitration proceedings did not take place till 1910, the railway company having continued to pay the rent. The railway was the only means of transport from two neighbouring collieries to a port.

Held: in arriving at the purchase money and compensation payable to the landowner for the pieces of ground the arbitrator should take into consideration (i) the special adaptability of the land for railway purposes, but not any special value arising from the fact that there was on the land a part of a public railway or that such railway formed part of the main line of the railway company, and (ii) the enhanced rent which he found that the landowner was likely to receive upon the renewal of the lease to the colliery owners or to the railway company.

The question of "special adaptability" considered.

Notes. Considered: *Vyricherla Narayana Gajapatiraju (Raja)* v. *Vizagapatam Revenue Divisional Officer*, [1939] A.C. 302. Referred to: *Swift* v. *Board of Trade*, [1926] 2 K.B. 131.

As to measure of compensation generally, see 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and for cases see 11 Digest (Repl.) 126 et seq. As to special adaptability, see 10 HALSBURY'S LAWS (3rd Edn.) 95; and for cases see 11 DIGEST (Repl.) 133, 134. As to costs of arbitration, see 10 HALSBURY'S LAWS (3rd Edn.) 188; and for cases see 11 DIGEST (Repl.) 216 et seq.

Cases referred to:

(1) *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; 77 L.J.K.B. 1009; 99 L.T. 767; 72 J.P. 437; 24 T.L.R. 858; 52 Sol. Jo. 173; 6 L.G.R. 1106, C.A.; 11 Digest (Repl.) 133, *182*.

(2) *Re Gough and Aspatria, Silloth and District Joint Water Board*, [1904] 1 K.B. 417; 73 L.J.K.B. 228; 90 L.T. 43; 68 J.P. 229; 52 W.R. 552; 20 T.L.R. 179; 48 Sol. Jo. 207, C.A.; 11 Digest (Repl.) 133, *181*.

(3) *Re Countess of Ossalinsky and Manchester Corpn.* (1883), Browne & Allan's Law of Compensation, 2nd Edn. 659, D.C.; 11 Digest (Repl.) 133, *179*.

Award of an umpire stated in the form of a Special Case.

The award recited that by a notice in writing dated June 9, 1893, the North Eastern Railway Co. (hereinafter called "the railway company") gave notice to Henry Sidney (herein called "the landowner") and others that they required to purchase and take for the purposes of the North-Eastern Railway Act, 1890, and of the Acts therewith incorporated, which included the Lands Clauses Consolidation Act, 1845, the lands mentioned in the schedule to the case which the railway company were authorised to purchase and take. Arbitrators were appointed in July and December, 1910, respectively, and an umpire was appointed in June, 1911. The arbitrators having differed, the umpire heard the matter, and made an award in which he set out the facts and stated that it was contended [para. 8 of the Special Case] before him on behalf of the landowner that in determining the amount of the purchase money and compensation to be paid in respect of the land, he (the umpire) should have regard (a) to the special adaptability of the land to railway purposes arising from the fact of the existence on it of an integral part of a public railway, and (b) to the fact that if the railway company had not exercised their statutory powers of taking the land it would have been necessary for them or for the coal company to have renewed the wayleave lease owing to the railway held under it forming part of the main line of the public railway over which a large traffic passed daily. On behalf of the railway company it was contended [para. 9 of the Case] that the umpire ought to disregard entirely any value that the land might have to the railway company, and that he should treat the value to the landowner as being determined by the rent of £51 paid by the railway company, and that under the circumstances set forth in this case there could not be any probability of any increased rent being obtainable by the landowner from the coal company or any other party than the railway company. The umpire found [in para. 10 of the Case] that, if the railway company had not exercised their statutory powers and the wayleave lease had expired, there would have been a reasonable probability that the landowner would have renewed the lease to the colliery lessees at an enhanced rent if the lease had not been renewed to the railway company, and that such renewed lease could have been assigned to the railway company by the colliery lessees, thereby placing the railway company for a further term of years in the same position as they had been of many years, subject only to the payment of the increased rent. He was of opinion [para. 11 of the Case] that, while he ought to disregard any special value which the land might have to the railway company by reason of its forming part of their public railway, he ought to take into his consideration the probability of the landowner being able to renew the wayleave lease to the colliery lessees at an enhanced rent as mentioned in the last precedent paragraph, and that in assessing the compensation he ought to have regard to the enhanced rent which in his judgment the landowner might reasonably have expected to obtain as between a willing lessor and a willing lessee for such renewal if the railway company had not obtained and exercised statutory powers of taking the land. It was also contended [para. 12 of the Case] before the umpire on behalf of the landowner that in assessing compensation the umpire should include interest on the amount of the purchase money assessed by him as from the date of the notice to treat, but in the umpire's opinion, having regard to the circumstances of this case, the landowner was not entitled to claim interest, and his award did not comprise any interest.

Gore-Browne, K.C., and *Disturnal, K.C.*, for the landowner.

Upjohn, K.C., and *Courthope-Munroe* for the railway company.

Cur. adv. vult.

May 7, 1914. The following judgments were read.

AVORY, J.—The precise question raised between the parties in this case has not been determined in any of the decisions to which our attention has been

called. We think it advisable that the judgment of the court should be given, in the light of those decisions, in the form of direct answers to the questions submitted by the umpire.

First, we think the contentions of the railway company in para. 9 of the Special Case are wrong. It was admitted at the Bar that they could not be supported. Secondly, as to the contentions of the landowner in para. 8 of the Case, we think that the umpire should have had regard to the special adaptability of the land for railway purposes, but not to the fact of the existence on it of an integral part of a public railway, or to the fact of such railway forming part of the main line. Thirdly, we think that the umpire was entitled to find as he has done in para. 10 of the Special Case, and we see no reason for doubting the correctness of such finding. Fourthly, as to para. 11 of the Special Case, assuming the amount of purchase money and compensation is calculated on the basis of a rental under a new lease, we think that, although it is right to disregard the special value which the land has to the railway company by reason of it forming part of their public railway, the umpire ought to have taken into consideration the enhanced rent which the landowner might reasonably have expected to obtain in competition between the colliery owners and the railway company if the railway company had not obtained and exercised statutory powers of taking the land. Fifthly, as to para. 12 of the Case upon which our opinion also was invited in the statement of the Case, that has been abandoned by the consent of both parties on the ground that the point does not arise at this stage.

ROWLATT, J.—I agree. It is well settled that the compensation must represent the value to the owner, not to the purchaser. But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

Special adaptability is an expression which is wide enough to include special adaptability for any purpose, but where the special adaptability is for purposes other than those of the compulsory purchaser it is merely an element in the calculation of the probable competition for the land, that is, an element in its general value. It only gives rise to a question in compensation law, where, existing for the purposes of the promoters, its consideration seems at first sight to infringe the principle that value due to the scheme is to be excluded. For example, a piece of land may have a special value for a particular crop, for a particular sort of building scheme, or for a reservoir, or for several of these purposes. But if it is going to be taken for an artillery or rifle range, or for a railway, these are elements of general value only, and raise no question. Suppose, however, it is to be taken for a reservoir, its special suitability for that purpose (being the purpose of the scheme) does raise the question how far that can be taken into consideration without infringing the rule against giving value due to the scheme. Special adaptability for the particular scheme may be taken into consideration where it can be said that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market. But no case has raised directly for decision the precise point whether when the possibility of other competitors for the same purpose is negatived or after the price has been raised to a point at which such competition ceases, there is any room in the former case or any further room in the latter for the factor of special adaptability. FLETCHER MOULTON, L.J.'s reasoning in *Re Lucas and Chesterfield Gas and Water Board* (1) negatives any such proposition. The judgments of VAUGHAN WILLIAMS and BUCKLEY, L.JJ., in the same case contain phrases wide enough to affirm it, but they are not expressly directed to it. *Re Gough and Aspatria, Silloth and District Joint Water Board* (2) does not really deal with it. It seems we cannot shelter ourselves under authority but must

deal with the point by determining to which conclusion the true application of settled principles leads us.

If and so long as there are several competitors including the actual taker, who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail to what can any further value be attributed? The point has been reached when the owner is offered more than the land is worth to him for his own purposes, and all that anyone else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers the owner need not sell to that one, and that one would need to make higher and yet higher offers in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed.

For these reasons I agree with the formal answers we propose to make to the arbitrator. In conclusion, I would draw attention to a fallacy in fact which underlies the contention of the owner in this case. He says he is entitled to special value for his property as part of a public railway. At the moment of the cesser of the wayleave right that is not its character; it is merely land in the track of a projected public railway and wanted for it. The special want of the owner of that public railway for this piece of land cannot be taken into consideration in valuing it.

SHEARMAN, J.—I am of the same opinion. I agree entirely with the written judgment of my brother AVORY, which is intended to law down a pronouncement of the entire court as to the principles which in this case should guide the umpire in assessing compensation. I have also read the judgment of my brother ROWLATT, and I agree with it entirely. I add a few observations because there are many cases of this kind heard throughout the country, and by arbitrators, and it is seldom that they come before the courts. All those who have been practitioners in this class of business are aware how often arbitrators are puzzled by the problems that are put before them when the parties do not wish, because of the delay and expense, to have these problems put before the court. I therefore desire to make a few observations as to the meaning of the phrase "special adaptability," and as to what I think was the entire fallacy which underlay the argument of the claimant in this case.

The facts of the present case are these: In the year 1851 the freeholders of the land granted a wayleave for a considerable number of years to certain persons for the purpose of making a private colliery railway. In the year 1854 a small railway company took over that undertaking and made it a public railway. Subsequently the North Eastern Railway Co. absorbed the smaller railway company under one of their Acts and took over their entire undertaking. The railway company then proceeded to run one of their main lines of railway over a portion of the land to which they only had title as assignees of the original holders of the land. Somewhere prior to the year 1890 the North Eastern Railway Co. discovered this defect in their title, and they accordingly remedied it by obtaining compulsory powers to take this land by their Act of 1890, and on June 9, 1893, they served notice to treat upon the freeholders. At that time the problem did not arise, owing to the friendly relations which existed between the landowner and the company, or rather as the wayleave was still running, and had some considerable time to run before the question of the value of the land to be taken came up for settlement. It is clear on practice and on settled law that it is the duty of an arbitrator or umpire to find the value of the land at the time of the notice to treat, and in finding what is its value he must find what is its value to the seller and not

what is the value to the person who has acquired compulsory power to take it. In this case the claimant has been trying to obtain an enhanced value from the railway company on the sole ground that if the wayleave expired, they would be left, not with a main line on the premises, but with a bit of the main line ending at one place and another bit beginning at another place, because the moment the wayleave expired the railway company became trespassers with no title to run their railway over this land at all. It was of importance to the railway company to acquire this intermediate part in order to carry on their undertaking, but this was entirely a value and a special value to the railway company and not in that sense a special value to the landowner. The only way in which the existence of the railway company gave any value to the owner was that they were one of several people who might have been willing to buy the land quite apart from the purposes for which they obtained compulsory powers. Looking at the facts of this case the arbitrator is only entitled in the manner laid down in the judgment read by my brother AVORY to look at the value of the land looking at the different colliery companies and the railway company as persons who would be liable to compete in fixing the price to the landowner if he was willing to sell and they were all willing to buy, apart from any statutory powers.

I only desire to make one other observation, and that is as to the meaning of the phrase "special adaptability." Long before *Re Gough and Aspatria, Silloth, and District Joint Water Board* (2) and the *Chesterfield Case* (1) were reported in the courts practitioners in this class of business were well acquainted with what was known as the *Countess of Ossalinsky's Case* (3), the judgments in which have been reported in the books of practice on the subject; and from that time onward the ingenuity of claimants has been exercised in discovering special adaptability of some sort in any kind of land compulsorily taken; and arbitrators have often had to deal with it. The statements of FLETCHER MOULTON, L.J., as to special adaptability in his judgment in *Re Lucas and Chesterfield Gas and Water Board* (1) are those which should guide arbitrators. Special adaptability is nothing more than an element of market value. If land is taken on the borders of a navigable river, that is a recomendation, because a class of persons would be likely to take it for the purposes of a wharf, and that I daresay would be described as "special adaptability"; but special adaptability is merely one kind of special value which is likely in the market to attract a class of purchaser or purchasers who would come into competition. In this case the special adaptability to the railway company ought to be taken into consideration, because owing to collieries round about and to the presence of other railways in the neighbourhood it may well be that this land has a special value generally for the purposes of a railway apart altogether from any exigencies of the North Eastern Railway Co. Looked at in that light, the expression "special adaptability" may be very well used as meaning nothing more than that it has a special value in the market. As regards the general question of competition, I would say that competition of buyers may be and very often is in the market competition between people who have themselves different objects in buying. A particular part of a railway might find a purchaser who wanted it for the purposes of a reservoir or one who wanted it for chemical works or something of that sort, and the fact that you can only find one purchaser, including the person who might afterwards apply for statutory powers, does not prevent there being competition for the land, but the value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.

On these grounds I entirely agree with the judgment written by my brother AVORY as laying down the principles upon which the arbitrator should be guided in this case.

Judgment accordingly.

Solicitors: *E. Flur, Leadbitter & Neighbour*, for *C. Alderson*, Morpeth; *R. F. Dunnell*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

BRITISH MURAC SYNDICATE, LTD. *v.* ALPERTON RUBBER CO., LTD.

[CHANCERY DIVISION (Sargant, J.), April 14, 15, 16, 1915]

[Reported [1915] 2 Ch. 186; 84 L.J.Ch. 665; 113 L.T. 373; 31 T.L.R. 391; 59 Sol. Jo. 494]

Company—Articles—Alteration—Alteration in breach of agreement—Injunction.

Where it is a term of a contract made by a company that an article of association of the company is not to be altered, the company is not at liberty to alter its articles so as to break that contract, and if it attempts to do so, may be restrained by injunction, at the suit of the other party to the contract.

Allen v. *Gold Reefs of West African, Ltd.* (1), [1900], 1 Ch. 656, applied.

Punt v. *Simmons & Co., Ltd.* (2), [1903] 2 Ch. 506, stated to have been overruled on this point in *Baily* v. *British Equitable Assurance Co.* (3), [1904] 1 Ch. 374.

By an agreement made between a syndicate and a company, it was provided that so long as the syndicate held at least 5,000 shares in the company they should have the right of nominating two directors on the company's board. It was further recited in the agreement that the company's memorandum and articles of association had been already prepared with the privity of the syndicate. Article 88 of the articles provided that so long as the syndicate held at least 5,000 shares in the company it should have the right of nominating two directors, so that both under the articles and by virtue of the agreement the syndicate had this right. From time to time until 1915 the syndicate exercised this right. Differences having arisen among the directors, the syndicate on Mar. 3, 1915, nominated T. and W. as directors. These persons the company refused to accept, and called a meeting to pass a special resolution cancelling art. 88 so as to remove the company's obligation to appoint the syndicate nominees. Thereupon this action was launched claiming (inter alia) a declaration that T. and W. had become directors of the company; an injunction to restrain the company or its directors from excluding T. and W. from its board; specific performance of the agreement; and an injunction restraining the company from cancelling art. 88. The company had no reasonable personal objection to T., but might have a reasonable personal objection to W.

Held: (i) the company would and should be restrained by injunction from cancelling art. 88 as to do so would be a breach of its contract; (ii) as the objection to the proposed directors was not to them personally, but to the right of the syndicate to nominate them, and as they would constitute a minority, a declaration that T. and W. had become directors would be made, but no injunction to restrain the company from excluding them from the board would be made at present.

Bainbridge v. *Smith* (4) (1889), 41 Ch.D. 462, applied.

Semble: if necessary such an injunction would have been granted as to T.

Notes. Distinguished: *Plantations Trust, Ltd.* v. *Bila (Sumatra) Rubber Lands, Ltd.* (1916), 85 L.J.Ch. 801.

As to how far a company may alter its articles of association, see 6 HALSBURY'S LAWS (3rd Edn.) 272–273, para. 565; as to appointment of directors by an outside body, see ibid., 278, para. 572, text and note (e); as to injunction against a company to restrain a wrong to an individual member, see ibid., 447, para. 865; and for cases see 9 Digest (Repl.) 591–596, 456, and 728 respectively.

Cases referred to:

(1) *Allen* v. *Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656; 69 L.J.Ch. 266; 82 L.T. 210; 48 W.R. 452; 16 T.L.R. 213; 44 Sol. Jo. 261; 7 Mans. 417, C.A.; 9 Digest (Repl.) 592, *3920*.

(2) *Punt* v. *Simmons & Co., Ltd.*, [1903] 2 Ch. 506; 72 L.J.Ch. 768; 89 L.T. 525; 52 W.R. 41; 47 Sol. Jo. 619; 10 Mans. 415; 9 Digest (Repl.) 593, *3925*.

(3) *Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374; 73 L.J.Ch. 240; 90 L.T. 335; 52 W.R. 549; 20 T.L.R. 242; 11 Mans. 169, C.A.; reversed sub nom. *British Equitable Assurance Co., Ltd.* v. *Baily*, [1906] A.C. 35; 75 L.J.Ch. 73; 94 L.T. 1; 22 T.L.R. 152; 13 Mans. 13, H.L.; 9 Digest (Repl.) 593, *3926*.

(4) *Bainbridge* v. *Smith* (1889), 41 Ch.D. 462; 60 L.T. 879; 37 W.R. 594; 5 T.L.R. 375, C.A.; 9 Digest (Repl.) 465, *3037*.

(5) *Automatic Self-Cleansing Filter Syndicate Co., Ltd.* v. *Cuninghame*, [1906] 2 Ch. 34; 75 L.J.Ch. 437; 94 L.T. 651; 22 T.L.R. 378; 50 Sol. Jo. 359; 13 Mans. 156, C.A.; 9 Digest 498, *3282*.

Witness Action.

The facts and arguments sufficiently appear from the judgment of SARGANT, J.

Gore-Browne, *K.C.*, and *Whinney* for the plaintiffs.

Grant, *K.C.*, and *Hecksher* for the defendants.

SARGANT, J.—This is an action of rather an unusual character. It is first of all to declare that certain persons nominated by the plaintiffs, the British Murac Syndicate, Ltd., which I will refer to as "the syndicate," to sit on the board of the Alperton Rubber Co., Ltd., which I will refer to as the "Alperton company," have been duly appointed directors of the Alperton company. The plaintiffs also seek an injunction to restrain interference with the persons so nominated taking up their position as directors of the company, and they now ask also for an injunction to restrain the Alperton company from holding a meeting for the purpose of confirming a special resolution which has already been passed at a preliminary meeting for the purpose of blotting out from their articles of association an article which gives in terms the right to the syndicate to appoint two directors of the Alperton company.

The rights of the syndicate depend primarily on a sale agreement which was entered into between them and a trustee for the Alperton company on Mar. 24, 1910. That agreement was adopted in the usual way, and has become binding upon the Alperton company, who then had another name, the Crude Rubber Co. The agreement, after having been adopted, was carried out and completed by virtue of an assignment of May 26, 1910. Under that agreement there was a recital that the memorandum and articles of the Alperton company had been prepared with the privity of the syndicate and Mr. Dessau, who was an inventor and co-vendor with the syndicate. In those articles appears art. 88, under which the syndicate have the perpetual right of nominating two directors to sit on the board of the Alperton company. By an agreement that arrangement was confirmed in this language—it is cl. 10 of the agreement:

> "So long as the syndicate holds at least 5,000 shares in the capital of the company [I need hardly say that a large number of shares in the Alperton company were to be allotted to the syndicate as part performance of the purchase] the syndicate shall have the right of nominating two directors on the board of the company, such directors to obtain their qualification within one month after appointment."

So that under the agreement and articles the right of the syndicate exists. It is both a right under the agreement and it is a right under the articles in respect of a shareholding in the Alperton company. In that year two persons were appointed to be the nominees, and the nominee directors of the syndicate, and sat on the board, but they ceased to be directors some time in 1911. It appears that during the first part of the existence of the company very heavy losses were incurred. To some extent, at any rate, these losses were due to Mr. Dessau, who was the co-vendor to the company, and who appears to be an inventor of considerable ability, and possibly a better inventor than a man of business. It appears that the

patents which formed a part of the subject-matter assigned by Mr. Dessau and the syndicate to the Alperton company turned out to be of little, if any, value; and ultimately they were abandoned. Since then the company have begun to carry on a new policy and to desist from the patent business with which they started, and have entered upon, I am told, with some success, a manufacturing business which holds out, I am glad to think, considerable prospects of success. Mr. Dessau, who had been originally the manager of the company and afterwards its technical adviser, after a time ceased to hold that position. During 1914 the syndicate only exercised their power of appointing directors to the extent of nominating one director, a Dr. Thomson, and he appears to have worked in harmony with the other directors of the Alperton company. That appears from a speech made by the chairman of the company at the general meeting. As a matter of fact, he seems to have thought that he was rather worried by Mr. Dessau, and at one time, towards the end of 1914, he resigned his position as a director of the company. A considerable question of policy appears to have arisen at the board of the Alperton company whether they should continue their manufacturing business as their sole undertaking or whether they should take up a new invention which had been discovered by Mr. Dessau. On that there seems to have been an honest difference of opinion. The opinion that has prevailed down to the present has been in favour of continuing the manufacturing policy of the company and not taking up this special invention by Mr. Dessau, though down to the close of last year the opinion of the Alperton company seems rather to have been in favour of taking up this speciality of Mr. Dessau's.

Towards the end of 1914 the syndicate nominated Mr. Dessau as their second nominee on the board of the Alperton company. To that nomination objection was taken on behalf of the Alperton company and its directors. Accordingly the syndicate, acting, as it seems to me, with a good deal of consideration for the Alperton company, did not in any way press that nomination, and, as I understand, abandoned it, because on Mar. 3, 1915, the syndicate proceeded to nominate as their directors on the board of the Alperton company Dr. Thomson, who had, as I have mentioned, resigned his position as a director, and a Mr. Thomas Warwick, a person concerned in the manufacture of rubber goods. On that the Alperton company declined to accept the nomination of either of these two gentlemen on their board, and they called, in accordance with a requisition of a number of their shareholders, a meeting of the company to be held on Mar. 23 of this year. The object of that meeting was to pass a special resolution, to be confirmed by a subsequent meeting, for the purpose of cancelling art. 88 of the articles of association. That is the article which recognised the right of the syndicate to appoint the two directors of the Alperton company. It is conceded that the only business at that meeting was to be to cancel that article, because, although there are five or six other resolutions mentioned in the notice convening the meeting, they are admittedly merely consequential on the cancellation of that article—they are mere questions of drafting. In the circular which was sent of the formal notice of the meeting, after giving some account of the history of the company, the directors say this:

> "It is most detrimental to the business of this company to be under the necessity of appointing two additional directors nominated at any time by the British Murac Syndicate, Ltd., who may seek to alter the settled policy of the company."

Then later on in the same paragraph occurs this sentence:

> "Your directors feel strongly that the general body of shareholders should have the sole right of appointing their directors."

Therefore the sole and only object of the meeting as avowed was to get rid of the obligation resting on the Alperton company of accepting on their board the nominees of the syndicate; the object was to destroy the right of the syndicate to nominate two directors on the board. In that state of things the matter was

mentioned to me, I think, on the very morning when the meeting was to be held. I did not attempt to interfere with the meeting itself, because it was arranged very reasonably between those representing the plaintiffs and the defendants that the matter should be dealt with by me before the confirmatory meeting was held. The confirmatory meeting will be held, unless I restrain it, next week; and accordingly it is essential that I should give judgment at once.

There are one or two preliminary objections to the action which I will get rid of at once. In the first place counsel for the defendant, the Alperton company, attempted to make out a case that this was a question of specific performance, and that there had been a total or partial failure of consideration on the part of the syndicate; and that in view of the large losses which had been sustained by the company in their early operations and the entire worthlessness of the patents made over to them there was no case for specific performance. That is hardly more than verbal. There is no question really in this case of specific performance in the sense that that phrase is used at all. What I have to deal with is the specific enforcement of an obligation contained in an agreement which has in fact itself been kept. This is not a question of carrying out an executory agreement; so that the ordinary questions relative to specific performance do not arise at all. This is a mere question of enforcing a subsisting obligation, and the executory agreement has been carried out by the assignment of the patents. It would be perfectly impossible to consider the obligations at an end unless a clear and manifest case of fraud were made out on behalf of the defendant company. Of course no attempt has been made to do anything of that kind. It is observable that some time after all the facts were known to the defendant company they did determine not to give up the patents. That appears quite clearly from a letter or minute of the board of July 22, 1913. The defendant company then determined to retain the patents. Therefore, as far as specific performance in that sense is concerned, there is no ground at all to lead me to hold my hand.

There was one other point put forward which, again, is somewhat verbal, perhaps—namely, that under the article itself something further had to be done beyond the mere nomination of the two directors by the syndicate. In my opinion that is not so. I think that the true reading of the article is that when the syndicate formally nominate the persons they choose, those persons become directors then and there. It was suggested that co-operation on the part of the other directors might be necessary. I do not think so. In any case it is a mere formality, and the right of the syndicate to choose the two directors seems to me to be clear.

Having brushed aside those preliminary points I will deal with the two main objections of the defendant company which, as I understand them, are these. First, that the company cannot contract out of their inherent statutory power to alter their articles of association; the second objection is that the contract in question is a contract of the nature of a contract of service, and is therefore an obligation to enforce the specific performance of which would be contrary to the practice of the court.

With regard to the first point I am not really sure that it is very much more than verbal for this reason. As I understood counsel for the Alperton company, he did not contend that the alteration of the articles of association by the striking out of this art. 88 would, in fact, get rid of the right of the syndicate to nominate the directors and the obligation of the Alperton company to accept the directors. He took the view as I understand it that that right and obligation would subsist, and that, although the article might have gone, the syndicate would still be at liberty, by virtue of their contractual rights, to nominate the two directors and the Alperton company would still be bound to accept them; I mean, of course, apart from the second objection. Therefore there really does not seem to me to be very much in this objection. But it is said: "Well, at any rate, it does get rid of one fetter on the company"—namely, the fetter of complying with their obligations. The principal case on the subject is *Allen* v. *Gold Reefs of West Africa*,

Ltd. (1); but in that case the court seems to me to have quite clearly recognised that a company cannot alter its articles so as to commit a breach of contract, and that it might be that even the articles themselves might show that there was such a contract that it would be unfair for the company to alter. Here I have not to consider the question, because there is here both the provision in the articles and the express obligation in the contract under which the syndicate are to have this express right. It seems to me that the real gist of the decision in *Allen* v. *Gold Reefs of West Africa, Ltd.* (1) is to be found in the judgment of LORD LINDLEY, M.R. He says ([1900] 1 Ch. at p. 673):

> "But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered."

I think that clearly recognises that if the court sees that a contract involves as one of its terms that an article is not to be altered, then the company is not at liberty to alter its articles so as to break that contract. In my judgment, on the facts of the case the contract between the syndicate and the Alperton company clearly involved as one of its terms that art. 88 was not to be altered—that is, that the syndicate were to have a perpetual right of nominating two directors of the company.

It has been said that *Punt* v. *Simmons* (2) is an express authority in favour of the defendants' contention. I think, looking at the case, that it is an express authority in favour of that contention; but so far as this part of *Punt* v. *Simmons* (2) is concerned, it seems to me that it has been overruled by the decision of *Baily* v. *British Equitable Assurance Co.* (3), where the Court of Appeal considered, on the view which they took that there was a contract with the policy-holders of the company, that the full profits should be applied in declaring bonuses on the policies of the various holders, that on that view of the existence of the contract the company was disqualified from altering its articles so as to provide that a certain portion of the profits should be carried to a reserve fund. Although that decision was reversed by the House of Lords, it is clear to me that it was not reversed through any quarrel by the House of Lords with that principle. Indeed, they seem to me in their judgment to have recognised that principle. All that the House of Lords held was that, on the true interpretation of the bargain between the policy-holder and the company, there was, in fact, no contract between them that the allocation of the whole of the profits to the policies by way of bonus should be a perpetual arrangement. That is an authority clearly in favour of this, that a company may be restrained from altering articles for the purpose of committing a breach of a definite contract, one of the terms of which is that the articles shall not be altered.

Then comes the second objection—namely, that the contract under which the syndicate are to have the right of appointing two directors is in the nature of a contract of service, and accordingly that on the ordinary principles relating to those contracts the court will not specifically enforce the contract, will not compel one person to accept another as his servant. As regards that I feel great difficulty whether the relations between a company and a director is of the nature of a contract of service within the meaning of that doctrine at all. It appears, quite clearly from *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame* (5) that the directors may have rights and powers and duties under the constitution of a company independently of the direction of a majority of the shareholders, that is,

to some extent they occupy an independent position. It is quite true that in *Bainbridge* v. *Smith* (4) the Court of Appeal declined to force by injunction a certain person on a company as a managing director in spite of the existence of a contract to that effect, but a managing director is to some extent in a different position from an ordinary director, because he is half director and half manager. Beyond that the question I am considering at the moment is not a question of whether a particular man shall be forced upon an unwilling company; but whether there is a general right on the part of the syndicate to nominate persons who shall be directors of the company. What the company are doing is trying to get rid altogether of a general right of nomination, not merely objecting to receiving in the capacity of director any particular individual. Everybody who has had anything to do with companies must know that arrangements of this kind, under which either preference shareholders or holders of debentures or other persons who have a permanent stake in a company have a right to appoint one or more directors of the company for the purpose no doubt of protecting their interests, are extremely common. This also is quite obvious, that to enforce an agreement of that kind merely by giving damages for the breach of it would be a wholly inadequate and illusory remedy. I am not going to be the first to hold here that an agreement for good consideration under which a shareholder in a company, whilst he holds his shares or a certain number of them, shall in virtue of that holding have the right of appointing or nominating a director of the company, is one that cannot be enforced by an injunction of this court. In my opinion the right is one which ought to be so enforced, and the enforcement of which by way of declaration or injunction is not in conflict with the ordinary rules against the specific performance of contracts of service.

It is not here as if the syndicate had had the power of nominating an absolute majority of the board of the company. To that there might possibly be objections, though I have not to deal with the matter now, inasmuch as it would be putting the control of the company in the power of an outsider. Here, all that is secured by the nomination of a director by the syndicate is that there shall be some person or persons on the board, not a majority of the board, and that accordingly the views advocated by the syndicate shall have expression on the board of the company. That being so, I think that I ought to accede to the claim of the plaintiffs by declaring that by virtue of the nomination made by them Dr. George Thomson and Mr. Thomas Warwick have become directors of the defendant company, and I think that I ought also to grant an injunction as I do to restrain the holding of the confirmatory meeting for the purpose of getting rid of art. 88 of the articles of association of the company.

I have to consider the question how far an injunction ought to be granted to compel the acceptance of Dr. Thomson and Mr. Warwick as members of the board. I think it is clear that although an outside body like the syndicate in this case may have the power of nominating two directors on a board, the court would not by injunction force the company to accept on this board powers who were unfit or thoroughly unacceptable as members of the board of the company. So far as unacceptability merely means that the persons nominated are persons who might be in sympathy with the general policy of the syndicate or with the general policy of Mr. Dessau, I do not think that of itself would be a proper reason of objection on the part of the company or the other directors. But I must deal with one or two further personal objections. As regards Dr. Thomson as far as I can see, there is no personal objection to him. It is acknowledged as a mere matter of personality that he is acceptable to the other directors; and not one word is said against him. I think he is a friend of Mr. Dessau; and it is said that Mr. Dessau is a gentleman of too speculative a turn of mind; and that he exercises too much influence on Dr. Thomson; and that Dr. Thomson accordingly is a dangerous director to have on the board of the Alperton company; or at any rate that he is a director who would always be opposing the views of the other directors of the company, and interfering with the settled policy which they have now adopted of continuing the process of manu-

facturing only. I can see no reason for taking that view. I have seen Dr. Thomson in the box. He does not strike me as a gentleman destitute of an individuality of his own. I think he is perfectly capable of resisting any undue blandishment on the part of Mr. Dessau, if there has been any such, which I have no reason to believe. Although, no doubt, if he sees an opportunity he may advocate the policy of taking up the more recent invention of Mr. Dessau, I feel perfectly certain that if he finds that the board have determined on a settled policy, he will do his best to give effect to that policy, and will not be perpetually drawing the suggested red herring across the trail. If he were alone concerned I should have no difficulty in forcing him if necessary upon the company and the other directors.

But as regards Mr. Warwick I do not think the matter is so clear. He undoubtedly is a manufacturer whose business is in competition, if not with the company with that of a great number of customers of the company, and I can understand that there may be reasonable objections to him in that capacity, and possibly in other capacities.

Accordingly counsel for the plaintiff syndicate has accepted the proposal which I have made on this part of the case. I do not propose at present, while making a declaration, to grant an injunction in support of it. I assume that the board of directors of the Alperton company will accept Dr. Thomson; and it will be quite unnecessary to proceed to enforce his position by way of injunction. On the other hand I propose, as was done in *Bainbridge* v. *Smith* (4), to wait and see whether the shareholders of the company who at present have only been trying to get rid of the general obligation towards the syndicate think it worth while to have a meeting called and to object to the personality of Mr. Warwick. If such a meeting is called and if his personality is objected to by the great majority of the shareholders, and on reasonable grounds, I should think it extremely likely that neither would Mr. Warwick desire to force himself upon the directors of the Alperton company, nor would the syndicate desire to assist him in doing so. It may well be, therefore, that the matter will adjust itself. I hope that the parties will show themselves reasonable towards each other with regard to this matter. Therefore for the moment I shall wait and see whether any necessity arises for granting an injunction. I propose to give liberty to apply for an injunction generally without, of course, embodying in that liberty any special directions or indications.

I think I ought to say this. Counsel for the Alperton company rather suggested that if the declaration was made that these two gentlemen were directors of the company, the company might proceed at once under one of their articles—art. 100—by extraordinary resolution to remove the directors from their office. Perhaps that was only said in the heat of argument. I cannot imagine that the company, having regard to the respect which is ordinarily shown to the decisions of the court, would desire to make use of art. 100 in such a way for a purpose for which I do not think it can possibly have been inserted in the articles of association. If my judgment against the company is wrong they have the usual facilities for setting it right elsewhere; but while the judgment stands I feel quite sure that the company at a meeting will not endeavour to get rid of the effect of the judgment by any such machinery as is suggested. Therefore the judgment will be in the terms that I have stated; I must give the plaintiffs the cost of the action; but I propose only to give the costs of the action against the Alperton Rubber Co., Ltd.: I see no reason for giving costs against the directors.

Solicitors: *Lumley & Lumley*; *Jenkins, Baker, Reynolds & Co.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

Re RAVEN. SPENCER *v.* NATIONAL ASSOCIATION FOR THE PREVENTION OF CONSUMPTION AND OTHER FORMS OF TUBERCULOSIS, AND ANOTHER

[CHANCERY DIVISION (Warrington, J.), March 5, 1915]

[Reported [1915] 1 Ch. 673; 84 L.J.Ch. 489; 113 L.T. 181]

Charity—Charitable bequest—Direction that trustees' decision on identity of beneficiary to be final—Legacy to named association—Extrinsic evidence of testator's intention to benefit particular branch of the association—Admissibility.

The testator, among other charitable bequests, bequeathed £1,000 to the "National Association for the Prevention of Consumption." The will directed that in case of doubt the trustees should decide the identity of the institution intended to benefit, and their decision "shall be final and binding on all parties." The association's full title was the National Association for the Prevention of Consumption and other forms of Tuberculosis. Its head office was in London, but it had a branch in Leicester where the testator resided, and the testator was a life member of the Leicester branch and had contributed to its funds. In view of extrinsic evidence of the testator's intention the trustees decided to pay the legacy to the branch, but the association desired the decision of the court on the identity of the institution intended to benefit.

Held: the association, not the branch, was entitled to the legacy, since (i) the direction in the will that the decision of the trustees should be final was void and inoperative because it purported to oust the jurisdiction of the courts; and (ii) the association was correctly described in the will and therefore extrinsic evidence of the testator's intention was inadmissible.

Notes. As to the court's functions in construction of wills, see 34 HALSBURY'S LAWS (2nd Edn.) 158 et seq.; as to the admissibility of evidence for the purpose of identification, see ibid., at p. 170 et seq. For cases on the admissibility of extrinsic evidence, see 44 DIGEST 614 et seq.

Case referred to:

(1) *Massy* v. *Rogers* (1883), 11 L.R.Ir. 409; 44 Digest 533, b.

Also referred to in argument:

Charter v. *Charter* (1874), L.R. 7 H.L. 364; 43 L.J.P. & M. 73, H.L.; 44 Digest 615, *4432*.

Re Thompson, [1910] V.L.R. 251.

National Society for the Prevention of Cruelty to Children v. *Scottish National Society for the Prevention of Cruelty to Children*, [1915] A.C. 207; 84 L.J.P.C. 29; 111 L.T. 869; 30 T.L.R. 657; 58 Sol. Jo. 720, H.L.; 44 Digest 827, *6786*.

Originating Summons.

By his will dated Sept. 29, 1911, the testator, William Raven, bequeathed among other legacies to charities the sum of £1,000 free of all duties to the "National Association for the Prevention of Consumption" (hereafter referred to as "the association") and directed that if any "doubt shall arise in any case as to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties." The full title of the association was the National Association for the Prevention of Consumption and other forms of Tuberculosis and its head office was in London. The testator resided at Leicester and had been a life member of the Leicester and Leicestershire branch of the association; he had been particularly interested in that branch and had subscribed liberally to its funds; he had never subscribed to or had any connection with the association in London. On the trustees proposing to pay the legacy to the association in London the testator's family informed them that the

testator had intended to benefit the Leicester branch and that this could be confirmed by his medical adviser, Dr. Pratt, who also took a great interest in the Leicester branch and who had been largely instrumental in the granting of the legacy. In these circumstances the trustees proposed to pay the legacy to the Leicester branch.

For the association it was submitted that the words "Leicester branch" must have been intentionally omitted from the legacy since in legacies to charities in Leicester immediately preceding and following the legacy in question the institutions had been fully described as, e.g., the "Leicester Infirmary" and the "Leicester and Leicestershire Maternity Hospital"; and it was further submitted that as the association was correctly described in the will it was entitled to the legacy and extrinsic evidence as to the testator's intention to benefit the Leicester branch was not admissible. Affidavits of the testator's intention were filed by Dr. Pratt, the testator's widow, and two of his friends, in support of the claim of the Leicester branch, and it was submitted in support of the claim that the provision in the will that the trustees' decision was to be final and binding was a valid condition and not contrary to public policy.

T. R. Hughes, K.C., and *Alfred Adams* for the trustees.

W. Coldridge, K.C., and *R. F. MacSwinney* for Dr. Pratt, claiming for the Leicester branch.

Tomlin, K.C., and *J. W. Manning* for the association.

WARRINGTON, J.—In my opinion it is incompetent for a testator to give legal rights by giving a legacy and at the same time to say that those legal rights are to be determined by others and not by the ordinary tribunals. In that case the trustees might make the decision as they thought fit, and it is contrary to public policy to deprive persons of their right to resort to the ordinary tribunals. The opinion of CHATTERTON, V.C., in *Massy* v. *Rogers* (1) entirely agrees with mine. A legatee cannot be debarred from taking the opinion of the court, nor can the jurisdiction of the court be ousted, and it is for the court to decide who is entitled. In my opinion the direction was unlawful and inoperative.

As regards the identity of the legatee, I have no doubt that according to legal rules the legacy was given to the association and not to the branch. The testator seems to know nothing more than the name of the defendant association. Evidence of intention can only be admitted when the description applies indifferently to more than one society. In my opinion, the National Association are entitled to the legacy. Costs as between solicitor and client will be paid out of the residuary estate.

Solicitors: *Hastie*; *Surr, Gribble & Co.*, for *Toller, Burgess & Pochin*, Leicester.

Order accordingly.

[*Reported by* W. H. TRUELOVE, ESQ., *Barrister-at-Law.*]

SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION CO. *v.* ATTORNEY-GENERAL

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor), December 15, 16, 1914, February 19, 1915]

Reported [1915] A.C. 654; 84 L.J.K.B. 907; 112 L.T. 826; 79 J.P. 305; 31 T.L.R. 254; 59 Sol. Jo. 381; 13 L.G.R. 563]

Bridge—Repair—Statutory obligation to keep bridge over canal "in sufficient repair"—Standard of repair required—Increase in volume of traffic—Worcester and Birmingham Canal Act, 1791 (31 *Geo.* 3, *c.* 59), *s.* 61.

By the Worcester and Birmingham Canal Act, 1791, a company of proprietors were empowered to make a canal, which was constructed in or about 1812, subject to the condition, contained in s. 61 of the Act, that the company should not make the canal across any highway "until they have made and perfected such bridges . . . across such highway . . . of such dimensions and in such manner as the commissioners [appointed under the Act] . . . shall adjudge proper and all such . . . bridges . . . to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company."

Held: on the true construction of s. 61 the words "and all such . . . bridges . . . shall from time to time be supported, maintained, and kept in sufficient repair" by the company must be considered with reference to the class of traffic on the highways when the bridges were built, and did not impose an obligation on the canal company, or the appellants as their successors, to maintain and keep up such bridges in a condition to carry the increased volume of traffic existing in 1915.

Decision of Court of Appeal, [1914] 3 K.B. 1, reversed.

R. v. *Kerrison* (1) (1815), 3 M. & S. 526, distinguished.

Dictum of FLETCHER MOULTON, L.J., in *Hertfordshire County Council* v. *Great Eastern Railway* (2), [1909] 2 K.B. at p. 412, discussed.

Notes. Applied: *A.-G.* v. *Great Northern Railway*, [1916–17] All E.R.Rep. 272; *A.G. for Ireland* v. *Lagan Navigation Co.*, [1924] A.C. 877; *Manchester Corpn.* v. *Audenshaw Urban Council and Denton Urban Council*, [1928] All E.R.Rep. 314. Considered: *London and North Eastern Rail. Co.* v. *North Riding of Yorkshire County Council*, [1936] 1 All E.R. 692. Referred: *Worsborough Urban Council* v. *Barnsley British Co-operative Society* (1914), 111 L.T. 429; *Butt* v. *Weston-Super-Mare Urban Council*, [1922] All E.R.Rep. 469; *Welden* v. *Smith*, [1924] A.C. 484; *Swain* v. *Southern Rail. Co.*, [1938] 3 All E.R. 705; *Railway Executive* v. *Yorkshire (West Riding) County Council*, [1949] 1 All E.R. 836.

As to liability of individuals to maintain bridges across highways, see 19 HALSBURY'S LAWS (3rd Edn.) 470–477; and for cases see 26 DIGEST (Repl.) 643 et seq.

Cases referred to:

(1) *R.* v. *Kerrison* (1815), 3 M. & S. 526; 105 E.R. 708; 26 Digest (Repl.) 646, *2921*.

(2) *Hertfordshire County Council* v. *Great Eastern Railway*, [1909] 2 K.B. 403; 78 L.J.K.B. 1076; 101 L.T. 213; 73 J.P. 353; 25 T.L.R. 573; 53 Sol. Jo. 575; 7 L.G.R. 1006, C.A.; 26 Digest (Repl.) 654, *2990*.

(3) *Macclesfield Corpn.* v. *Great Central Rail. Co.*, [1911] 2 K.B. 528; 80 L.J.K.B. 884; 104 L.T. 728; 75 J.P. 369; 9 L.G.R. 682, C.A.; 26 Digest (Repl.) 647, *2922*.

(4) *R.* v. *Inhabitants of Kent* (1811), 13 East, 220; 104 E.R. 354; 38 Digest (Repl.) 442, *944*.

(5) *R.* v. *Inhabitants of Lindsey* (1811), 14 East, 317; 104 E.R. 623; 26 Digest (Repl.) 646, *2920.*

(6) *R.* v. *Inhabitants of Ely, Old Bedford Bridge and New Bedford Bridge Cases* (1850), 15 Q.B. 827; 4 New Mag. Cas. 128; 4 New Sess. Cas. 222; 19 L.J.M.C. 223; 15 L.T.O.S. 412; 14 J.P. 512; 14 Jur. 956; 4 Cox, C.C. 281; 117 E.R. 671; 26 Digest (Repl.) 646, *2913.*

(7) *West Lancashire Rural District Council* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K.B. 394; 72 L.J.K.B. 675; 89 L.T. 139; 67 J.P. 410; 51 W.R. 694; 19 T.L.R. 625; 47 Sol. Jo. 693; 1 L.G.R. 788; 38 Digest (Repl.) 321, *205.*

(8) *Chichester Corpn.* v. *Foster*, [1906] 1 K.B. 167; 75 L.J.K.B. 33; 93 L.T. 750; 70 J.P. 73; 54 W.R. 199; 22 T.L.R. 18; 14 L.G.R. 205, D.C.; 26 Digest (Repl.) 492, *1771.*

(9) *Burgess* v. *Northwich Local Board* (1880), 6 Q.B.D. 264; 50 L.J.Q.B. 219; 44 L.T. 154; 45 J.P. 256; 29 W.R. 931, D.C.; 26 Digest (Repl.) 352, *673.*

Also referred to in argument:

R. v. *Inhabitants of Devon* (1825), 4 B. & C. 670; 7 Dow. & Ry.K.B. 147; 3 Dow. & Ry.M.C. 346; 4 L.J.O.S.K.B. 34; 107 E.R. 1210; 26 Digest (Repl.) 652, *2971.*

R. v. *Inhabitants of Surrey* (1810), 2 Camp. 455; 26 Digest (Repl.) 639, *2864.*

A.-G. (*Pickford, Ltd.*) v. *Great Northern Railway* (1914), 83 L.J.Ch. 763; 12 L.G.R. 1196; 58 Sol. Jo. 595; 30 T.L.R. 557; on appeal 84 L.J.Ch. 793; 31 T.L.R. 501; 59 Sol. Jo. 578; 80 J.P. 9; [1915] W.N. 263; 13 L.G.R. 998; affirmed, [1916] 2 A.C. 356; 85 L.J.Ch. 717; 115 L.T. 235; 80 J.P. 337; 32 T.L.R. 674; 60 Sol. Jo. 665; 14 L.G.R. 997, H.L.; 26 Digest (Repl.) 648, *2928.*

R. v. *Inhabitants of Henley* (1847), 2 New Mag. Cas. 354; 10 L.T.O.S. 110; 2 Cox, C.C. 334; 11 J.P.Jo. 804; 26 Digest (Repl.) 382, *914.*

Birmingham Canal Navigation Co. Proprietors v. *Hickman* (1892), 56 J.P. 598; 8 T.L.R. 407, C.A.; 38 Digest (Repl.) 441, *942.*

Chamber Colliery Co. v. *Rochdale Canal Co.*, [1895] A.C. 564; 64 L.J.Q.B. 645; 11 T.L.R. 544; 11 R. 264, H.L.; 11 Digest (Repl.) 171, *414.*

Caledonian Railway v. *Glasgow Corpn.*, [1909] A.C. 138; 78 L.J.P.C. 52; 99 L.T. 784, H.L.; 38 Digest (Repl.) 314, *155.*

R. v. East and West India Dock Co. (1888), 60 L.T. 232; 53 J.P. 277; sub nom. Re East and West India Dock Co., 5 T.L.R. 151, D.C.; 26 Digest (Repl.) 647, *2924.*

Appeal by the Sharpness New Docks & Gloucester & Birmingham Navigation Co., defendants in the action, from an order of the Court of Appeal, [1914] 3 K.B. 1, which varied a judgment of PHILLIMORE, J., reported, [1913] 1 K.B. 422.

On Aug. 14, 1911, a writ was issued at the suit of the Attorney-General (at the relation of the mayor, aldermen, and citizens of the city of Worcester, the respondents in this House, against the appellants claiming (i) a declaration that the appellants were liable to support, maintain, and keep in repair certain bridges therein mentioned within the city of Worcester which carried the several common highways over the appellants' canal within the city sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the highways carried over the canal by the said bridges, having regard to the present character and needs of the district served by the highways; and (ii) an injunction restraining the appellants, their servants, and agents from allowing the said bridges and each of them, other than Sidbury Bridge, to remain in such a condition as to hinder or endanger His Majesty's subjects passing and repassing over and along the said highways and bridges with the ordinary traffic of the district, which might reasonably be expected to pass and repass over the same, and requiring the appellants forthwith to support, maintain, and keep in sufficient repair the said bridges and each of them. PHILLIMORE, J., held that the

company were only liable to keep the bridges in repair so as to be sufficient, having regard to their original construction to bear such traffic as was then ordinarily on such highways. The Court of Appeal (VAUGHAN WILLIAMS, KENNEDY and SWINFEN EADY, L.JJ.) allowed an appeal by the plaintiff and ordered that the judgment of PHILLIMORE, J., should be varied by declaring that the defendants were liable to support, maintain, and keep in repair each of the said bridges (reserving Lowesmoor Bridge) sufficient to bear the ordinary traffic existing at the present time, and directed that the taxed costs should be paid by the defendants to the plaintiff. The defendants appealed.

Sir Robert Finlay, K.C. (*Macmorran, K.C.*, and *E. W. Cave* with him), for the appellants.

Cave, K.C., and *J. B. Matthews, K.C.* (*W. W. Mackenzie, K.C.*, with them), for the respondent.

Their Lordships took time for consideration.

Feb. 19, 1915. The following opinions were read.

VISCOUNT HALDANE, L.C.—About 1812 a canal company, who were the predecessors in title of the appellants (bound by the obligation of the company), constructed certain bridges over a canal which extended from Birmingham to Worcester. These bridges formed part of works undertaken with the powers conferred by the Worcester & Birmingham Canal Act, 1791 (31 Geo. 3, c. 59). This Act authorised the construction of the canal itself, and provided by s. 61 that the company should, among other things, make and from time to time maintain and support such bridges, arches, culverts, drains, and passages over, under, by the side of, or into the canal as certain commissioners should determine. The section further enacted that the company should not

> "make the said canal . . . across any common highway . . . until they should have made and perfected such bridges . . . across such highway . . . of such dimensions and in such manner as the commissioners . . . shall adjudge proper and all such . . . bridges . . . to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company."

The bridges were constructed in a fashion approved and adjudged proper by the commissioners. The question which arises in this appeal may be shortly stated. Since 1812 the ordinary traffic which might be expected to pass along the highways and cross the bridges has become materially heavier, and of this traffic there is some which the bridges will not bear unless they are reconstructed. The Court of Appeal decided that the appellants were liable to repair the bridges in such a way that they should be sufficient to bear the ordinary traffic which might, at the present time, be reasonably expected to pass along the highways carried by them over the canal—a conclusion which might obviously necessitate reconstruction. In so deciding they differed from PHILLIMORE, J., who had held that the obligation was limited to keeping the bridges in such a condition that they could bear the traffic which might have been expected to pass over them in 1812, the date when they were made. The question is, therefore, whether the statute has imposed an obligation to reconstruct the bridges from time to time so as to bear traffic which, though ordinary, is progressively including heavier vehicles.

This question depends exclusively on s. 61, and to the language of that section I therefore turn. I do not think that the words "supported" and "maintained" add anything to the effect of the expression "kept in sufficient repair." Now it is to be observed that what are to be kept in sufficient repair mean such bridges as were approved by the commissioners. In my opinion, this language, so far as the natural meaning of the words goes, prescribes unambiguously the extent of the obligation to keep in repair. It appears to me to stop short of imposing on the appellants an obligation to reconstruct so as to provide bridges of a standard

higher than that which the commissioners have prescribed. When they had certified what was to be perfected and made they were primâ facie functi officio. It will be observed that they are given no powers as regards maintenance, support, or repair, their supervision being confined to the original construction. Such, to my mind, is the natural import of the section, and unless there is some principle of law which directs that the language is to be read as implying something that is not expressed, that is what the meaning ought to be taken to be. Authorities were cited at the Bar in support of the proposition that a duty such as is contended for by the respondent ought to be implied, and among these authorities we were referred to *R.* v. *Kerrison* (1). There undertakers were authorised by statute to make a river navigable, and to cut the soil belonging to other persons in order to make a new channel, or other things necessary for making the river navigable. Substantially nothing further was said in the statute. The undertakers, in the execution of these powers, built a bridge over which they carried the highway, and for some time they repaired the bridge. Later on they contested their liability to do so. They were indicted in consequence, and the Court of King's Bench—Ellenborough, C.J., and Le Blanc and Bayley, JJ.—held that the indictment would lie, for the words of the statute conferred on the undertakers a power to cut the highway only upon an implied condition that an adequate means of passage was substituted for the benefit of the public. The words of the statute interpreted there were very different from the words we have to deal with. They prescribed nothing about liability to repair, and left the question where the liability was to fall to be determined by implication. In the case before us this is otherwise. Section 61 contains a set of provisions which appear on their face to be intended as exhaustive.

Under these circumstances I see no reason for departing from, or adding to, the natural meaning of the language. Authorities in cases of construction of statutes of this nature can rarely be of much value. The statutes, the language of which has to be construed, vary in expression, and, as they must be read as a whole, the materials for answering questions of interpretation ought primarily to be sought for within the four corners of the Act of Parliament, and not in what judges, however eminent, have said about other statutes, the language of which is different, or about the common law, which is superseded by the code expressed. It may be that, as was said by Fletcher Moulton, L.J., in *Hertfordshire County Council* v. *Great Eastern Railway* (2), [1909] 2 K.B. at p. 412, where persons acting under statutory authority interrupt a highway they must, if nothing to the contrary is enacted, construct such works as will restore to the public its use, and maintain these works, unless the statute provides otherwise. But this does not touch the question in the present case, which is, there being a provision in the statute, what obligation its words impose. Nor does the other recent authority cited, *Macclesfield Corpn.* v. *Great Central Rail. Co.* (3), carry the matter further. The point there turned on words in a statute which differed materially from those before us. The Court of Appeal seem to have thought that the obligation under these words to maintain and repair might have imposed an obligation to make new works, by analogy to the general obligation of the county authority to keep a highway in such a condition that it could carry not only the traffic of the period at which it was made, but heavier traffic coming into existence subsequently. But s. 61 of the Act which we have to construe in the present case does not appear to me to admit of resort to any presumption of intention based on the analogy of the common law. It contains a code, so far complete in itself, and it is self-contained.

I am, therefore, of opinion that the judgment of the Court of Appeal was wrong, and ought to be reversed. The declaration to be substituted for that contained in the order complained of should not, however, be in the form adopted by Phillimore, J. I think that his order should be varied by directing that the appellants are liable to support, maintain, and keep in repair each of the bridges (reserving Lowesmoor Bridge for further consideration) in the condition in which

it was made and perfected, in accordance with the adjudication of the commissioners, and that the bridges, as made in 1812, ought to be presumed to have satisfied the requirements which the commissioners made. As this variation does not substantially modify the result of this appeal, the appellants (there having been no costs given at the trial) are entitled to their costs here and in the Court of Appeal. I move accordingly.

LORD DUNEDIN.—I concur, and as to the construction of this statute have nothing to add. I wish, however, to state explicitly my opinion that the whole question necessarily depends upon the proper construction of the statute; and that where the statute deals with the subject its provisions form a code on that subject, and cannot be added to by what has been called a common law doctrine.

I am unable to agree with the dictum of FLETCHER MOULTON, L.J., in *Hertfordshire County Council* v. *Great Eastern Railway* (2), ([1909] 2 K.B. at p. 412) which is approved of in the judgments in the Court of Appeal in this case, and which, in my opinion, is too broadly expressed, as it would import a common law obligation running side by side with the expressed statutory obligations. The dictum is founded on the four cases of *R.* v. *Inhabitants of Kent* (4), *R.* v. *Inhabitants of Lindsey* (5), *R.* v. *Kerrison* (1) and *R.* v. *Inhabitants of Ely* (6). Now, *R.* v. *Inhabitants of Kent* (4), it looked into, will be found to be based upon an obligation extracted by construction from the words of the statute. The point of the judgment is thus put by LORD ELLENBOROUGH, C.J. (13 East at *226):

> "Here the statute gives power to the company to alter the old highways for their own purposes, upon condition of leaving another passage as convenient in room; and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition."

That case is, therefore, no authority for the proposition. *R. v. Inhabitants of Lindsey* (5) only decided that the county was not liable to maintain the bridge in question; but so far from imposing liability on the canal company, it expressly points out that the company might discontinue the bridge. There remain *R.* v. *Kerrison* (1) and *R.* v. *Inhabitants of Ely* (6), and it is true that in neither of them was reliance placed on a clause of the statute enjoining anything on the parties who had made the bridge. In neither case, however, was there a specific statutory authorisation to make the bridge. In *Kerrison's Case* (1) the power was merely to straighten a river and cut new channels. A new channel had intercepted a highway, and a bridge had been made and continuously repaired by the undertakers since 1695. The court in 1815 held that they must still go on repairing it. In *R.* v. *Inhabitants of Ely* (6) the bridge was originally constructed by adventurers without any Act of Parliament soon after 1630, though their undertaking was in 1663 vested by Act of Parliament in a corporation. The judgment really followed *R.* v. *Kerrison* (1).

I am not doubting the authority of these two cases. But it seems to me a perfectly different thing to come to the conclusion that when, without special statutory authority, there has been made an obstruction to a public road, which obstruction has been obviated by means of a bridge, then the right of the undertakers to continue the obstruction is conditional upon its maintaining the bridge, and to raise up a so-called common law doctrine of repair where the work in question is specifically allowed by statute, and when the statute itself in a clause or clauses expresses the conditions under which the work may be done. Authorisation by statute to do a particular thing makes that thing, when done, a legal act, and imposes no liability. This has often been held, as in a question with private individuals—e.g., in the cases as to sparks from locomotives and vibration caused by trains, and I see no reason why the principle is not equally sound in the case of a public right, and when the statute which authorises goes on to provide what are to be the rights and obligations flowing from the execution of the statutory act, it is in it and it alone that rights and remedies must be found. I think the right view was taken by WRIGHT, J., in *West Lancashire Rural District*

Council v. *Lancashire and Yorkshire Rail. Co.* (7), where in a case which fell under the Railways Clauses Act, 1845, he treated the question as depending entirely on the true construction of the sections of that statute.

LORD ATKINSON.—In the argument of this appeal many authorities were cited to establish that it is the duty of road authorities to keep their public highways in a state fit to accommodate the ordinary traffic which passes or may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repairs of the highway alter to suit the change. No person really contests that principle. It was further argued that where a canal or railway is cut through a highway, removing a piece of it, and those who do this are required to provide, in the shape of the roadway over a bridge, a new piece of highway as a substitute for the portion of the old so cut away, all the duties of maintenance and repair imposed by law on the road authority in reference to the old highway are imposed, at least primâ facie, upon the body having authority over the substituted highway, and, just as the road authority would have been bound to keep the old piece of road fit for ordinary traffic, however increased or altered in character, so must the bridge authority keep their structure fit for the increased or altered ordinary traffic. It is not disputed that the road authority cannot widen one of the public highways.

In my view, little assistance can be obtained from the discussion of these general principles towards the solution of the question to be decided in this case. One must look first, and I think I might almost say look last, at the provisions of the statute under which were built the bridges in reference to which the dispute arises. Upon those provisions, which are in themselves complete, the decision must depend. The statute is the Worcester and Birmingham Canal Act, 1791. Section 61 is the important section. It prescribes that the company of proprietors therein mentioned

> "shall make, erect, and set up and from time to time maintain and support such bridges, culverts, drains, and passages over, under, by the side of, or into the said canal, and the trenches and aqueducts communicating therewith, and the towing paths on the sides thereof of such dimensions and in such manner as the commissioners [i.e., the commissioners named in the Act] shall from time to time judge necessary and appoint."

The commissioners are thus made the judges of the dimensions of those bridges which they consider it is necessary to construct, and the manner in which they are to be constructed. The further duty imposed upon them in this part of the section is, from time to time, to maintain and support the works—the bridges among them—which they shall have so made, erected, or set up. No duty is cast upon them in this part of the section to maintain any bridges other than those they have so erected. It is not to be assumed that when they "appointed" the bridges to be erected they did not do their duty, or did not to some extent contemplate an increase of the ordinary traffic, but it could not, I think, be supposed that they could have contemplated its alteration in character in the extraordinary way it has altered in recent years. The section proceeds to enact that the Company of Proprietors shall not make the canal or any trench in or across any common, highway, public bridge-way, or footpath, unless they shall have made and perfected such bridges, passages, and arches across such highway, bridge-way, or path, and of such dimensions and in such manner as the said commissioners shall deem proper. This provision was obviously directed to secure that the public should not be put to the inconvenience of having their common highway or public bridle-way or footpath intersected until the substituted way had been provided. The commissioners are again made the absolute judges of the proper dimensions, and the proper manner of construction, of these bridges, and then the section proceeds to deal, not merely with the bridges, passages, and arches to be built across the highway, bridle-path, or foot-ways, but in addition with the works and conveniences, including bridges, mentioned in the earlier

portion of the section. It enacts that all such gates, stiles, bridges, arches, and other works and conveniences to be made shall from time to time "be supported, maintained, and kept in sufficient repair."

If one asks oneself the question, What in relation to the crossing of the old highway where the canal is cut are the structures which are to be supported, maintained, and kept in good condition, surely the answer must be those particular bridges, passages, and arches which were built by the Company of Proprietors, of the dimensions and in the manner adjudged proper by the commissioners, and not bridges, passages, and arches not built by this company at all, but from time to time by their successors long afterwards. The identity of the work approved by the commissioners must, I think, be preserved. I cannot think the words "supported, maintained, and kept in sufficient repair" can be stretched to cover reconstruction in whole or in part so as to make the bridges so built and perfected something different from what they were left when finished according to the directions of the commission. Restoration so as to make them as near what they were when built as time, wear, and the elements will permit, are, in my view, the very utmost that can be required from the appellants, the successors of the builders. I concur with my noble and learned friend, LORD DUNEDIN, in the criticism of the several authorities cited in argument. I do not think, therefore, that the Attorney-General is entitled to either of the wide declarations he asked for. I agree with the order which has been suggested by my noble and learned friend on the Woolsack.

LORD PARKER.—So far as the result of this appeal depends only on the true construction of the Worcester and Birmingham Canal Act, 1791, the appellants are, in my opinion, entitled to succeed. That Act defined the conditions upon which the canal company might construct the canal across a common highway. It might do so if it carried the highway over the canal by a bridge the size and strength of which was to be determined by certain commissioners appointed by the Act, and every such bridge when completed was from time to time to be supported, maintained, and kept in sufficient repair by the company. The company, under the powers of the Act, constructed the canal across certain highways, carrying the highways over the canal by means of bridges which (as must be assumed after this lapse of time) were of the size and strength determined by the commissioners. In determining such size and strength the commissioners would, of course, be bound to take into account the requirements of the ordinary traffic which might be expected to pass over the bridges, but there was nothing to prevent them from taking into account also the possible or probable increase in the dimensions and weight of the vehicles then in use, and for all that is known they may have done so. It was clearly their duty to uphold the public interests as against those of the canal company.

Since these bridges were built the traffic which may reasonably be expected to pass over the highways in question has become considerably heavier, by reason of the introduction of mechanical traction, and it is doubtful how far the bridges are of sufficient strength to bear this heavier traffic. The respondents contend that the company's obligation to maintain and support the bridges, and keep them in sufficient repair, involves an obligation to strengthen them as occasion may require, so that they will at all times be adequate to the ordinary traffic which may reasonably be expected to pass along the highways, however such traffic may increase in weight, and even though this obligation may involve pulling down and rebuilding the fabric itself. In my opinion, this contention cannot be upheld. What the company has to support, maintain, and keep in repair is in each case the fabric of the particular bridge, the size and strength of which were originally determined by the commissioners appointed by the Act, and there is, I think, no principle of construction by which an obligation to maintain, support, and repair a particular fabric can be enlarged into an obligation to reconstruct or rebuild the fabric in such a way that it is materially different in strength, size, or

otherwise from the particular fabric the subject of the obligation. The standard by which the obligation is to be judged is neither the ordinary traffic when the canal was constructed nor the ordinary traffic of to-day, but the bridge itself as determined by the commissioners under the Act.

The respondent relied on the common law principle laid down in *R.* v. *Kerrison* (1) and other cases, and recently acted upon by the Court of Appeal in *Hertfordshire County Council* v. *Great Eastern Railway* (2). This principle is stated by FLETCHER MOULTON, L.J., in the last-mentioned case as follows ([1909] 2 K.B. at p. 412):

> "Where persons, acting under statutory authority, for their own purposes, interrupt a highway by some work which renders it impossible for the public to use it, an obligation is primâ facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and the obligation so imposed is of a continuing nature, involving, not only the construction of such works, but also their maintenance."

It was contended that on this principle the company's obligations were not only those expressly imposed by the Act, but included a common law obligation under which it was bound from time to time to construct and maintain such bridges as would afford the public the same facilities for traffic which would have been enjoyed if the canal had never been carried across the highways in question. For the reasons stated by the LORD CHANCELLOR, I think this contention fails. It is one thing to rely on a common law principle where a statute is silent. It is quite another thing to invoke a common law principle in order to impose an obligation different from or in addition to the obligations which are defined by the statute as those subject to which a company may interfere with a highway. In my opinion, therefore, the appeal should be allowed, and I am content with the order proposed by the LORD CHANCELLOR.

LORD PARMOOR. The appellants are successors of the Company of Proprietors of the Worcester and Birmingham Canal Navigation, who, under the provisions of the Worcester and Birmingham Canal Act, 1791, constructed certain canal bridges and other works now vested in the appellants, subject to the same obligations and liabilities as those imposed upon the said Company of Proprietors. The question raised is as to the standard of liability in supporting and maintaining in sufficient repair certain canal bridges constructed to make communication between the severed portions of certain highways within the city of Worcester. The Court of Appeal are determined that the appellants are liable to support, maintain, and keep in repair the said bridges (reserving Lowesmoor Bridge) sufficient to bear the ordinary traffic of the district which might reasonably be expected to pass along the highway carried over the appellant's canal. It was argued on the appeal to this House that the appellants are only bound to support, maintain, and keep under sufficient repair the bridges constructed by their predecessors with the sanction and approval of the commissioners appointed under the said Act, and that they are not bound to support or reconstruct such bridges so as to enable them to carry an increased weight of traffic, though such traffic might from time to time, as conditions change, be reasonably expected to pass along the highway.

The question is simply one of the construction of s. 61 of the said Act. This section deals with three different subject-matters: (i) That the towing path shall be fenced off; (ii) that certain accommodation works shall be constructed; (iii) that the said Company of Proprietors shall not make the canal or any trench in or across any public highway until they shall have made and perfected such bridges across such highway, and of such dimensions, and in such manner, as the said commissioners shall adjudge proper, and that such bridges shall from time to time be supported, maintained, and kept in sufficient repair by the said Company of Proprietors. It is admitted, for the purpose of the case, that the bridges

in question were originally made in accordance with the provisions of the said Act, and were approved and adjudged proper by the commissioners. What is the standard of liability placed upon the appellants to support, maintain, and keep these bridges in sufficient repair? I can find no difficulty in the language of the section, giving to the words their ordinary meaning. It appears to me quite clear that the standard of support, maintenance, or repair is fixed, not in relation to the changing conditions of traffic, but to the character and strength of the structure as ordered and approved by the commissioners. It is a fixed standard, not a mutable one varying with the requirements of the traffic from time to time. In argument on behalf of the respondent, counsel relied on three points: First, that the word "supported" implied more than the word "maintained," and placed an obligation upon the defendants to reconstruct a bridge not sufficiently strong to carry traffic which might reasonably be expected from time to time to pass along the highway on either side of any one of the bridges; secondly, that the word "sufficient" implied sufficiency for such traffic; thirdly, that in Acts of this character, which legalise the severance of a public highway, there is a presumption that the liability to support, maintain, and repair the substituted means of communication is the same as attaches to the road authority in respect of the severed portions of the highway.

As to points (i) and (ii), I am unable to hold that an obligation to support and keep in sufficient repair a particular bridge can be construed as an obligation to reconstruct the bridge on a different scale, or of a different strength and character. The main argument on which reliance was placed is that the appellants are, by presumption or implication, under the same obligation as the road authority, although no such obligation is expressly imposed. The respondent mainly relies on the obligation of a road authority to keep the roads, as dedicated to the public, in a reasonably fit state to bear the ordinary traffic of the district which may reasonably be expected to come upon them: *Chichester Corpn.* v. *Foster* (8); *Burgess* v. *Northwich Local Board* (9) Q.B. Div. 264; *Hertfordshire County Council* v. *Great Eastern Railway* (2). The last-named case contains a sufficient reference to the earlier authorities. In my opinion, it gives no support to the contention raised on behalf of the respondent. It not inaptly illustrates the difference between making a presumption where the statute is silent, and making a presumption where the nature and extent of the obligation are expressly defined in the terms of the statute. It was held that where there is a duty on a railway company to make some means of communication for the purpose of restoring the continuity of a severed highway, there is also invoked a duty to keep in repair the substituted work, although there are no express words imposing the obligation in the statute. FLETCHER MOULTON, L.J., in his judgment expresses the opinion that to get rid of this presumption the company which has been authorised to sever a highway must show that the statute which legalised the severance contains some provisions amounting to an exemption from such an obligation, and that it is not enough that the statute is silent on the point. In the present case the statute is not silent either as to the nature of the substituted works or as to the obligation of the appellants to keep them in repair. The nature and strength of the substituted works are determined by the commissioners, and the obligation is to support and maintain in sufficient repair such works. To make a presumption such as was made in *Hertfordshire County Council* v. *Great Eastern Railway* (2) would be setting aside the statutory obligation and substituting a different one in its place. The substituted obligation would not only be different from that imposed by the statute, but under certain conditions inconsistent with it. It is not unreasonable to suppose that the commissioners directed bridges to be constructed with a margin of strength beyond what was necessary for the traffic which might at that date have been reasonably expected to pass over the severed highways, and so long as this margin was not exhausted the appellants would have been liable to fulfil their obligations of maintenance and repair, though the traffic was of an exceptional character and

in excess of what might reasonably have been expected at the time. It may be true that in more recent times the balance has turned the other way, but this is no reason for rescinding the clear words of a statute. If in the public interest a different standard of liability from that imposed by the Worcester and Birmingham Canal Act, 1791, has become more convenient, it is a question for Parliament whether such a different standard should be imposed, and at whose cost the necessary reconstruction should be carried out. The function of the courts is simply to construe a statute so as to give effect to the will of legislature, and in the present case the language used is free from any ambiguity. In my opinion, the appeal should be allowed with costs, and the order varied in the form approved by the Lord Chancellor.

Solicitors: *Burton, Yeates & Hart*, for *Johnson & Co.*, Birmingham; *Church, Rendell, Bird & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

DIXON *v.* BROWN

[King's Bench Division (Ridley and Bray, JJ.), January 19, 21, 1915]

[Reported [1915] 2 K.B. 294; 84 L.J.K.B. 1248; 112 L.T. 1033]

County Court—Appeal to Court of Appeal—Claim for damages for tort not exceeding £20 and for injunction—Claim for injunction withdrawn—Right to appeal without leave against judgment for damages—County Courts Act, 1888 (51 *&* 52 *Vict.*, *c.* 43), *s.* 120, *proviso.*

By the County Courts Act, 1888, s. 120, proviso: "There shall be no appeal in any action of . . . tort . . . where the . . . damage claimed does not exceed £20 . . . unless the judge . . . shall grant leave to appeal."

The plaintiff claimed in the county court £20 damages for trespass and an injunction. At the trial of the action the county court judge said that, although he thought there had been a trespass, he did not want to put the defendant to expense by granting an injunction, but would adjourn the case. Before the adjourned hearing, the plaintiff withdrew his claim to the injunction. The judge having given judgment for the plaintiff for £15 damages, the defendant appealed without having obtained leave.

Held: the proviso to s. 120 of the County Courts Act, 1888, did not apply where there was a claim for an injunction, but only where the claim was solely for debt or damages not exceeding £20; accordingly, the defendant could appeal without leave.

Notes. The County Court Act, 1888, s. 120, has been replaced by s. 108 of the County Courts Act, 1959.

Distinguished: *Brett* v. *Thrower*, [1945] 2 All E.R. 284.

As to appeals from a county court to the Court of Appeal, see 9 Halsbury's Laws (3rd Edn.) 320 et seq.; and for cases see 13 Digest (Repl.) 464 et seq. For the County Courts Act, 1959, s. 108, see 39 Halsbury's Statutes (2nd Edn.) 183.

Cases referred to in argument:

Brune v. *James*, [1898] 1 Q.B. 417; 67 L.J.Q.B. 283; 77 L.T. 802; 46 W.R. 257; 42 Sol. Jo. 214, D.C.; 13 Digest (Repl.) 464, *878.*

Dreesman v. *Harris* (1854), 9 Exch. 485; 18 J.P. 330; 156 E.R. 207; sub nom. *Harris and Taylor* v. *Dreesman*, 23 L.J.Ex. 210; 22 L.T.O.S. 246; 18 J.P. 458; 2 C.L.R. 498; 13 Digest (Repl.) 464, *872.*

Appeal by the defendant from Lancaster County Court.

The plaintiff claimed £20 damages for trespass in consequence of the defendant having wrongfully entered on the plaintiff's premises and erected a building on a party wall belonging to the plaintiff and defendant. The plaintiff also claimed a mandatory injunction to compel the defendant to remove the building. At the trial of the action the county court judge gave a judgment in which he said that, in the circumstances of the case, in his opinion the defendant had committed a trespass but that he never granted mandatory injunctions if he could help it and he did not propose to grant an injunction at present but to adjourn the case as he did not want to put the defendant to expense by granting an injunction. Before the adjourned hearing, the claim for the injunction was withdrawn and at the subsequent hearing the judge gave judgment for the plaintiff for £15.

The defendant appealed without having obtained leave of the county court judge and the plaintiff took the preliminary objection that no appeal lay without the leave of the judge as the plaintiff's claim did not exceed £20.

By the County Courts Act, 1888, s. 120:

"If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court; Provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed £20 . . . unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal."

Wingate-Saul for the plaintiff.
A. Neilson for the defendant.

RIDLEY, J.—We must overrule this objection and hear the appeal and hold that the proviso to s. 120 of the County Courts Act, 1888, does not apply where there is a claim for a mandatory injunction as in the present case. We think that the proviso only applies where the claim is solely one for debt or damages which does not exceed £20.

BRAY, J., concurred.

[The substantive appeal was then heard and a new trial ordered.]

Solicitors: *Rawle, Johnstone & Co.*, for *Whiteside & Knowles*, Morecambe; *W. P. Ellen* for *Richard Knight*, Morecambe.

[*Reported by* G. H. KNOTT, ESQ., *Barrister-at-Law.*]

HARRIS *v.* TAYLOR

[COURT OF APPEAL (Buckley, Pickford and Bankes, L.JJ.), March 11, 12, 13, 1915]

[Reported [1915] 2 K.B. 580; 84 L.J.K.B. 1839; 113 L.T. 221]

Conflict of Laws—Foreign judgment—Enforcement—Voluntary submission to jurisdiction of foreign court—Conditional appearance—Motion to set aside writ.

The plaintiff and his wife were domiciled in the Isle of Man. The plaintiff brought an action against the defendant in the High Court in the Isle of Man for criminal conversation with his wife. As the defendant was not resident or domiciled in the Isle of Man, the plaintiff obtained leave to serve him out of the jurisdiction with the writ in the action, which was served in England. The defendant obtained leave to enter a "conditional" appearance to set aside the writ, and filed a motion in which he contended that there was no authorisation for service out of the jurisdiction of the Manx court, that no cause of action had arisen within the jurisdiction of the Manx court, and that the defendant was domiciled in England. This motion was dismissed. Subsequently the plaintiff, in the defendant's absence, obtained judgment for damages and costs. The plaintiff now sought to enforce the judgment of the High Court of the Isle of Man.

Held: the defendant, by his motion in the Isle of Man court, had voluntarily submitted to the jurisdiction of that court and the judgment was, therefore, enforceable against him in England.

Decision of BRAY, J. (111 L.T. 564), affirmed.

Notes. Distinguished: *Re Dulles Settlement Trusts, Dulles* v. *Vidler*, [1951] 2 All E.R. 69. Referred: *Moreland* v. *Eley, Eley* v. *Moreland*, [1916] 1 K.B. 85; *Forsyth* v. *Forsyth*, [1947] 2 All E.R. 623; *Jacobs* v. *Jacobs and Coen*, [1950] 1 All E.R. 96.

As to foreign judgments, see 7 HALSBURY'S LAWS (3rd Edn.) 140 et seq.; and for cases see 11 DIGEST (Repl.) 501 et seq.

Cases referred to:

(1) *Schibsby* v. *Westenholz and others* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, *1220*.

(2) *Phillips* v. *Batho*, [1913] 3 K.B. 25; 82 L.J.K.B. 882; 109 L.T. 315; 29 T.L.R. 600; 11 Digest (Repl.) 519, *1329*.

(3) *Russell* v. *Smyth* (1842), 9 M. & W. 810; 11 L.J.Ex. 308; 152 E.R. 343; 11 Digest (Repl.) 512, *1277*.

(4) *Williams* v. *Jones* (1845), 13 M. & W. 628; 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L.J.Ex. 145; 4 L.T.O.S. 318; 153 E.R. 262; 11 Digest (Repl.) 527, *1401*.

(5) *Carrick* v. *Hancock* (1895), 12 T.L.R. 59; 40 Sol. Jo. 157; 11 Digest (Repl.) 506, *1237*.

Also referred to in argument:

Jefferys v. *Boosey* (1854), 4 H.L.Cas. 815; 3 C.L.R. 625; 24 L.J.Ex. 81; 23 L.T.O.S. 273; 1 Jur.N.S. 615; 10 E.R. 681, H.L.; 2 Digest (Repl.) 174, *46*.

Ashbury v. *Ellis*, [1893] A.C. 339; 62 L.J.P.C. 107; 69 L.T. 159; 9 T.L.R. 517; 1 R. 388, P.C.; 11 Digest (Repl.) 531, *1423*.

Eschger, Ghesquirer & Co. v. *Morrison, Kekewich & Co.* (1890), 6 T.L.R. 145, C.A.; 29 Digest 488, *395*.

Keymer v. *Reddy*, [1912] 1 K.B. 215; 81 L.J.K.B. 266; 105 L.T. 841, C.A.; 16 Digest 122, *209*.

Malcolmson v. *Givins*, Times, Feb. 27, 1873.

Rayment v. *Rayment and Stuart, Chapman* v. *Chapman and Buist*, [1910] P. 271; 79 L.J.P. 115; 103 L.T. 430; 26 T.L.R. 634; 53 Sol. Jo. 721; 11 Digest (Repl.) 473, *1041*.

Mayer v. *Clarctie* (1890), 7 T.L.R. 40, D.C.; 16 Digest 122, *207*.

Voinet v. *Barrett* (1885), 55 L.J.Q.B. 39; 34 W.R. 161; 2 T.L.R. 122, C.A.; 11 Digest (Repl.) 507, *1240*.

Rousillon v. *Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 11 Digest (Repl.) 443, *842*.

Emanuel v. *Symon*, [1908] 1 K.B. 302; 77 L.J.K.B. 180; 98 L.T. 304; 24 T.L.R. 85, C.A.; 11 Digest (Repl.) 505, *1224*.

Ringland v. *Lowndes* (1863), 15 C.B.N.S. 173; 33 L.J.C.P. 25; 9 L.T. 479; 10 Jur.N.S. 48; 12 W.R. 168; 143 E.R. 749; sub nom. *Kingsland* v. *Lowndes*, 3 New Rep. 84; on appeal (1864), 17 C.B.N.S. 514; 4 New Rep. 409; 33 L.J.C.P. 337; 28 J.P. 519; 10 Jur.N.S. 850; 12 W.R. 1010; 144 E.R. 207, Ex. Ch.; 2 Digest (Repl.) 538, *752*.

Davies v. *Price* (1864), 34 L.J.Q.B. 8; 11 L.T. 203; 12 W.R. 1009, Ex. Ch.; 2 Digest (Repl.) 574, *1067*.

Boissière & Co. v. *Brockner & Co.* (1889), 6 T.L.R. 85; 11 Digest (Repl.) 508, *1243*.

Sirdar Gurdyal Singh v. *Rajah of Faridkote*, [1894] A.C. 670; 10 T.L.R. 62; 11 R. 340, P.C.; 42 Digest 688, *1032*.

Appeal by the defendant from a judgment of BRAY, J.

The facts are set out in the judgment of BUCKLEY, L.J.

Atkinson, K.C., and *T. B. Leigh* (*Boyd Merriman* with them) for the defendant.

Greer, K.C., and *Latter* for the plaintiff.

BUCKLEY, L.J.—This is an appeal from a decision of BRAY, J. (1914), 111 L.T. 564, in an action brought in the Isle of Man by the plaintiff to enforce a judgment obtained by him against the defendant. The plaintiff was domiciled and resident in the Isle of Man; the defendant was resident in England and, primâ facie, was not subject to the jurisdiction of the Isle of Man court, and the question we have to consider is whether he so acted that he must be deemed to have submitted to the jurisdiction of the Isle of Man court. In order rightly to understand the question, it is necessary carefully to look into the rules of procedure which regulate legal proceedings in the Isle of Man. An action is not commenced by writ. It is provided by Ord. 2, r. 1, of the rules of 1884 of the High Court of Justice, Isle of Man, that

> "every action in the High Court, hereinafter called 'the court,' shall be commenced by filing in the Rolls Office a concise statement of the nature of the claim made, and of the relief or remedy required in the action."

What happened in the present case was this. On Dec. 17, 1913, the plaintiff made his statement of claim as follows:

> "The plaintiff's claim is for damages for loss of the society and service of his wife Amy Margaret Harris and for criminal conversation with her."

That statement of claim was filed in court on Dec. 27, 1912, and, according to the practice of the Isle of Man, that was the commencement of the action. The action having thus commenced, it appears that it is then listed and comes before the court on a certain day. It is provided by Order 8, r. 2:

> "In any case not of a criminal nature, if the summons be served personally upon a defendant, or it appear to the satisfaction of the court that the fact of such summons having been issued and having been attempted to have been served, has come to the knowledge of a defendant three days at least before the day on which such summons required him to appear, the cause may proceed and be determined in his absence, or may be adjourned or otherwise as to the court may seem fit."

When this action first came into the list, the defendant had not been served and did not appear in court. The plaintiff thereupon applied ex parte for leave to

issue a writ and to serve it on the defendant out of the jurisdiction. Leave was given on Feb. 17, 1913, and on Feb. 21 a writ was issued and was duly served on the defendant in England. On Mar. 17, 1913, the defendant by his advocate, Mr. Cruickshank, physically appeared in court, and this is what took place, according to the official record:

"Mr. McWhannell for plaintiff. Mr. Cruickshank appears conditionally to set aside writ. Defendant to file motion to set aside writ."

The evidence given by the Isle of Man lawyer shows that, in the Isle of Man, an appearance in an action is not entered as it is here. When a cause has been entered in the list, the defendant appears in court either personally or by his advocate, and the Deemster makes a note of his appearance in his book, and that is what happened here. On Mar. 31, notice of motion was given on behalf of the defendant:

"To set aside the order for service out of the jurisdiction of this court upon defendant granted by His Honour Deemster Callow, on Feb. 21, 1913, and the writ of summons issued thereunder on the following grounds: 1. That the rules of the High Court of Justice, 1884, do not contemplate or authorise service out of the jurisdiction in actions for tort. 2. That no cause of action arose or exists within the jurisdiction of this court. 3. That defendant is domiciled in England and has no domicil in the Isle of Man and never has had such last-mentioned domicil."

On April 23, counsel for the plaintiff and the defendant having been heard, this motion was dismissed out of court with costs. Subsequently, on May 19, the plaintiff gave notice of motion for interlocutory judgment and for an order for a special jury to assess the damages (if any) payable to the plaintiff under Ord. 19, r. 4.

That rule provides that:

"If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant or all defendants, if more than one, make default as mentioned in r. 2, the plaintiff may obtain an interlocutory judgment against the defendant or defendants, and the court shall thereupon direct a jury to assess the value of the goods, and the damages, or the damages only, as the case may be.

Referring back to r. 2 of Ord. 19, it is as follows:

"If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, obtain judgment for the amount claimed, with costs."

Therefore, in a case coming under r. 4, the defendant makes default if he does not, within the time allowed for that purpose, deliver a defence. There are two cases in which a defence is required, and they are dealt with in Ord. 14, rr. 6 and 7, the one being where a statement of case has been delivered to a defendant, and the other, under r. 7, which provides that:

"A defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of case, must deliver his defence (if any) at any time within ten days after his appearance, unless such time is extended by the court."

Therefore, if a defendant has appeared in an action, an interlocutory judgment may be obtained against him in default of defence. The interlocutory judgment, which was delivered on June 30, was in the following terms: [His Lordship then read the judgment, and continued:] That judgment, as drawn up, was on its face a judgment for default of appearance and not in default of defence. The case then went before a jury, when the claim was limited to damages for criminal conversation. The jury having returned a verdict in favour of the

plaintiff for £800 damages, judgment was duly entered for that amount together with costs for the plaintiff on July 15. The judgment contained the following recital:

"The defendant, who is resident out of the jurisdiction, but upon whom a writ of summons in the action has been duly served, not having filed or delivered any defence nor appearing to the action,"

That is the history of the proceedings in the Isle of Man court.

Therefore, when the defendant was served in this country with the process of the Isle of Man courts he need have done nothing at all in the matter, and, although judgment might have been obtained against him, it could not have been enforced unless he had some property within the jurisdiction of the court. The defendant, however, was not content to sit still and do nothing; he went over to the Isle of Man court and, by so doing, he did something which he thought it was in his interest to do. He went to the court and contended that the court had no jurisdiction over him. In that he failed. By electing to go to the court it was decided that he had become amenable to the jurisdiction of the court. In my opinion, there was a voluntary appearance by the defendant in the Isle of Man court in which he invoked a decision of that court which, if in his favour, he was going to take advantage of. He was bound by the decision of that court to the jurisdiction of which he had submitted, and that decision went against him. It then became his duty to appear in the action, but he failed to do so. He took his chance and must abide by the consequences. What was done by his advocate on Mar. 17 was either an unqualified or a qualified appearance. If it was the latter, it was an appearance for the purpose of obtaining a decision of the court whether the defendant was bound by the decision of the court on the question of jurisdiction. The court had decided that he was bound, and that he had submitted for all purposes to its jurisdiction. The question, therefore, is whether there is a duty on him to obey an order of a foreign court which, if he had not submitted to its jurisdiction, he might have disregarded. I think the doctrine which is applicable to this case is that, if a defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign court, that judgment is enforceable against him in this country: see *Schibsby* v. *Westenholz and others* (1). In my opinion, therefore, the defendant, having submitted to the jurisdiction of the Isle of Man court, owed a duty to that court to obey its judgment.

With regard to the form in which the interlocutory judgment is drawn up, it will be observed that it contains these words:

"The defendant John Taylor having failed to appear or enter an appearance to the writ of summons in the action which has been duly served on him."

I think that must be taken to be an interlocutory judgment in default of defence. I think it is possible to read the interlocutory judgment in that way. The words "having failed to appear or enter an appearance" must mean "having failed to appear in bodily presence," and also refer to his not having entered formal appearance as he ought to have done after his motion had been dismissed on April 23. I do not think it is quite plain on the language of the judgment, but it does not matter very much, because, according to the practice, the Deemster was entitled to treat the appearance of the defendant as he thought proper, and he treated it as an appearance in the action for all purposes.

Therefore, what has happened is this: The defendant has submitted to the jurisdiction of the Isle of Man court, and this court will recognise that judgment, and will pronounce judgment in order to enforce that judgment. It is, therefore, unnecessary to consider the second point raised in this action, or the decision of SCRUTTON, J., in *Phillips* v. *Batho* (2), and I say nothing about it. This appeal fails, and must be dismissed.

PICKFORD, L.J.—I agree. I do not think this is an easy case to decide, and it is not made more easy by the fact that the Isle of Man courts have no

cut-and-dried system of procedure such as we have here. Primâ facie, it is quite clear that the Isle of Man court would have no jurisdiction over the defendant because he was not resident on the island, and could not in any way become subject to the jurisdiction of its courts unless he submitted to them. I am not prepared to accept the definition of a submission in this connection that the defendant voluntarily went to the Isle of Man court to have the main point in dispute decided. In this case, the procedure in the Isle of Man court, so far as it is necessary to state it, is this: A certain document, called a statement of claim, is filed, and the case is called on in court. The defendant may or may not be present. If he is present, no difficulty arises; he has to put in a defence. If he is not present and he is a resident in the Isle of Man, a certain procedure is followed, but, if he is not so resident, the plaintiff has then to obtain an order for service of a writ out of the jurisdiction. That was done in the present case, and defendant's counsel subsequently applied to the court to have the service of the writ set aside on the following grounds: that the rules did not authorise service out of the jurisdiction; that there was no cause of action within the jurisdiction of the court; and that the defendant was domiciled in England. That application was heard by the court and was dismissed. The next matter is that the plaintiff signed an interlocutory document and obtained a writ of inquiry for the assessment of the damages by a jury. The interlocutory judgment, as drawn up, states that the defendant had failed to appear or enter an appearance to the writ of summons in the action which had been duly served on him. The jury having returned a verdict in favour of the plaintiff for £800 damages, final judgment was entered for that amount against the defendant, and that judgment is expressed to be in default of defence, and, further, that the defendant had not appeared to the action.

It is said that those documents show what was done, and that, when the defendant applied to set aside the service of the writ, it was not an appearance in the action, nor was it treated as such. On the other hand, it is said that, whatever the form of the judgment, the court must be taken as having treated it as an appearance, because, although the interlocutory judgment was expressed to be in default of appearance, the court had only power to give judgment in default of defence, and therefore the judgment must be taken to be a judgment in default of defence. It is not quite clear what the practice of the Isle of Man is, and it is certainly odd that, if there is no power to sign judgment in default of appearance, there should be a form to that effect in their practice book. I think it is very likely that not very much consideration was given to the form of the judgment as the time for delivering a defence had gone by. I am inclined to think that the court treated the defendant's appearance to the motion as conditional, but that point does not seem to me to be of great importance, since the evidence of the defendant goes to show that, where such an appearance is made, it is within the discretion of the court to treat it as an appearance to the action. If a defendant applies to a court to set aside the service of a writ under which judgment could be obtained against him, and that court has the right to treat the application as amounting to an appearance in the action, then, in my opinion, he is bound by the judgment of that court and liable to pay on that judgment either in the Isle of Man or in any other country. I am of opinion that the defendant did submit to the jurisdiction of the Isle of Man court, and that the courts of this country will enforce that judgment against him. Under these circumstances I say nothing as to the second point.

BANKES, L.J.—I agree. I think the precise point which we have to decide has never arisen before, but the principles underlying all these cases seem to apply. The matter arises thus: [His Lordship stated the facts, and continued:] The question is whether what the defendant did brings him under an obligation to obey the ultimate judgment of the court against him. The rules under which the courts of this country enforce foreign judgments have been laid down in many

cases. In *Schibsby* v. *Westenholz and others* (1) BLACKBURN, J., said (L.R. 6 Q.B. at p. 159):

> "the true principle on which the judgments of foreign tribunals are enforced in England is that stated by PARKE, B., in *Russell* v. *Smyth* (3) (9 M. & W. at p. 159), and again repeated by him in *Williams* v. *Jones* (4) (13 M. & W. at p. 633), that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

Therefore, the question which has to be considered is whether the foreign court is, as regards the defendant, a court of competent jurisdiction. The following instances are given where a foreign court is held to be a court of competent jurisdiction—namely, where the defendant was, at the commencement of the action, resident in the foreign country, or where he selected that tribunal, or where he voluntarily appeared in the action. I quite agree that in most of the cases which have been referred to the appearance of the defendant was an appearance in a technical sense and related to the particular procedure which the defendant had to follow in order to have a right to contest the matter, but a defendant may submit voluntarily to the jurisdiction of a foreign court in many other ways, since the principles underlying the case of a person resident in the foreign country or of a person who voluntarily submits to the jurisdiction of the courts of that foreign country apply equally to persons who appeal to a foreign court to be relieved from an obligation at a preliminary stage. With regard to defendants resident in a foreign country, it was contended in *Carrick* v. *Hancock* (5) that temporary residence in the foreign country did not create a state of circumstances which would oust the jurisdiction of the courts of that country over him. Mr. Arthur Cohen said in the course of his argument in that case (12 T.L.R. at p. 60) that

> "as a man would be protected from being robbed while passing through a foreign country, so also he was liable to the jurisdiction of its courts,"

and LORD RUSSELL OF KILLOWEN, C.J., said in his judgment (ibid.) that, in his opinion,

> "the duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually on the territory was wholly immaterial."

If the duty of allegiance exists where only temporary protection of the law of the foreign country is claimed, it is a fortiori where a defendant appeals to a foreign court to relieve him from a liability. I think that fact places him under a duty to obey the judgment that may be passed on him. In the present case, the defendant asks whether the action is properly constituted as against him or not. In my opinion it is a misconception of the principle applicable to say that there is a voluntary submission on the part of a defendant to the jurisdiction of a foreign court only when he has consented to the ultimate judgment in the action. For these reasons, I think the decision of BRAY, J., is right and should be affirmed.

Appeal dismissed.

Solicitors: *Ridsdale & Son*, for *John Gardner*, Liverpool; *Grundy, Kershaw, Samson & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HALL *v.* MANCHESTER CORPORATION

[HOUSE OF LORDS (Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), March 25, 26, 28, and May 4, 1915]

[Reported 84 L.J.Ch. 732; 113 L.T. 465; 79 J.P. 385; 31 T.L.R. 416; 13 L.G.R. 1105]

Housing—House unfit for habitation—Unfitness due to proximity of other houses—Discretion of local authority—Manchester Corporation Waterworks and Improvement Act, 1867 (30 & 31 *Vict., c. xxxvi*), *s.* 41.

Three houses in Manchester were structurally fit for human habitation when taken separately, but by reason of their original grouping and the proximity of other houses might be considered to be unfit. Acting under s. 41 of the Manchester Corporation Waterworks and Development Act, 1867, Manchester Corporation made an order that the houses were "not fit for human habitation" and should not be inhabited. In an action for an injunction to restrain the corporation from acting on the order,

Held: the order was properly made, since a house might be unfit for human habitation not only because of structural or other defects in the building, but for any other reason, including external causes, such as want of ventilation, and whether or not the houses were unfit was a matter for the judicial discretion of the corporation properly exercised, subject to such statutory right of appeal as was provided.

Notes. The general statutory provisions as to houses unfit for human habitation are now contained in the Housing Act, 1957, Part II, s. 4 et seq.

Distinguished: *Cohen* v. *West Ham Corpn.*, [1933] All E.R.Rep. 24. Referred: *Estate and Trust Agencies (1927), Ltd.* v. *Singapore Improvement Trust*, [1937] 3 All E.R. 324.

As to fitness of houses for human habitation, see 19 HALSBURY'S LAWS (3rd Edn.) 602 et seq.; as to the Housing Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 314; and for cases see 26 DIGEST (Repl.) 680 et seq.

Cases referred to:

(1) *Stimpson* v. *Emmerson* (1847), 2 New Prac. Cas. 283; 9 L.T.O.S. 199; 2 Digest (Repl.) 656, *1760*.

(2) *Adams* v. *Great North of Scotland Rail. Co.*, [1891] A.C. 31; 2 Digest (Repl.) 678, **1467*.

(3) *Glasgow City and District Rail. Co.* v. *MacGeorge, Cowan and Galloway* (1886), 13 R. (Ct. of Sess.) 609; 23 Sc.L.R. 414; 11 Digest (Repl.) 215, **613*.

(4) *Local Government Board* v. *Arlidge*, ante, p. 1; [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109, H.L.; 26 Digest (Repl.) 691, *74*.

(5) *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; 54 L.J.M.C. 81; 53 L.T. 157; 40 J.P. 420; 33 W.R. 661; 1 T.L.R. 313, H.L.; 26 Digest (Repl.) 571, *2357*.

Appeal by the plaintiffs against a decision of the Court of Appeal reported 111 L.T. 182, reversing a decision of the Vice-Chancellor of the County Palatine of Lancaster at the trial of the action.

The substantial question was whether, under s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, the respondents, Manchester Corporation, were empowered to close three houses belonging to the appellant, situated in the working class district of the city, as unfit for human habitation by reason of the original grouping of the houses, their proximity and contact, it being admitted that each individual house taken separately was fit for human habitation. The houses in question were situated in Dorrington Street and Vine Street, Manchester.

and were built about 1860 in accordance with the then regulations of the respondents, and no structural alterations had since been made. The houses had since been continuously occupied by tenants, and business had been conducted there for fifty years without noticeable damage in health to any occupier, there being no exceptional sickness or death rate among the tenants, and the houses were in a fair state of repair and drainage satisfactory. The appellant contended that the object for which the closing order was made was to improve the locality without compensating the owner of the property required under the scheme to be pulled down or otherwise altered. He further contended that the Act of 1867 only gave the respondents power to make a closing order where the premises closed were themselves unfit for human habitation, and that not being the case with respect to his houses the closing order was ultra vires, and he claimed an injunction. The respondents denied that the order had anything to do with an improvement scheme and contended that a building was unfit for human habitation within the meaning of s. 41 of the Act of 1867 if it was so unfit for any reason and not only, as the appellant alleged, if it was so unfit because of some structural or other defect existing in the building itself. The Vice-Chancellor decided the question in favour of the owner, but his decision was reversed by the Court of Appeal (LORD COZENS-HARDY, M.R., BUCKLEY, L.J., and CHANNELL, J.). The owner appealed.

The Manchester Corporation Waterworks and Improvement Act, 1867, provided:

"41. In any case where it is certified to the corporation by an inspector of nuisances . . . that any building, or part of a building, is unfit for human habitation, the corporation may by their own order affixed conspicuously on such building or part of the building, declare the same is not fit for human habitation, and shall not, after a date therein to be specified, be inhabited; any person who shall, after the date or time mentioned in such order, let or occupy, or knowingly suffer to be occupied, such building or part of building, shall be liable to a penalty not exceeding £5, and for a continuing offence not exceeding 40s. for every day during which the offence may continue. Provided always, that if at any time after such order the corporation shall be satisfied that such house has become or has been rendered fit for human habitation they may revoke their said order. . . ."

The Manchester Improvement Act, 1871, provided:

"37. Any person dissatisfied with any order, determination, apportionment, or adjudication of the corporation or of any justice under this Act or under the Manchester Corporation Waterworks and Improvement Act, 1867, shall be entitled to appeal against the same in manner provided by ss. 262, 263, and 264 of the Manchester Police Act, 1844."

The Manchester Police Act, 1844, s. 262, provided for an appeal to general quarter sessions.

Cyril Atkinson, K.C., Frank S. Foley, and *W. Taylor* for the appellant.

C. E. E. Jenkins, K.C., and *Arthur G. Roby* for the respondents.

The House took time for consideration.

May 4, 1915. The following opinions were read.

LORD DUNEDIN.—This case turns on the construction of s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867. Manchester is a city which is regulated by a series of private Acts, and, although it is also subject to such public Acts as are of application, I think the argument that this section is impliedly repealed by the subsequent public Acts dealing with matters of the same sort may be at once rejected. I agree with the learned Vice-Chancellor in thinking in particular that s. 91 of the Housing of the Working Classes Act, 1890, makes that argument impossible.

What does s. 41 provide? I think it provides, first, that to set the respondents in motion there is a condition precedent of a certificate being presented by the

inspector of nuisances or by two medical practitioners, which certificate must set forth, as to some building or part of it, that it is unfit for human habitation. On that being presented, the respondents may, by order affixed to the incriminated building or part thereof, declare that it is so unfit, and fix a time after which it is not to be inhabited. I think that the expression "may" declare shows that there is imposed on the respondents a duty of consideration as to whether the facts bear out the allegation contained in the certificate. If the duty imposed was a purely ministerial duty, I think the word would have been "shall." It is true that it is trite law that "may" in a statute may be equivalent to "shall." But each case must go on its own circumstances, and in my view all considerations of common sense point to the view I have expressed. It is, I think, inconceivable that a positive duty should be imposed on the respondents in respect of the ipsi diximus of any two medical practitioners, who need not even belong to Manchester. Now, if that duty is imposed on the respondents, I think the respondents must set themselves to the task in a judicial spirit; but if they do so, acting in good faith, and coming to a conclusion on the facts that they are warranted in making a declaration of unfitness, then I think no court can review that determination. The reason for that is that Parliament has chosen to commit the adjudication of this particular thing to a particular body.

In the case of anything being referred to the determination of one of the inferior yet constituted courts of the realm, there may be an appeal from the determination, though no such appeal is given. For there may be a common law or a statutory right of a superior court to review the decisions of a lower court. That doctrine, however, cannot apply where, as here, the one charged with the duty of determination is a person or corporation (which is just a legal person) and not a court. Then unless appeal is given there the matter must end; for it is that person, and that person alone, who Parliament has said must determine. But, while this is so, there is always side by side another doctrine which may have practical scope of application—viz., that when a person is given a right to do things which he could not do but for statutory allowance so to do, he must act within the allowance of the statute and not outside it, and if he attempts to act outside it he can be controlled by the High Court. Whether the control be exercised by way of certiorari or mandamus or injunction it is needless to inquire. All these things are matters of procedure, and procedure only. The rule I am stating is a rule of general law common to all enlightened systems, which may nevertheless differ very much in their methods of control. Applying this rule to the matter in hand, it follows that the corporation can only determine yea or nay to the question, is the building unfit for human habitation, and cannot under pretence that it is declaring it unfit for human habitation, really condemn the building on other grounds. In other words, they cannot act ultra vires, and if they do they may be restrained.

It is not, I think, very easy to express in definite language the difference between cases where an error in such decisions is an error which springs from ultra vires action and the cases where the error is an error on the merits. In concrete cases I do not think the difficulty is nearly so great. Experience shows that we have here that class of difficulty of which it may be said, solvitur ambulando. There is a class of cases which is not the same but very analogous, and in which the decisions, which are numerous, are, I think, helpful in this matter. I refer to the decisions, as regards the awards of arbitrators. The analogy rests in this. An arbitrator has no jurisdiction save what the parties by agreement confer on him. If he confines himself to the province in which he has jurisdiction, his award cannot be touched by a court of law, however wrong in the merits it may be; but if he wanders ultra fines compromissi, then a court of law will quash his award. The statute in this case does what the parties do in that. It tells the respondents that they may decide on certain things. They may decide that without review, but they can decide no other. Now there are two obvious ways in which the arbitrator, or here the respondents, may act ultra vires. They may, under colour of exercising a juris-

diction, really want to attain another end. That is mala fides. Such a proceeding is negatived, I think rightly, in this case in the judgment of the learned Vice-Chancellor. But they may go bona fide on a wrong interpretation in law of what are really the fines compromissi. In such a case also the court will interfere. Your Lordships will easily understand that I am speaking quite apart from the provisions of the Arbitration Act, and rather as the law was laid down in *Stimpson v. Emmerson* (1) as explained by LORD HALSBURY, L.C., in *Adams v. Great North of Scotland Rail. Co.* (2).

I will venture to quote as illustrative in this matter a Scottish case, because the law of Scotland has no Arbitration Act, and therefore the position is as it was in England before the Arbitration Act, and because I conceive I am dealing with general legal principles of universal application. The case is that of *Glasgow City and District Rail. Co. v. MacGeorge, Cowan and Galloway* (3). In that case a local City and District Railway Act allowed the promoter company to construct a tunnel under certain streets in Glasgow. It then provided that, if by reason of the construction any "structural damage" should be caused to the buildings of any frontagers (who had by their titles no property in the street, and whose land was, therefore, not taken), they should be entitled to compensation, to be determined in the usual way under the Lands Clauses (Consolidation) Act, 1845. The defendants, MacGeorge, Cowan and Galloway, were frontagers, and their building was injured. They claimed, went to arbitration, and the arbiter awarded a lump sum of £950 for structural damage. The railway company raised a reduction of the award on the ground that the arbiter had included in the so-called structural damage deterioration in the marketable value of the property. The Lord Ordinary determined the action as irrelevant, holding that as the award bore on the face of it that the sum awarded was for structural damage, no more could be said. That the Inner House reversed and allowed a proof; i.e., they allowed the arbiter to be examined as to whether he had really acted ultra vires by including in structural damage what, on a proper interpretation of the phrase, was not structural damage at all. The arbiter was examined, and as it appeared that he had only allowed for structural damage in the proper sense of the term, the court held it could not review the figure at which he had arrived, and the action of reduction was dismissed.

I think that case was strictly analogous to the present. I think the action raised before the learned Vice-Chancellor was a relevant action because it averred that on a just construction of the words, "unfit for human habitation," the corporation had condemned the buildings for a fault outside the fault specified in the statute. And, just as the arbiter was examined there, the corporation was, through its witnesses, examined here. So that, if the interpretation which the learned Vice-Chancellor put on the words, "unfit for human habitation," was correct, then I think his judgment was a judgment which he had a right to pronounce. That question therefore, and that I think alone, is the question which we have to determine, and that question is well expressed for the respondents in the first reason in the case before your Lordship's House, which is in these terms:

> "That a building is or may be unfit for human habitation within the meaning of s. 41 of the Act of 1867 if it is so unfit for any reason and not only as the appellant alleges if it is so unfit because of some structural or other defect existing in the building itself."

The learned Vice-Chancellor pronounced in the negative as to that proposition, but the Court of Appeal pronounced in the affirmative, and the question for your Lordships is, which was right. The question is not without difficulty, but, on consideration, I have come to agree with the Court of Appeal. The appellant's counsel argued that, inasmuch as the earlier Acts applying to Manchester and dealing with nuisance, ruinous buildings, and provision of drains, the words used, as regards buildings, pointed to a condition personal, so to speak, to the building itself, therefore the words unfit for human habitation must be construed in the

same manner. I do not say anything on this topic, as I think it is dealt with with great clearness and effect by BUCKLEY, L.J., in the court below, and I have nothing to add to what he has said. The words used in the Act are perfectly general, without any qualification whatever. Then the appellant argued that, if the wider meaning was given, it stultified s. 23 of 28 Viet., c. xc, which provides for the making of byelaws dealing with sufficiency of space round buildings and the ventilation thereof, and then provides that no such byelaw shall apply to a building erected before the passing of the Act. The plain answer is that the byelaws, which by the proviso are insured to be non-retrospective, may provide for a modern and up-to-date standard, whereas the condemnation under s. 41 of the Act of 1867 can only be when there is absolute unfitness for human habitation—a state of affairs which could not properly be said of many houses, although their ventilation might be far short of an up-to-date standard. That a house may be unfit for human habitation through non-ventilation seems obvious. It admittedly might be so if it had no windows. Nor do I think that anyone is entitled to trust for ventilation to his neighbour's ground, which may be lawfully covered with buildings right up to the edge of the property.

Another argument urged by the appellant I only mention to show it was not overlooked—viz., that the action of the respondents was mala fide in respect that it was really effecting without compensation what they ought to do with paying compensation, namely, the removal of No. 1 Dorrington Street, as an obstructive house. This argument always seemed to me worthless, as it omits to notice that in the action of the respondents under the present closing order there is no compulsion on the appellant to take down No. 1 Dorrington Street. If he chose to construct a ventilating court partly on No. 1 and partly on Nos. 60 and 62 Vine Street, he might equally avoid the closing order. This brings me to the argument which seems to have weighed with the learned Vice-Chancellor viz., that, because the action contemplates the house becoming or being rendered fit for human occupation again, that points to something the owner can do. The answer I have already really indicated. No man is entitled to rely on his neighbour for his ventilation, and the opening up of a space on his own land is the remedy which lies in his hand. It is doubtless the case that as the matter stood in 1867 it left very large powers in the respondents, with very little check if the powers were abused. That state of affairs, however, was ended by the Manchester Improvement Act of 1871, which supplied what was probably an oversight in the Act of 1867, and gave an appeal such as was given by s. 262 of the Act of 1844—namely, to quarter sessions. This gives an appeal on the merits - i.e., as to whether the house is, in fact, unfit for human habitation.

That this appeal is in this case still open is, I think, clear; for I think it is clear from s. 41 of the Act of 1867 that the only operative order is an affixed order. In fact, affixture comes in place of service, and I am clearly of opinion that the appealing days begin to run from the date of affixture. It follows that, as in this case there has been no affixture, there will still be opportunity for the appellant to appeal on the merits. These merits are for the quarter sessions, and I do not think we should do more than point out, as, indeed, I have already said, that "unfit for human habitation" is a very strong expression, and vastly different from "not up to modern or model requirements." Further, that if such a term is applied to a house as a whole it must mean that each and every room is unfit—a result which, if the defect is want of ventilation, I can scarcely conceive being arrived at when there are rooms with windows facing a street.

The present appeal should, I think, be dismissed with costs.

LORD ATKINSON.—I concur. The facts have been already sufficiently stated. The appellant in his statement of claim has alleged that these three houses were not unfit for human habitation, and that the respondents were acting mala fide and endeavouring under colour of exercising their powers under s. 41 to evade a

liability imposed on them by Part I of s. 38 of the Housing of the Working Classes Act, 1890, and other Acts amending the same.

The proceedings of the respondents up to the issue of the writ appear to me on the face of them to be perfectly regular. This charge of mala fides made against them or their sub-committees, at the trial and persisted in before your Lordships, was dealt with by the Vice-Chancellor in the following passage of his judgment:

"It is charged against the sub-committee of the corporation and Mr. Rook that they are actuated by 'bad faith' in taking advantage of the Act of 1867. If by 'bad faith' is meant a desire to do the plaintiff an injury, or that they had any motive except to do their public duty as they understood it, or that their finding of fact was a perverted or dishonest finding, I am satisfied on the evidence that such a charge is groundless. Mr. Rook inspected the yards and concluded that the air space was insufficient for proper ventilation. The members of the sub-committee who inspected the yards on April 19, accompanied by Dr. Nivin, came to the same conclusion, and it was, in my opinion, an honest, even if a mistaken, conclusion. But all knew they were working under the Act of 1867, as they had done on many previous occasions, and with the object, if they found the houses not fit for human habitation, of putting the section into operation, and thereby compelling the plaintiff to make alterations satisfying their requirements. If they so acted under a mistaken view of their powers under the statute, they acted, in my opinion, in good faith."

It is quite true that the respondents prepared plans showing the alterations in these houses which they considered would render them fit for human habitation. The alteration consisted in demolishing house No. 1 and converting its site into the yard or yards of Nos. 60 and 62. Section 41 of the Act of 1867 did not, however, confer on them any power to demolish a house, or to compel the owner of a house to make alterations in it of one kind rather than of another. All the statute enabled the respondents to do was by notice conspicuously affixed to a building or part of a building to declare such building or part of a building to be unfit for human habitation, and that it should not after a date to be therein specified be inhabited. The statute then inflicts a penalty on the person who after the date named lets or occupies, or knowingly suffers to be occupied, the building or part of a building so declared to be unfit for human habitation. If the respondents should any time thereafter be satisfied that "such house" has become or been rendered fit for human habitation, they may revoke their order. It is thus left entirely to the owner to remedy the defect in his premises. It cannot be successfully contended, in my opinion, that this section of the Act of 1867 is repealed, in whole or in part, by s. 38 and s. 39 of the Housing of the Working Classes Act, 1890. And, if that be so, I utterly fail to see what there is mala fide in the respondents, if their powers be cumulative, as I think they are, in putting into force their powers under the earlier rather than under the latter statute. No wrong or injustice is done to any owner in compelling him, in the interest of the public health, not to allow a house or building belonging to him which is unfit for human habitation to be used or occupied for that purpose. It was to effect this object the respondents took action. They and their sub-committee are found to have acted bona fide and in the honest belief that these houses were unfit for human habitation. The demolition of house No. 1, as is evident from the letters of the county surveyor of July 12, 1912, and that to the appellant on Nov. 6, following, was merely suggested as a mode in which the two remaining houses could be made fit for human habitation, but the appellant was left quite free to choose any other method of correcting the evil which might appear to him preferable. There is, in my opinion, nothing in this point. In addition, each of the three houses of the appellant would, as regards the remaining two, appear to be an "obstructive building" in relation to the others within the meaning of s. 38 of the later Act, since it is the close grouping or crowding together of the houses which renders the ventilation of each defective, and, moreover, s. 39 seems to

contemplate a large scheme of demolition and rearrangement not desired by the respondents in the present instance.

It was next contended that the learned Vice-Chancellor had not found as a fact that the ventilation of any of the houses was defective or that the alleged unfitness of any of them for human habitation was due to this cause. No notice of a cross-appeal was served. The point was not raised in the Court of Appeal, and from the judgment of the Vice-Chancellor it would seem to have been assumed that the ventilation was defective. He says:

> "It is admitted that each house taken separately is fit for human habitation, and that their unfitness lies in their contact and proximity."

And,

> "The enclosed yards are small in area and contain two pail closets and an ashpit. The passage leading into the yard is 2 ft. 9 in. in width, and the houses surrounding the yard are two-storied buildings. These yards are ill-ventilated, the only access to air being the narrow passage or over the roofs of the buildings."

And ultimately, deciding on the construction of s. 41, he came to the conclusion that

> "each building must be treated separately without regard to its proximity to or contact with any other building."

It would have been entirely unnecessary for him to have considered the construction of this s. 41 as to the kind of unfitness dealt with by it, if he had been of opinion that no unfitness for human habitation from any cause had been proved. The natural way of raising this question of fact for decision was by lodging an appeal under s. 50 of the Manchester Corporation Act, 1882. The appellant has chosen to take another course. If his contention be right he has failed to get a finding in his favour on this issue of fact. The Vice-Chancellor was not asked expressly to find on the question whether each of these houses, or any part of them, was unfit for human habitation from want of ventilation, though a great deal of evidence was given on the point. If the appellant has embarrassed himself by taking the course he has taken, rather than appealing, he has himself to blame. He may still, however, avail himself of the facilities to appeal offered to him by the respondents. It is quite impossible for the House to deal on this appeal with a contested issue of fact on which no inferior tribunal has pronounced any finding.

There remains then the real question, the only question dealt with by the Court of Appeal, viz., the construction of the statute. What is the kind of unfitness for human habitation contemplated by this section? In my view it is impossible to confine the words of the section to an unfitness for human habitation due to structural defects in a house itself, or to defective internal physical conditions in a house itself. I think those words include an unfitness due to external causes, such as want of ventilation, noxious effluvia, &c. I am, therefore, of opinion that the judgment of the Court of Appeal on this, the only point raised before it, was right. A lengthy argument was addressed to your Lordships on the injustice that might be done if, by the use of the word "may" in the section, an absolute discretion was held to be vested in the respondents to direct notices such as are mentioned to be affixed to premises simply on receipt of a certificate from an inspector of nuisances or two medical men, while no power of appeal was given by the statute. It was urged that on the construction of this Act the respondents should be held bound, if their action should be challenged, to show, not merely that they were themselves honestly satisfied that the building or part of a building to which the notices were affixed was unfit for human habitation, but that it was in fact unfit. Their belief or conviction on the point would, it was urged, be insufficient; and to justify their action the tribunal before which they were impleaded should be satisfied of the unfitness for human habitation as well as themselves. The point is not now of practical importance since a right of

appeal is given by the later statute, but I do not think the discretion of the respondents can be so limited. If they act without jurisdiction, or corruptly, or for some indirect motive, or against natural justice, their action could be restrained by injunction. They might possibly be compelled by mandamus to discharge their duty, or if the act they perform be in any given case in the nature of a "judicial act," in the wide meaning which that term has received, their order might be removed by certiorari. These are safeguards independent of appeal, which though more or less cumbrous and costly are fairly adequate to prevent injustice or the abuse of power, and one is not driven to put on the section the strained construction contended for in order to prevent wrongs and abuses which can be otherwise prevented or checked. In my opinion, therefore, the section gives to the respondents, once they have obtained the preliminary certificate specified, a discretion, subject to the control and supervision I have mentioned, to put their powers in force if they honestly believe that the circumstances of the case call for their exercise.

It was also contended that no appeal now lies under s. 50 of the Manchester Corporation Act, 1882, since more than twenty-eight days have elapsed since the date of the order. The town clerk had by his letter of Nov. 26, 1912, already referred to, informed the appellant that it was considered that the time for appealing ran from the service of the order. By service he must have meant the affixing of the order to the premises, since that is the only mode of service provided for in s. 41. It is a mode of service often resorted to in different circumstances. The words of the section run thus:

> "The corporation may by their order affixed conspicuously on such building, or part of a building, declare. . . ."

They cannot make any declaration by an order not so affixed. In that mode alone can their determination or adjudication be evidenced. I am myself inclined to think the town clerk was right, that an order is no order within the meaning of the section until it is affixed, and that the date when it is so affixed is its true date from which the time for appealing runs. It was, moreover, at the appellant's request that the order was not "affixed." In addition the respondents have through their counsel undertaken not to raise this objection if an appeal be now taken. I think, on the whole, that the appeal should be dismissed with costs.

LORD PARKER OF WADDINGTON.—This appeal raises several points upon the true construction of s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867. The section provides that in any case where it is certified to the respondents by the inspector of nuisances or by any two medical practitioners that a building or any part of a building is unfit for human habitation, the respondents may by their order, affixed conspicuously on such building or part of the building, declare that the same is not fit for human habitation and shall not after a date therein to be specified be inhabited. The section imposes a penalty on any person who shall after the date mentioned in such order let or occupy or continue to let or occupy, or knowingly suffer to be occupied, such building or part of a building.

I think it reasonably clear that the object of this section is to enable the respondents to prohibit in the interest of public health the use for human habitation of buildings which are in fact unfit for that purpose. It is not intended to make the certificate of the inspector of nuisances or any two medical practitioners conclusive on this point of fact. Where the fact is certified, the respondents can proceed under the section, but in so doing they must examine the circumstances and themselves come to a bona fide conclusion as to whether the building or part of the building in question is not in fact unfit for human habitation. They cannot rely solely on the certificate. The question then arises as to whether the power intrusted to the respondents is purely administrative or is a judicial power. On this point I have had considerable doubt, because there is no provision in the Act for hearing any party interested, or for receiving evidence, nor is there any pro-

vision for an appeal. But inasmuch as an order of the council under the section entails a penalty on persons who disregard it, I think on the whole that the respondents' power is in the nature of a judicial power, and that consequently any party interested has a right to be heard and, if he desires it, to adduce evidence, and, in case the power is abused, could protect himself by certiorari or injunction. It is to be observed too, that, since the passing of the Manchester Improvement Act, 1871, he has the right of appeal conferred by s. 37 of that Act. This appeal, however, has, by virtue of s. 50 of the Manchester Corporation Act, 1882, to be brought within twenty-eight days after the date of the order or adjudication complained of, and there was some discussion as to when the twenty-eight days commenced to run for the purposes of s. 41 of the Act of 1867. It is clear that under the section an order of the respondents has no operation unless and until it be affixed to the premises. There is no provision for its service otherwise than by so affixing it. I think, therefore, that the twenty-eight days must be held to run, not from the making, but from the affixing of the order.

There is one other question which arises on the construction of s. 41 of the Act of 1867. Can a house be, within the meaning of the section, unfit for human habitation for a reason extrinsic to itself; e.g., because neighbouring buildings preclude the access of air and impair its proper ventilation? It was argued that a building could not be unfit for human habitation within the meaning of the section unless it was in itself and without reference to surrounding circumstances so unfit. I agree with the Court of Appeal that this construction cannot be maintained. The sole question in every case is whether the house is as a fact unfit for human habitation, and not in any case the cause of the unfitness. The arguments to the contrary founded on the public statutes in force at the time do not appear to me to be sound. There is, in my opinion, no presumption that a corporation promoting a private Act for the better government of their district are not seeking to obtain, or that the legislature does not intend by the private Act to confer on them, powers additional to or more beneficial than those powers which are enjoyed by other corporations under the general law.

A suggestion was also made in argument that the powers conferred by s. 41 of the Act of 1867 have in some way been abrogated or limited by s. 91 of the Housing of the Working Classes Act, 1890. As a matter of fact, s. 91 of the last-mentioned Act expressly preserves these powers, though it provides that

> "a local authority shall not by reason of any local Act relating to a place within its jurisdiction be exempted from the performance of any duty or obligation to which such authority are subject under any part of this Act."

It is said that the respondents were by virtue of the last-mentioned Act under an obligation to apply to one or more of the buildings in question the provisions of s. 38 thereof. It will be found, however, on reference to that section that, although corporations are bound to take the question into their consideration, they are not bound to proceed to put the powers of the section into force, and, in my opinion, the fact that the object of the section can be attained at less expense under a private Act would be a legitimate reason for proceeding under the private Act rather than under s. 38. In the present case the city council, on Aug. 7, 1912, confirmed an order made by their sanitary committee on July 31, 1912, declaring three houses of the appellant, Nos. 60 and 62 Vine Street, and No. 1 Dorrington Street, to be unfit for human habitation, and fixing twenty-eight days from the service of the order as the period after which they were not to be inhabited. This order was never affixed to any of the houses of the appellant with which it deals, but on Oct. 25 the town clerk wrote to the appellant saying that unless the houses were altered to the satisfaction of the city surveyor he would have no alternative but to "post the notices," meaning, I suppose, to affix notice of the order to the premises. Thereupon, after some correspondence, the appellant issued his writ in this action claiming an injunction restraining the respondents from affixing on his premises or any part thereof any notice declaring the same or any part thereof

to be unfit for human habitation. There is no doubt that the inspector of nuisances had certified the houses as unfit for human habitation, or that the appellant had an opportunity of being heard on the matter, but in his pleading the appellant suggested mala fides, a suggestion which was disproved at the trial. His chief contention was, however, that the section referred only to buildings in themselves useful for human habitation. The Vice-Chancellor took this view, and, inasmuch as the alleged unfitness in each case was due, not to the house itself, but to the circumstances, he held that the section did not apply. The Court of Appeal reversed the decision of the Vice-Chancellor on the ground that the section applied from whatever cause the building or part of a building was unfit for human habitation. In this, I think, they were right, and it follows that this appeal should be dismissed with costs.

I desire to add that if the respondents are minded to proceed further with the matter under s. 41 dealing with the houses in question, they would do well to consider the following points. In deciding whether a house is unfit for human habitation, reference must necessarily be made to some standard of fitness or unfitness. The fact that the respondents have a certain standard of fitness which they desire to impose on the area subject to their jurisdiction, and that the building in question falls short of that standard, will not in my opinion necessarily render the house unfit within the meaning of the section. Thus the absence of such air spaces at the front and back as are prescribed by the byelaws in respect of new houses would not, in my opinion, be alone sufficient to justify the corporation in making an order under the section. The standard to be applied would seem to be that of the ordinary reasonable man. This test may seem vague, but it will be found quite sufficient except in cases on the border-line, and in such cases the respondents will proceed at their own risk and must expect litigation. Once again it seems reasonably clear that the respondents cannot make an order as to the whole building where part only is unfit for human habitation. The mere fact that there are rooms in a house so devoid of light or air as to be unfit for human habitation will not justify them in closing the whole house. I venture to make the above remarks because, although your Lordships' attention was not called to the evidence, there appears to me to be some doubt on the plans produced whether the confined air space at the back of the houses was sufficient to render them unfit for habitation according to the standard of ordinary reasonable men, and also because the alterations suggested by the respondents will not improve the ventilation of considerable parts of the buildings, which if now unfit for habitation, will remain unfit even though the alterations be carried out, a fact which seems to point to the order having been too wide. I do not intend to decide either of these points, but they are worthy of the consideration of the respondents if they determine to proceed.

LORD SUMNER.—This appeal depends in the first instance on the meaning of the Manchester Corporation Waterworks and Improvement Act, 1867, s. 41. There has clearly been no implied repeal by subsequent legislation. It stands, and must be construed as it would have been construed when enacted, and to my mind it runs in plain and untechnical language. The section enables the respondents to declare a building to be "not fit for human habitation," and thereupon to make its habitation an offence for which a heavy penalty may be imposed. It does not say from what causes the unfitness must arise. It does not specify who, if anybody, must be to blame. It is concerned with the building. It says that the building may be declared unfit when it is certified to be unfit. Public health is the matter in hand, and public health seems to demand that a building which is in fact unfit to be inhabited should not be inhabited, whatever be the cause and whosesoever the blame. I find no warrant, not even in the reference to an "inspector of nuisances," for limiting this section to unfitness owing to or in the nature of a nuisance. The prior legislation about public health or the removal of nuisances is not incorporated. This Act is an omnibus Act. Neither its pre-

amble nor its other sections limit s. 41. There is nothing to confine the unfitness for habitation to unfitness due to something in the state or the construction or condition of the building itself, and I do not see why we should supply this. Why are we to suppose that the legislature meant this concrete question to be considered in the abstract, as if the building stood in the midst of an imaginary desert and not in a particular street in a populous city?

True, the section does not invest the respondents with certain powers ancillary to the exercise of this function, as might have been expected. It does not enable their officers to enter the premises without the consent of the owner or occupier, in order to inspect their condition. It does not enable them to alter the premises if the owner declines to do so, or in case of need to pull them down, even though the existence of the premises, inhabited or uninhabited, causes unfitness for human habitation in adjacent buildings. It may be the case, as is suggested, that no public general Act confers on municipal corporations at large powers so wide as this section appears to confer on Manchester Corporation. Still I do not see that these points assist the construction of the section. Whether it refers to unfitness, as such, or only to unfitness by reason of the state in which the building itself is, whether the powers given are to be measured in some way by the provisions of the prior enactments or are as wide in substance as they are in expression, the absence of power to enter or of power to demolish is equally embarrassing, and is equally significant or insignificant. A similar answer must be made to the point that by s. 23 of 28 Vict., c. xc., the respondents' power of making byelaws designed (inter alia) to secure a sufficiency of air space, does not extend to old houses, and that this provision for the house-owner's protection might be evaded if the respondents could close by order a house which they could not regulate by byelaw. The objection arises equally whether the unfitness named in the section is construed as unfitness proper to the house and due to its state or to unfitness arising from the effect of other houses on its circulation of air. An old house, though beyond the scope of the byelaw power as such, would be subject to s. 41 if its structure made it unventilated in itself, so that the construction of the section remains unaffected by this argument. So, too, if, as is urged, no other city has powers as ample as Manchester claims under this section, that only shows that the legislature has preferred Manchester before other cities, and it is not for me to say why it should not. Counsel for the respondents formally admitted (in my opinion not going beyond what the section implies) that the respondents' function under it is a judicial one, and is not merely administrative; that they must themselves investigate the case, and not be contented with mere satisfaction of the condition precedent as to a certificate from an inspector of nuisances or two doctors; that in proceeding under the section they must observe, and not contravene, the rules of justice and fair play; that, for example, they must give parties concerned an effective opportunity of being heard, not necessarily before the city council, but by some authoritative delegacy, and not only of being heard but of adducing evidence if they wish, and that if, in these respects or in any other way they act or threaten to act ultra vires or in contravention of their duty under the section, they may be controlled by mandamus, certiorari, or injunction, as the case may be. In my opinion, when the exercise of the power is thus fully hedged about, there is no reason to question that the legislature meant it to be enjoyed in the full breadth of the term in which it is conferred. So much for the main point on the section.

The appellant's argument, very ably put, has not been limited to the bare construction of the section. It is suggested that the appellant and his houses have been condemned unheard, that he has been manœuvred out of his right of appeal, that he is mulcted for a sanitarian's counsel of perfection, that what was good enough for our fathers should be good enough for us, that the respondents are trying to improve the city at the appellant's private expense, instead of, as they have power to do, at the expense of the ratepayers. It is said, furthermore, that, if these suggestions are not borne out by the facts of this case, still, by way of hypothesis, the respondents' construction of the section involves the right to

condemn the houses even though every one of these things were true, and therefore that such a construction cannot be one which the legislature ever intended. Enough has been urged in this connection to make it right to say that the suggested abuse of the respondents' powers does not appear to have been proved. When Mr. Hall appeared before the housing and unhealthy dwellings sub-committee, it is true that his case was somewhat summarily disposed of, but he was well able to take care of himself. He knew the sub-committee's point, and they knew his. He does not appear to have desired to call evidence. Speech-making would not have mended matters. Though little was said and no time was wasted, I think it cannot be held that he was unfairly cut short or went unheard. Again, the ultimate decision was not within the competence of the sub-committee before which he appeared, and, when the matter was finally decided, first by the sanitary committee of the council and then by the city council itself, he was not present, nor was he summoned. Here, too, I think, there was no substantial injustice, for it is plain that the recommendation of the sub-committee was approved as matter of course, since in the meantime the appellant had not complied with its requirements. I think this point falls within the decision of your Lordships' House in *Local Government Board* v. *Arlidge* (4).

It is argued that the respondents have evaded some duty to proceed in this matter under the Housing of the Working Classes Act, 1890. I think there is a confusion here. Section 32 (1) is the one which alone imposes a duty; whether that duty is absolute or admits of any and what discretion need not now be determined. That section applies when a dwelling-house "is in a state so dangerous or injurious to health as to be unfit for human habitation," but it has been truly pointed out for the appellant here, and, indeed, is in the forefront of his complaint, that his houses are not in a state so dangerous or injurious to health as to be unfit for habitation at all. They are only declared to be unfit owing to the proximity of other houses, apart from which they would be unobjectionable. Their unfitness, such as it is, does not arise out of their state at all. If these houses are regarded as obstructive dwellings which obstruct other dwellings, though not more than the other dwellings obstruct them, the section of the Housing of the Working Classes Act, 1890, which would be applicable, is s. 38, and then the respondents have a discretion to proceed or not to proceed. The case is not one where, the circumstances imposing a duty to use powers under one Act, the respondents proceed to use powers under another Act for the mere purpose of getting rid of those circumstances and of that duty. No evasion is established here. It is not shown that the Housing of the Working Classes Act, 1890, imposed on the respondents a duty to deal with the appellant's houses under its provisions. Possibly the powers given by the Housing of the Working Classes Act, 1890, s. 38, might have been exercised, but the question is whether the powers of s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, were not equally exercisable. Resort to the powers given by s. 41 of that Act is not ipso facto evasion of a duty to use the powers given by s. 38 of the Act of 1890. It is only the reason why no duty under the latter section ever arises. The conduct of the respondents may have been unsympathetic, and their administration Draconian; but, if that is all, we are not called on to say what we think about it.

In the matter of the right of appeal I think the appellant has been mistaken from the first. By the Manchester Improvement Act, 1871, s. 37, and the Manchester Police Act, 1844, s. 262, the appellant, if dissatisfied with an order made under s. 41 of the 1867 Act, was given a right of appeal to the general quarter sessions for the borough. The appellant has been advised that the time for this statutory appeal, which has to be taken by giving notice of appeal, runs from the date when the city council adopted their sanitary committee's recommendation that the houses in question should be closed. He complains that he was not informed that this adoptive resolution had been passed till so long after its date that the statutory interval for giving notice of appeal had elapsed. On this he has argued that, since such a thing is permissible under the section—nay, has actually happened—the

section should be read in a narrowly restricted sense, so that if the respondents should be minded to be tyrannical they may at least be only a tyrant on a small scale.

The whole of this is, in my opinion, fallacious. By the section the only thing that operates against the appellant is an order "affixed conspicuously on his building." Till such publication has taken place neither he nor his tenants can be fined, and, as far as I can see, the respondents are free to rescind or to ignore their own determination or order. The words of the proviso at the end of the section, which refer to revocation of an order which has been affixed on the building and then has been complied with, seem to me to confirm this view. The right of appeal given by the Manchester Improvement Act, 1871, s. 37, is an appeal against an order, determination, or adjudication of the respondents with which the appellant is dissatisfied, and nothing can be truly said to be adjudicated or ordered which is done behind the backs of the parties affected, and may be altered, cancelled, or forgotten just as the body making the order may choose. Further, the appellant has no appealable dissatisfaction with something which he can disregard without peril or prejudice to himself. It is said, and truly so, that such a construction requires the house to be placarded and pro tanto aspersed before the owner can appeal at all, but I do not see what difference it makes whether the order is published on the house or in the newspapers, or otherwise, to all whom it may concern. It is not appealable till it is operative, and it is not operative till it is published in manner prescribed by the Act.

It is said, too, that the gist of the offence is occupation after the expiration of a time fixed in the order, and that the respondents might deliberately limit by their order a time so short as to disable the owner of the building from bringing any appeal to a hearing. So I suppose they might, but, if they did, I think they would find somehow, and quickly too, that they had not kept on the windy side of the law. When the legislature thinks fit to entrust a great corporation, with a judicial function, as I must conceive this to be, I do not think its meaning is to be tested by making the unsubstantial hypothesis that the corporation will betray their trust. Furthermore, the effect of s. 49 of the Act of 1867, which applies s. 247 to s. 261 of the Manchester Police Act, 1844, to the Act of 1867, is to make the penalties imposed by s. 41 recoverable, and as I think exclusively recoverable, before justices, and s. 50 of the same Act provides for the case of an offence, completed by non-compliance within the time fixed, even though the time for applying has not run out, and a fortiori for a case where the notice of appeal has been given but it has not been possible to bring the appeal to a hearing, in a manner which sufficiently meets the difficulty suggested by the argument. I think these considerations suffice to dispose of what seems to be really an academic objection. This being so, the appellant will have an opportunity, when a closing order has been affixed on his buildings, of appealing against it to the city sessions. Various questions which were raised before your Lordships and the courts below will then be open to him. Is a house unfit for human habitation which has been fitly inhabited for over half a century? Is this alleged stuffiness a real unfitness or a sanitary fad? Is a house unfit merely because other houses are built very close to it, though there is no objection to its own condition or construction? If the old privies are removed, as I understand the various owners have done or will do, is a house unfit merely because its back yard is inconveniently small? Is it unfit even though that back yard, with or apart from adjacent buildings, provides scanty ventilation or light to a scullery, or a cellar, or a staircase window, the living rooms being well lit and well ventilated? If such back part is unfit, can an order be made condemning the whole house, and so declaring the front parts unfit as well, though they open on to reasonably wide streets? As these questions may be, and I dare say will be, discussed elsewhere, I will only say what I think, as the Court of Appeal thought, that there is a good deal to be said about them.

One point remains. Can the appellant bring an action for trespass to his buildings on the ground that an order has been affixed to them which was made in error,

or can he bring an action for an injunction to restrain such an anticipated trespass, and in either case raise directly the question of fact whether the houses are fit for habitation or not as a question for a judge or jury? Frankly, my Lords, I hope that he cannot. The appeal to the sessions is an apt and usual way of getting such a question judicially determined, though it is true that the remedies are less wide than those which the High Court can give. If, in addition, the same matter can be raised in the High Court, a recalcitrant owner in a doubtful or unpopular case might thwart the exercise of the respondents' powers by the threat of protracted and costly litigation. The Vice-Chancellor heard evidence at the trial as to the actual condition of the buildings in question with reference to their fitness or unfitness for human habitation. This was relevant to the issue as to the respondents' good faith, an issue disposed of in the respondents' favour. In so far as such evidence was tendered on the question of the fitness of the buildings in fact, I do not think it was completed. Certainly the Vice-Chancellor decided no such issue of fact, but held that under the section it was not competent for him to do so. When the respondents appealed, the present appellant gave no notice that he would ask to have the decision below varied, or to have the case sent back to be completed and disposed of on this issue, a course which, by R.S.C., Ord. 58, r. 6, he ought to have taken if he was to raise any such question on appeal, nor does he appear to have argued this point. It seems to me that the competency of an inquiry into this issue of fact in such an action as the present may not strictly come before your Lordships for decision on this appeal, but I will venture to say a few words on the point. Section 41 of the Act of 1867 is provided with no machinery of appeal. I shall assume that from 1867 to 1871, any person affected by the respondents' order could test its validity on the merits in an action at law, and so put the defendants to justify their proceedings, though I think it may be doubted whether a section which enables a corporation by their own act to create an offence punishable by a court of summary jurisdiction can be construed as impliedly subjecting the exercise of that power to the ordinary civil jurisdiction in an action; and LORD SELBORNE's language in *Spackman* v. *Plumstead Board of Works* (5) gives ground for saying that under that section the respondents' order was final. It is said that this section is the only empowering section in all the Manchester Acts which does not provide for an appeal. It is suggested that this was an inadvertent omission, cured at the respondents' own instance when next they had occasion to come to Parliament. I daresay this is so, but the Act of 1871 does not provide that it is to be construed as one with or as part of the Act of 1867, and I do not think a mere surmise that the appeal was inadvertently omitted from the first Act can supply the want of such words in the second. Their omission is simply another case of inadvertence. The appeal given, however, is against any order of the respondents or of any justice, under this Act, the Act of 1871, or under the Act of 1867. The orders of justices would not be open to review in an action. So far as they are concerned, the appeal given in 1871 is clearly an exclusive remedy. I think it would be anomalous, as most certainly it would be inconvenient, to construe the appeal given in 1871, so far as the respondents' orders are concerned, as a concurrent remedy, and I think the section may be, and ought to be, read as conferring the particular remedy by way of appeal on the assumption in both cases that, so far as the question of fact is concerned, either there has been no other remedy before, or that at any rate there shall be no other remedy thereafter. In either case it makes the general quarter sessions, in effect, the exclusive tribunal before which the correctness of the respondents' decision can be questioned, assuming that an occasion for the exercise of its jurisdiction has occurred. Accordingly, I am of opinion that the appeal fails on all points, and should be dismissed.

LORD PARMOOR.—The appellant is the owner in fee of Nos. 1, Dorrington Street, and 60 and 62, Vine Street, Hulme, in the city of Manchester. On Apr. 19, 1912, an inspector of nuisances in and for the city of Manchester certified under s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, that

the above buildings were unfit for human habitation. After inquiry and consideration the town clerk, on Oct. 4, 1912, was instructed to post on the above buildings an order declaring them unfit for human habitation. Before posting the order the town clerk wrote to the appellant to give him a further opportunity to carry out certain alterations to the satisfaction of the city surveyor. In answer to this communication, the appellant gave notice that he intended to question the legality of the action of the respondents, and asked that the posting of the order should in the meantime be suspended. The appellant then commenced an action in the Chancery Division of the County Palatine of Lancaster for an injunction to restrain the respondents from entering on his property and posting and affixing thereon notices declaring such property unfit for human habitation, and obtained a declaration in his favour. This decision was reversed in the Court of Appeal.

The question to be decided turns wholly on the construction of s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867. It is not necessary to restate the words of the section, but the construction does not appear to me to present any unusual difficulty. It is clear that no question of fact as to whether a building is or is not unfit for human habitation can be competently entertained in these proceedings. I agree with the emphatic words of BUCKLEY, L.J., that the court in these proceedings has nothing to do with questions of fact. Section 41, as it stood in the Act of 1867, did not provide any appeal against the determination of the respondents, and made the respondents the final tribunal to determine questions of fact, provided that they acted bona fide, and within the powers which the section conferred on them. Later, in 1871, an appeal to the general quarter sessions was given to any person dissatisfied with any order, determination, apportionment, or adjudication of the respondents. Hence there is an appeal open to the general quarter sessions on questions of fact, but the appellant has preferred to raise a question of law.

In the argument before your Lordships the point was raised whether an appeal to the general quarter sessions was still open to the appellant, having regard to the lapse of time. This does not come before the House for direct decision, but I agree with the view expressed in the letter of the town clerk of Nov. 28, 1912. The authority given to the respondents under the section is to declare a building, or part of a building, not fit for human habitation by affixing their order conspicuously on such building or part of such building. Until such order has been so affixed there has been no formal determination or adjudication by the respondents, and, provided that the notice of appeal is given within twenty-eight days from the date of the affixing of the order, it appears to me to be in time. Counsel for the respondents stated that they were willing to issue a new order, as they had no desire to put any obstacle in the way of an appeal by the appellant to the general quarter sessions. The case for the appellant is that the respondents are not acting within their statutory authority in proposing to affix the order on Nos. 1, Dorrington Street, and 60 and 62, Vine Street, in the city of Manchester. At one time an allegation was made that the respondents had not acted bona fide, but from some sinister or indirect motive. I can find no evidence to support this allegation. It was not seriously pressed in the argument before your Lordships. In my opinion the procedure adopted by the corporation gives a fair notice to the owner of the buildings affected and enables him to obtain a fair hearing. The letters of the town clerk show that the respondents were desirous to give full opportunity to the appellant to enable him to comply with their requisitions before actually affixing the order on the buildings. The appellant contends that the respondents have no power under the section to declare a building or part of a building unfit for human habitation unless such building, or part of such building, is so unfit by reason of some structural or other defect existing in the building itself. I doubt whether the learned Vice-Chancellor adopted this view of the section. He says:

> "The unfitness referred to in the section is, I think, an unfitness which arises from the act or default of an owner, and which he can remedy, and does not apply to an unfitness which he cannot."

It is unnecessary, however, to further consider the construction contended for by the appellant, or that adopted by the learned Vice-Chancellor, since the respondents claim that, if a building or part of a building is from any cause, intrinsic or extrinsic, unfit for human habitation, they have power to make an order, not for closing such building or part thereof, but to prevent its use for the purpose of human habitation. In the present case insufficient air space and ventilation are the alleged cause of the unfitness on which the order was made. Whether or not the respondents have given a right decision within the ambit of their power does not arise in this appeal, and I desire to give no indication of opinion on either side. Section 41 of the Act of 1867 does not in form contain any words of limitation. The section appears to me to be unambiguous, and I adopt without any hesitation on this point the judgments in the Court of Appeal. In his address counsel for the appellant referred to a number of preceding or subsequent Acts in support of his argument that the scope of the section was limited to unfitness caused by some structural or other defect existing in the building itself. The later Acts have no relevance to the question of construction, but no doubt preceding Acts may be material so far as they show the state of the law at the time of the passing of the Act of 1867. These Acts are four in number, three of them general public Acts containing provisions for public health and sanitation, and one a local Act of Manchester of 1844. When the sections in these Acts, to which the attention of the House was directed, are considered, they give no assistance in the construction of s. 41 of the Act of 1867. Assuming that the powers conferred in the sections of the preceding Acts only apply to buildings unfit because of some structural or other defect existing in the building itself, no inference arises that a similar restriction should be implied in s. 41 of the Act of 1867 in which the language is different.

In my opinion the respondents are acting within their powers and the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Edward Le Voi & Co.*, for *H. L. F. Berry*, Manchester; *Austin & Austin*, for *Thomas Hudson*, Town Clerk, Manchester.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

SCHAFFENIUS *v.* GOLDBERG

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Bankes, and Warrington, L.JJ.), November 26, 1915]

[Reported [1916] 1 K.B. 284; 85 L.J.K.B. 374; 113 L.T. 949; 32 T.L.R. 133; 60 Sol. Jo. 105]

Alien—Enemy—Right to sue—Effect of internment.

The restraint imposed on the movements of an alien enemy, who is resident in this country under a licence to remain here granted him by the Crown on his registration as an alien enemy under the appropriate legislation, by his internment within the realm as a civilian prisoner of war does not make him an alien ex lege and deprive him of his civil rights in respect of a lawful contract entered into by him before the internment. He is in no worse position than a person who is in custody for an offence.

Sparenburgh v. *Bannatyne* (1) (1 Bos. & P. 163) applied.

Dictum in *Wells* v. *Williams* (2) (1 Lord Raym. 282, at p. 283), disapproved.

Notes. Applied: *Nordman* v. *Rayner* (1916), 33 T.L.R. 87; *Netz* v. *Ede*, [1946] 1 All E.R. 628. Considered: *R.* v. *Bottrill, Ex parte Kuechenmeister*,

[1946] 2 All E.R. 434. Referred to: *Johnstone* v. *Pedlar*, [1921] All E.R.Rep. 176; *Re an Arbitration between N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij and Soufracht*, [1942] 1 K.B. 222.

As to the right to sue of alien enemies, see HALSBURY'S LAWS (3rd Edn.) tit. Ward Emergency; and for cases see 2 Digest (Repl.) 241–247.

Cases referred to:

(1) *Sparenburgh* v. *Bannatyne* (1797), 1 Bos. & P. 163; 2 Esp. 580; 126 E.R. 837; 2 Digest (Repl.) 242, *447*.

(2) *Wells* v. *Williams* (1647), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 242, *440*.

(3) *Porter* v. *Freudenberg*, *Kreglinger* v. *Samuel and Rosenfeld*, *Re Merten's Patents*, post; [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 242, *444*.

(4) *R.* v. *Superintendent of Vine Street Police Station*, *Ex parte Liebmann*, post, p. 393; [1916] 1 K.B. 268; 85 L.J.K.B. 210; 113 L.T. 971; 80 J.P. 49; 32 T.L.R. 3; 25 Cox, C.C. 179; 2 Digest (Repl.) 244, *464*.

(5) *Princess Thurn and Taxis* v. *Moffitt*, ante, p. 301; [1915] 1 Ch. 58; 84 L.J.Ch. 220; 112 L.T. 114; 31 T.L.R. 24; 59 Sol. Jo. 26; 2 Digest (Repl.) 242, *443*.

Also referred to in argument:

R. v. *Schiever* (1759), 2 Burr. 765; 97 E.R. 551; 2 Digest (Repl.) 216, *290*.

Furly v. *Newnham* (1780), 2 Doug. K.B. 419; 99 E.R. 269; 2 Digest (Repl.) 244, *463*.

Three Spanish Sailors' Case (1779), 2 Wm. Bl. 1324; 96 E.R. 775; 2 Digest (Repl.) 244, *462*.

Wolf & Sons v. *Carr*, *Parker & Co.* (1915), 31 T.L.R. 407; [1915] W.N. 195, C.A.; 2 Digest (Repl.) 241, *439*.

Maria v. *Hall* (1807), 1 Taunt. 33; 127 E.R. 741; 2 Digest (Repl.) 242, *448*.

Re Mary, Duchess of Sutherland, *Bechoff*, *David & Co.* v. *Bubna* (1915), 31 T.L.R. 248; subsequent proceedings, 31 T.L.R. 394, C.A.; 2 Digest (Repl.) 215, *284*.

Appeal by the defendant from an order of YOUNGER, J., made in an action brought by the plaintiff to enforce an agreement between the parties.

Elkin for the defendant.

J. B. Matthews, K.C., and *Samuel Duncan* for the plaintiff.

LORD COZENS-HARDY, M.R.—This is an appeal from the judgment of YOUNGER, J., which raises a point which is undoubtedly one of importance.

The plaintiff was a German by birth who had been resident in this country for twenty-two years, and had carried on business here during that time. Immediately after the outbreak of the war [between Great Britain and Germany on Aug. 4, 1914] he registered himself under the provisions in force for the registration of aliens. That operated as a licence for him to remain in the country, and carried with it the right to trade and enter into agreements with British subjects. The agreement in question, under which the plaintiff agreed to finance the defendant in a business concerned with the manufacture of picture mouldings and to buy from him the whole of his output, was entered into in March, 1915, and there is nothing in the agreement itself to lend colour to the suggestion that it was otherwise than perfectly free from objection. A considerable sum of money is admittedly due from the defendant to the plaintiff under that agreement. The plaintiff was interned in July, 1915; a writ was issued on Sept. 7, and the judgment was delivered on Sept. 29. The only point tried was this. The defendant said that the plaintiff could not take any proceedings having regard to his internment, in other words, to use a phrase which is certainly not grammatical, but which meets the case, that the plaintiff was ex lege and had no locus standi in the courts at all, and that the action ought, therefore, to be dismissed. YOUNGER,

J., made a declaration that the contract between the plaintiff and the defendant was not affected by the plaintiff's internment, but that the plaintiff was entitled to sue upon the contract and maintain an action, and he gave liberty to amend the writ, and so on. From that decision this appeal is brought.

I think that one must be very careful not either expressly or by reasonable implication to say anything inconsistent with the judgment of the full Court of Appeal in *Porter* v. *Freudenberg* (3) delivered by Lord Reading, C.J., after the most elaborate discussion with all the other members of the court. What did that case decide? It decided, of course, that for the purpose of trading "alien enemy" does not mean nationality. That is not the test. It decided also by way of approving Sargant, J.'s judgment in that case that the effect of registration as an alien was that it was a licence by the Crown to the person who takes advantage of that proceeding and registers. It does not decide, nor could it reasonably have been asked to decide, that such a licence cannot be revoked by the Crown. But there is no circumstance here which can be suggested for one moment as evidence of revocation unless it be the internment of the plaintiff which took place in July of this year. We have been referred to a number of authorities, most of which, I will not say all, but by far the majority of which, were referred to and discussed in *Porter* v. *Freudenberg* (3). I deliberately do not intend to go back on anything that was said there, but there is one point at least which may be taken to be new, and it is this. It is said that, although it is true that registration has the effect of a permission from the Crown to remain in this country, yet that permission only lasts so long as the person registered does not molest the Crown and the Crown does not molest him, and it is said that the plaintiff in the present case is plainly molested by being kept in confinement in the Isle of Man under the Internment Order.

I think that there is absolutely no authority for that proposition. One authority was relied upon by counsel—namely, *Wells* v. *Williams* (2), and in that only one passage in the judgment. I do not know whose judgment it is, but the judge presiding in the court said this (1 Ld. Raym. at p. 283):

> "Though the plaintiff came here since the war, yet, if he has continued here by the King's leave and protection ever since, without molesting the government or being molested by it, he may be allowed to sue, for that is consequent on his being in protection."

What is the meaning of the expression "being molested by the government"? I think that it means only that, if it be shown that the licence was withdrawn by the Crown, that is a molestation which would prevent, or might prevent, the plaintiff from suing. I do not rely solely upon that, because, although *Wells* v. *Williams* (2) no doubt is a case of great importance, it is reported in more than one place. In the report in Salkeld the words which I have read, "without molesting the government or being molested by it," are not to be found. The judgment is very short, and I will read it:

> "If an alien enemy comes hither sub salvo conductu, he may maintain an action; if an alien enemy comes hither in time of peace, per licentiam domini regis, as the French protestants did, and lives here sub protectione, and a war afterwards begins between the two nations, he may maintain an action, for suing is but a consequential right of protection."

That judgment seems to me to put *Wells* v. *Williams* (2) on a perfectly satisfactory foundation, and I entirely decline to assume that such an important proposition as counsel for the defendant here relies upon can be established upon one single sentence in a short judgment in Lord Raymond's report. The observation which I have read from that report seems to me to be wholly irrelevant and, if I may respectfully say so, wrong, unless by "molesting" it means only that the Crown thinks fit under its prerogative to revoke the permission which it gave by its licence, in which case the man has no licence.

Then it is said that there is no authority at all which supports the present

appeal, but there is authority against it, and we have been referred to certain cases including the very recent case of *R.* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (4) in the Divisional Court, in which there was laid down a proposition, which I do not for a moment question, that a writ of habeas corpus cannot be taken out by a prisoner of war nor by an interned prisoner. That is all that case decided, and the decision seems to me, if I may respectfully say so, to be perfectly right. Speaking for myself, however, and for myself only, I desire not to be held to accept in its entirety the language used by the two learned judges, BAILHACHE and LOW, JJ. To carry those observations to the extent which it is sought to go—namely, that an interned German, in the circumstances in which the plaintiff in the present case finds himself, is, for the purpose of enforcing civil rights, to be treated as a prisoner of war in the same way as if he had been captured in a German ship or at some point in Flanders or elsewhere—to carry those observations to that extent is altogether—I think, an extension of the doctrine which I cannot in any way countenance.

I do not think that the present case is so bare of authority as was suggested. One of the cases to which our attention has been called is that of *Sparenburgh* v. *Bannatyne* (1). In that case the question was whether a German taken on a privateer vessel, I think it was—which was properly captured by the British government—he being a prisoner, could bring an action for wages due. The court, consisting of EYRE, C.J., and HEATH and ROOKE, JJ., dealt with it in observations which seem to me to be very helpful. EYRE, C.J., said (1 Bos. & P. at p. 168):

> "But a neutral, whether in or out of prison, cannot, for that reason, be an alien enemy. He can be alien enemy only with respect to what he is doing under a local or temporary allegiance to a Power at war with us. When the allegiance determines, the character determines. He can have no fixed character of an alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us; it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of war, how does he differ from any other individual who is in custody for an offence which he has committed, and for which he is answerable?"

A prisoner who may be committed to prison for an offence is not ex lege; he is entitled to assert his civil rights; and it is not right to say that the plaintiff in the present case, although his personal liberty is curtailed by the internment order, as it was, though to a less extent, by the order under the Aliens Registration Act, 1914, has lost all power of enforcing his rights in respect of the trade which he has been carrying on without any possibility of complaint since the agreement entered into by him in March of this year.

The matter does not rest there. HEATH, J., said (ibid. at p. 170):

> "Next as to the general question, the pleas state that the plaintiff was adhering to the King's enemies; they must be proved in all their parts; but a prisoner at war is not adhering to the King's enemies, for he is here under protection of the King. If he conspires against the life of the King it is high treason; if he is killed it is murder; he does not, therefore, stand in the same situation as when in a state of actual hostility. It has been said that a prisoner of war cannot contract; his case would be hard indeed if that were true."

That, I think, must be taken to mean that he can contract, and can assert his rights under the contract.

Later, HEATH, J., said (ibid.):

> "The contract in question was made by the permission of the King's officer, and therefore by the licence of the King, under whose authority the officer may be presumed to have acted."

ROOKE, J., says the same thing (ibid.):

> "An enemy under the King's protection may sue and be sued; that cannot be doubted. A prisoner of war is, to certain purposes, under the King's protection, and there are many cases where he can maintain an action. I will suppose that an officer of high rank on his parol is possessed of a ring or a jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him and refuse either to advance the money or return the pledge. Surely the court would say that he might recover his ring or his jewel from the tradesman."

If authority be wanted in support of the decision of YOUNGER, J., I think that it is to be found in *Sparenburgh* v. *Bannatyne* (1). But I do not base my judgment upon that point alone. It seems to me to be in accordance with general principles that the restraint which is imposed upon the personal movements of an interned German does not deprive him of civil rights in respect of a lawful contract entered into by him before the internment. For these reasons I think the appeal fails, and must be dismissed with costs.

BANKES, L.J.—I quite agree. The defendant's argument, as I understand it, is founded upon the fact that the plaintiff in the present case is both an alien enemy and a prisoner of war, and it seems to be suggested that because he is both of these he is in some different position than if he were only an alien enemy or only a prisoner of war. I do not agree with that proposition at all. The plaintiff's position as an alien enemy is rendered quite clear by the authorities. Upon the authority of *Princess Thurn and Taxis* v. *Moffitt* (5) and *Porter* v. *Freudenberg* (3) the plaintiff is in protection, and he is entitled to enforce in the courts of this country any civil rights that he may have. As a prisoner of war the plaintiff's position upon the authorities is quite clear. He is in no worse position than any other individual who is in custody for an offence. Therefore, he is entitled, upon the authorities, to maintain an action. But it is said that there is authority for the proposition that a person who, to use the language of the defendant's counsel, is either molesting the government or being molested by the government is in some different position from that of an alien enemy such as the plaintiff was, or a prisoner of war. In my view, there is no authority for that proposition. The only case in which in any judgment of the court those words are used is *Wells* v. *Williams* (2), as reported in LORD RAYMOND'S reports. As there alone reported, it seems to me that the reference to molestation is a reference to something that may be evidence of a licence, if it had been given, having been withdrawn, or there having been no licence at all. But it is not a separate proposition, nor is it a separate condition, apart from the condition of the alien enemy or the prisoner of war, which would disentitle this plaintiff to enforce any civil rights he may have in a court of law. On these grounds, I agree with the judgment of the court below and with the judgment delivered by the Master of the Rolls.

WARRINGTON, L.J.—The defendant here asserts that the plaintiff is for the time deprived of all civil rights, including particularly the right to institute and maintain an action in these courts. The plaintiff was a native of Germany. On the outbreak of war he complied with the Aliens Restriction Regulations and registered himself. The result of that was that he was for all civil purposes to be treated as either an alien friend, or even as a British subject. But, at any rate, it gave him the right to enter into any otherwise lawful contract and the right to resort to these courts for the purpose of enforcing his rights either under a contract made after the commencement of the war or under a contract made before the commencement of the war.

On July 1, 1915, the plaintiff was interned—that is to say, the King, in the exercise of his right and duty in defence of the realm, thought it desirable for that purpose that he should no longer be at large. It is said that from that moment,

so long as he remains interned, he loses all his civil rights—that is to say, that the first man who comes along might go and live in his house, and, provided he kept outside the criminal law, might take possession of his property and deal with it as he pleased, and the courts of this country could not interfere. It seems to me that such a proposition carries its own answer with it. It is so extravagant that it cannot possibly be the law of this country in time of war. Is it capable of being supported by any authority? In my opinion, clearly not. The right of an alien of enemy birth to sue in this country is derived from the fact that he is resident here under a licence from the Crown. Under a licence to do what? Simply to remain in this country. That is the only licence that is material. Can it be that a licence to remain in this country is recalled by an act of the Crown with compels him to remain in this country? It seems to me again one has only to state the proposition to see that it cannot possibly be so. In my judgment, notwithstanding the internment, the licence to remain in the country, which carries with it his right to prosecute an action in the courts of this country, must remain in force.

I have said this because we have been referred to *R.* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (4), before BAILHACHE and LOW, JJ., in which the only question the court had to determine was whether an interned alien was entitled to issue out a writ of habeas corpus—a very different question—and the decision of the court was that an interned alien had no right by means of a writ of habeas corpus to question the authority of the Crown to intern him. But there was no necessity to decide any further question, and I desire to express, as far as I am personally concerned, my disagreement, as at present advised at all events, with the statement made in the judgment of LOW, J., that in his opinion there was little doubt that it might be successfully contended that notice of internment was a sufficient revocation of the licence to remain in this country. I cannot agree with that, and I think it desirable, therefore, that I should say so, although our judgment in itself imports a disagreement with that proposition. The authorities that have been cited to us with regard to prisoners of war in olden times only go to this, that the prisoner of war could not issue out a writ of habeas corpus. That nobody now disputes. There is no case which goes so far as the proposition contended for by the defendant in the present case, and, in my judgment, *Sparenburgh* v. *Bannatyne* (1) is a distinct authority to the contrary.

Appeal dismissed.

Solicitors: *A. de Freece & Co.*; *Humphreys, Phillips & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

R. *v.* SUPERINTENDENT OF VINE STREET POLICE STATION. Ex Parte LIEBMANN

[King's Bench Division (Bailhache and Low, JJ.), August 30 and September 6, 1915]

[Reported [1916] 1 K.B. 268; 85 L.J.K.B. 210; 113 L.T. 971; 80 J.P. 49; 32 T.L.R. 8; 25 Cox, C.C. 179]

Alien—Enemy—Civilian—Liability to internment as prisoner of war—Right to writ of habeas corpus.

An alien enemy resident in the United Kingdom who, in the opinion of the executive government, is a person hostile to the welfare of this country and is on that account interned, may be properly described as a prisoner of war, and be interned as such, although not a combatant or a spy, and, being a prisoner of war, he is not entitled to obtain a writ of habeas corpus.

The applicant was born in Germany in 1868 of parents who were German subjects and he resided in Germany. In 1889 he came to England for business purposes, and had since carried on business in England. In 1890 he became denationalised in Germany, obtaining a formal discharge from German nationality, but he never became naturalised as a British subject. In August, 1915, he was interned by order of the executive government as a prisoner of war. On an application for a writ of habeas corpus for his discharge,

Held: although the applicant had obtained a formal discharge from German nationality, he had not become a naturalised British subject, and as, under German law, he had not thereby become entirely divested of the rights of a natural-born German, he was, therefore, an alien enemy and could be interned as a prisoner of war; accordingly, the application for a writ of habeas corpus would be refused.

Ex parte Weber (1), [1916] 1 K.B. 280, n., followed.

Notes. Considered: *Schaffenius* v. *Goldberg*, ante, p. 387. Followed: *R.* v. *Knockaloe Camp Commandant, Ex parte Forman* (1917), 87 L.J.K.B. 43. Distinguished: *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67. Considered: *R.* v. *Home Secretary, Ex parte L.*, [1945] K.B. 7; *Netz* v. *Ede*, [1946] 1 All E.R. 628. Approved: *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 2 All E.R. 434. Referred to: *Lowenthal* v. *A.-G.*, [1948] 1 All E.R. 295.

As to habeas corpus, see 11 Halsbury's Laws (3rd Edn.) 24 et seq.; and for cases see 17 Digest (Repl.) 420.

Cases referred to:

(1) *Ex parte Weber*, [1916] 1 K.B. 280, n.; 80 J.P. 14; 31 T.L.R. 602; 59 Sol. Jo. 692; affirmed, [1916] 1 A.C. 421; 85 L.J.K.B. 944; 114 L.T. 214; 80 J.P. 249; 32 T.L.R. 312; 60 Sol. Jo. 306; 25 Cox, C.C. 258, H.L.; 2 Digest (Repl.) 214, *279*.

(2) *R.* v. *Schiever* (1759), 2 Burr. 765; 97 E.R. 551; 2 Digest (Repl.) 216, *290*.

(3) *Furly* v. *Newnham* (1780), 2 Doug. K.B. 419; 99 E.R. 269; 2 Digest (Repl.) 244, *463*.

(4) *Three Spanish Sailors' Case* (1779), 2 Wm. Bl. 1324; 96 E.R. 775; 2 Digest (Repl.) 244, *462*.

(5) *Sylvester's Case* (1703), 7 Mod. Rep. 150; 87 E.R. 1157; 2 Digest (Repl.) 250, *507*.

(6) *Princess Thurn and Taxis* v. *Moffitt*, ante, p. 301; [1915] 1 Ch. 58; 84 L.J.Ch. 220; 112 L.T. 114; 31 T.L.R. 24; 59 Sol. Jo. 26; 2 Digest (Repl.) 242, *443*.

(7) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel and Rosenfeld, Re Merten's Patents*, post; [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 242, *444*.

Also referred to in argument:

Wolfe Tone's Trial (1798), 27 State Tr. 613; 39 Digest 343, *286*.

R. v. *Superintendent of Albany Street Police Station, Ex parte Carlebach*, [1915] 3 K.B. 716; 84 L.J.K.B. 2121; 113 L.T. 777; 31 T.L.R. 634; 25 Cox, C.C. 108; 2 Digest (Repl.) 199, *185*.

Application for a writ of habeas corpus.

On July 31, 1915, the applicant, Alfred Liebmann, was served by a superintendent of Police with the following notice:

"Take notice that it is intended to intern you as a prisoner of war on Tuesday, the 3rd day of August 1915";

and this notice was issued by authority of the Home Secretary. Under this notice the applicant was interned on Aug. 17. On an application being made on behalf of the applicant to Low, J., in chambers, the judge made an order on Aug. 20, 1915, that all parties concerned should attend the judge in chambers on Aug. 24, 1915

"to show cause why a writ of habeas corpus should not issue directed to the Superintendent of Police, Vine Street Police Station, Piccadilly, W., to have the body of Alfred Liebmann before a judge in chambers at the Royal Courts of Justice, London."

This summons, issued by the judge in chambers, was adjourned, and it was afterwards arranged that it should come before a Divisional Court, and that, for the purposes of the case, the summons should be treated as the granting of a rule nisi for a writ of habeas corpus.

The Solicitor-General (*Sir Frederick E. Smith*) and *Branson*, for the Crown, showed cause against the rule.

T. Healy, K.C. (*Frampton* with him), in support of the rule.

Cur. adv. vult.

Sept. 6. The following judgments were read.

BAILHACHE, J.—This is an application for a writ of habeas corpus by one Alfred Liebmann, who is interned at Vine Street Police Station. He was interned on Aug. 17, 1915, in pursuance of a notice sent to him by a superintendent of the Metropolitan Police, which, so far as is material, is in these terms:

"Take notice that it is intended to intern you as a prisoner of war on Tuesday, Aug. 3, 1915."

This notice was issued, we are told, by authority of the Home Secretary. The facts are that the applicant was a German subject born in Germany in 1868. He came to England for business reasons in 1889, and has resided and carried on business in England ever since. In May, 1890, he obtained a formal discharge from German nationality. He never became naturalised as an English citizen. The case was treated by consent as if a rule nisi had been granted, and the Crown by the Solicitor-General showed cause against the rule. In so doing, the Solicitor-General took the preliminary point that no writ of habeas corpus will issue in the case of a prisoner of war, and alleged that the appellant is a prisoner of war. We decided to hear argument on the whole case before dealing with this preliminary objection, and the Solicitor-General then made the further point that the Home Secretary in interning the applicant was acting in exercise of the royal prerogative to imprison alien enemies in time of war, and that the applicant was an alien enemy. Counsel who appeared for the applicant argued that the applicant was neither a prisoner of war nor an alien enemy, and further denied the existence of any such royal prerogative as that asserted. It appeared from the argument on behalf of the Crown that the contention that the Crown could, by virtue of its inherent prerogative, imprison civilians during a time of war was

not limited to alien enemies, although it was not necessary to claim any higher or further prerogative in this case.

If the preliminary objection raised by the Crown is sound, the second point, which is one of supreme constitutional importance, does not arise. It will be convenient, therefore, to consider the preliminary objection first. In so doing, the question whether the applicant is an alien enemy is so closely connected with the question whether he is a prisoner of war that it is necessary to discuss and determine both these points. I will consider in the first place whether the applicant is an alien enemy. He denies it, and claims that he is a person of no nationality. I have had the advantage of reading the judgment about to be delivered by Low, J. He has so fully dealt with this point that it is sufficient for me to say that I agree with the conclusion at which he has arrived. I agree, too, that this point is covered by the decision of the Court of Appeal in *Ex parte Weber* (1). There is a distinction between the two cases in that, in *Weber's Case* (1) nationality was lost by long residence abroad, while in this case the applicant obtained a formal discharge from German nationality, but, in my judgment, this distinction makes no difference in principle. The applicant is an alien enemy.

Next, is the applicant a prisoner of war? It is at first sight somewhat startling to be told that a civilian resident in this country, interned by the police on the instructions of the Home Secretary, can be accurately described as a prisoner of war. One generally understands by a prisoner of war a person captured during warlike operations by the naval or military forces of the Crown, or, perhaps, a civilian arrested as a spy. I think, however, that the courts are entitled to take judicial notice of certain notorious facts which may be summarised thus: There are a large number of German subjects in this country. This war is not being carried on by naval and military forces only. Reports, rumours, intrigues, play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only refer to wireless telegraphy, signalling by lights, and the employment, on a scale hitherto unknown, of carrier pigeons. Spying has become the hall-mark of German "kultur." In these circumstances, a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movement of submarines and Zeppelins—a far greater danger, indeed, than a German soldier or sailor. I have come to the conclusion that a German resident in the United Kingdom, who, in the opinion of the executive government, is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although not a combatant or a spy.

I have gone at such length into this part of the case for several grave reasons. It is, I believe, settled law that no writ of habeas corpus will be granted in the case of a prisoner of war. The cases cited on behalf of the Crown—*R.* v. *Schiever* (2); *Furly* v. *Newnham* (3); and the *Three Spanish Sailors' Case* (4)—are conclusive on the point. If, therefore, the applicant is in fact a prisoner of war, as I hold that he is, his application must fail. Another reason is that there is, I understand, no precedent, except in the case of a spy, which covers the case of a civilian subject of a Power at war with this country. The cases above referred to are all cases of combatants, prisoners of war in the ordinary acceptation of that term. As the preliminary objection succeeds it is unnecessary to say more; but these courts are specially charged to safeguard the liberty of the subject as one of their most sacred duties. The courts owe that duty not only to the subjects of His Majesty, but also to all persons within the realm who are under His Majesty's protection and are entitled to resort to these courts to secure for them any rights which they may have, and this whether they are aliens or alien enemies. I think it right, therefore, to add that, deeply impressed as I am with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the realm, and I should be prepared to hold, as at present advised, that, when the internment of an alien enemy is considered by the executive government charged with the protection of the realm desirable in

the interests of the safety of the realm, and the government thereupon interns such alien enemy, the action of the government in so doing is not open to review by the courts of law by habeas corpus.

I trust that I have throughout made it quite clear that I have been confining my observations to the case of alien enemies. I desire with all the emphasis I can command to state expressly that I am not dealing with the case of British subjects or with aliens the subjects of neutral countries, and I trust that nothing in this judgment will be considered as having any bearing whatever on any class of persons other than alien enemies. I desire to say this because there were some observations by the counsel for the Crown as to the extent of the royal prerogative to which I am not prepared to assent.

I cannot leave this case without a reference to counsel for the applicant's argument that there can be no prerogative of the Crown to intern alien enemies, because, if there were, there would be no need for emergency legislation giving the King power to restrict the movements of aliens, to compel them to register themselves, and the like. His argument was that, if there is this inherent power in the Crown to imprison, there must be also inherent the power to do all the lesser acts provided for by the emergency legislation. This short résumé of counsel's argument scarcely does it justice. I felt the force of it, and must ask counsel and his client to believe that I have fully considered it. I do not know why express power to intern alien enemies was not included in the emergency legislation, or why there has been no Order in Council dealing with the subject as it now arises, but I notice that the emergency legislation reserves all the powers of the Crown. The rule nisi must be discharged.

LOW, J., stated the facts, and continued: The first question we have to determine is whether the applicant is an alien enemy. He was born at Mannheim in 1868. He resided in Germany until 1889, serving a year in the German Army. In 1889 he came to England, and has resided here ever since. In 1890 he obtained a document purporting to discharge him from German nationality, but he has taken no steps to naturalise himself here. In August, 1914, he registered himself as an "alien enemy" under the Aliens Restriction Order. He states that he did this although he knew that he was not a German subject, but, as he could not at the time find his document of discharge, he registered himself as a precaution, that he subsequently found the document, and applied to the police to cancel the registration, but they refused to do so. He also says that later he applied to the Home Office Advisory Committee to exempt him from internment, and that that application was refused. The discharge from German nationality to which I have referred is said to have been granted under the provisions of a German law of 1870, which law was amended by another German law of 1913. The effect of both these enactments has been already considered by the Court of Appeal in *Ex parte Weber* (1), and in my opinion, that decision covers this question. It is clear on the examination of these laws that they attempt to place what is called in the later statute "a former German" in a privileged position, and that such a person can recover full German nationality (see para. 13 of the Law of 1913) without even going back to Germany at all, whereas "a foreigner" (see para. 8) can only obtain German nationality after settling in Germany. It is clear, therefore, that this applicant has not become entirely divested of the rights belonging to a natural-born German, and, therefore, following the decision of the Court of Appeal, I hold that the applicant is an alien enemy.

The second question is—is he a prisoner of war? The authorities cited by counsel for the Crown—*R.* v. *Schiever* (2), *Furly* v. *Newnham* (3), and the *Three Spanish Sailors' Case* (4)—show, if authority were required, that a writ of habeas corpus cannot be granted on the application of a prisoner of war, even for the purpose of giving evidence, much less in order to obtain his release. We were informed that there are no other authorities, and that the question what, in the

circumstances of any particular case, constitutes a prisoner of war is one of first impression. Of course, in cases of actual combatants, such as in the cases cited, no question can arise, but, in my opinion, to show that a man is a prisoner of war it is not necessary for him to have been an actual combatant. War at the present moment is not, as it was in olden times, confined to easily ascertained limits. The inventions and discoveries of recent years, and especially the existing means of communication, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put on the exercise of acts of hostility, and real danger to the realm may, therefore, exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place. In addition to this, methods of warfare or methods ancillary to warfare have come into practice on the part of our foes which involve the honeycombing of the realm with enemies, not only for the purpose of obtaining and dispatching information, but for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war. In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul, it would, I think, be idle to expect the Executive to wait for proof of an overt act or for evidence of an evil intent. In my opinion, this court is entitled to take judicial cognisance of these matters, and, in a question so greatly involving the security of the realm, to say that, where the Crown in the exercise of its undoubted right and duty to guard the safety of all represents to this court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and, accordingly, within the terms of the notice served in this case, to intern such alien enemy as a prisoner of war, he must be regarded for the purpose of a writ of habeas corpus as a prisoner of war.

With regard to the third question, as to the prerogative of the Crown to arrest an alien enemy, I have really answered almost as much of it as is necessary to deal with the present case when I have been dealing with question 2. I have no doubt at all that such action is quite within the Crown's prerogative. At common law an alien enemy had no rights (see *Sylvester's Case* (5)), and he could be seized and imprisoned and could have no advantage of the law of England. This position, however, has been softened by custom and by the decision of the courts, and the judgment of SARGANT, J., in *Princess Thurn and Taxis* v. *Moffitt* (6), approved by the Court of Appeal in *Porter* v. *Freudenberg* (7), shows that an alien enemy registered under the Aliens Restriction Act, 1914, as this applicant is, is entitled to sue in the King's Courts (which would, I suppose, include such an application as the present), as he is resident here by tacit permission of the Crown, and so is sub protectione domini regis. He is, therefore, in a similar position to an alien enemy resident here under licence from the Crown. That licence, however, can be terminated at any time by the Crown, and, although this point was not presented to us in the present case, I have little doubt that it might be successfully contended that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the licence. Of course, the alien enemy is protected from outrage, because in such case it is not the alien who invokes the aid of justice, but the King in vindication of his peace. Whether his licence is revoked or not, I see no reason why it should protect him in the present circumstances from being made a prisoner of war.

As this court is especially charged as between the Crown and the subject to exercise the greatest care in safeguarding the subject's liberty, I desire, having regard to some of the arguments which were advanced in this case on behalf of the Crown, and which were strongly commented on by learned counsel for the applicant, to guard myself from being supposed to agree with all those arguments, and particularly to say that nothing in this judgment is intended to apply to the case, should it arise, of a British subject or of a friendly alien, but only to the case of an alien enemy. I should also add that, as I understood the argument

on behalf of the Crown, it was not sought to justify this arrest under any of the emergency statutes passed since the commencement of the war or the regulations made under them, nor was it necessary to do so, and I agree with the contention of counsel for the Crown that the inherent power of the Crown to deal with alien enemies is sufficiently saved by these enactments.

I am of opinion that this rule must be discharged.

Rule discharged.

Solicitors: *Cruesemann & Rouse; Treasury Solicitor.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

SMITH, CONEY AND BARRETT *v.* BECKER

[Court of Appeal (Lord Cozens-Hardy, M.R., Swinfen Eady and Phillimore, L.JJ.), January 11, 12, 1915]

[Reported [1916] 2 Ch. 86; 84 L.J.Ch. 865; 112 L.T. 914; 31 T.L.R. 151]

Contract—Illegality—Alternative methods of performing contract—One method illegal, alternative method legal.

By a contract dated Aug. 1, 1914, which incorporated an arbitration clause, buyers bought from sellers, both parties being British subjects, a quantity of sugar to be delivered f.o.b. Hamburg during that month. On Aug. 4 war broke out between Great Britain and Germany. The contract contained a provision that in the event of such a war the contract would be deemed to be closed at certain official quotations of the price of sugar and any sum found to be due from the sellers to the buyers would be paid. On a question whether the declaration of war rendered the contract illegal and void so that the buyers would be unable to submit a dispute to arbitration under it,

Held: there being an alternative to the obligation of the sellers to deliver the sugar at Hamburg, namely, to pay the buyers a sum of money, the contract was not rendered illegal by the outbreak of war, and the arbitration clause it contained was effective.

Notes. Considered: *Taylor & Son* v. *Barnett*, [1953] 1 All E.R. 843. Referred to: *Jager* v. *Tolme and Runge and London Produce Clearing House*, [1916] 1 K.B. 939; *Blackburn Bobbin Co.* v. *Allen* (1918), 87 L.J.K.B. 1085.

As to illegality of contracts, see 8 Halsbury's Laws (3rd Edn.) 125 et seq.; and for cases see 12 Digest (Repl.) 263 et seq.

Cases referred to:

(1) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

(2) *Kitts* v. *Moore & Co.*, [1895] 1 Q.B. 253; 64 L.J.Ch. 152; 71 L.T. 676; 43 W.R. 84; 39 Sol. Jo. 96; 12 R. 43, C.A.; 2 Digest (Repl.) 498, *469*.

Also referred to in argument:

Cunningham v. *Dunn* (1878), 3 C.P.D. 443; 48 L.J.Q.B. 62; 38 L.T. 681; 3 Asp.M.L.C. 595, C.A.; 12 Digest (Repl.) 440, *3349*.

Jackson v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 12 Digest (Repl.) 438, *3339*.

Ford v. *Cotesworth* (1870), L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188;

23 L.T. 165; 18 W.R. 1169; 3 Mar.L.C. 468, Ex. Ch.; 12 Digest (Repl.) 439, *3348*.

Couturier v. *Hastie* (1856), 5 H.L.Cas. 673; 25 L.J.Ex. 253; 28 L.T.O.S. 240; 2 Jur.N.S. 1241; 10 E.R. 1065, H.L.; 12 Digest (Repl.) 414, *3222*.

Appeal from orders of WARRINGTON, J., made on a motion by the plaintiffs in an action brought by them for an injunction restraining the defendants from proceeding under an arbitration. HIS LORDSHIP refused to grant an injunction, and, on the application of the defendants, made an order staying the action.

Maurice Hill, K.C., and *Devonshire* for the plaintiffs.

Clauson, K.C. (with him *J. M. Gover*), for the defendants.

LORD COZENS-HARDY, M.R.—This is an appeal from two orders made by WARRINGTON, J., refusing, in the first place, an injunction against proceeding in an arbitration, and, in the next place, granting an order on a summons to stay proceedings in this action.

The plaintiffs and defendants are both British subjects; there is no question of alien enemies. They are both dealers in sugar. In 1914, before the war began, the plaintiffs had contracted to buy a large quantity of sugar at a price very much higher than it was at the end of July, when there was a great fall in the market. The sugar was to be delivered at Hamburg. They were anxious to cover their liability in respect of that contract. That contract was for delivery in the month of August. They, therefore, sought to and did cover their liability by selling to the defendants an equivalent amount also for August.

Before reading the contract, or the material parts of the contract, I ought to say that the rights of the parties here are dependent upon the terms of what I may call a clearing-house arrangement, an arrangement of a complicated nature, under which a number of bargains for the sale and purchase of sugar are ultimately settled by the payment of differences. In my view, nothing turns upon the details of that arrangement, although I may have to refer to it. The contract in question is dated Aug. 1, 1914, just before the declaration of war, and it is in these terms:

> "We have this day bought of you for our own account 6,500 bags beetroot sugar . . . Delivery August, 1914. Price 7s. per cwt. net,"

which was a great deal less than the price in the contract for the purchase by the plaintiffs. It is then declared to be

> "subject to the regulations and conditions of the London Produce Clearing House Limited for sugar future delivery business, and subject to war clause as printed overleaf."

The contract contained a clause providing that any dispute arising under it should be referred to arbitration. In this action the plaintiffs sought a declaration that the contract which I have just read was illegal by reason of the declaration of war between Great Britain and Germany on August 4. If it was illegal, then any question of arbitration under the contract would fall with it. It is also said that if the contract is not tainted with illegality, still, by reason of an embargo, the nature and extent of which are left exceedingly obscure upon the evidence—an embargo put by the German government upon the export of sugar from Hamburg on July 31—the contract, even though not so illegal, ought not to be enforced, because it must be taken to have been an implied term by both parties to the contract that it should have been possible to export the sugar, and that, somewhat on the principle of *Taylor* v. *Caldwell* (1) and other well-known cases, the contract, though not illegal, was affected by some definite vice (shall I say?) which prevented any right being secured by either party to it.

As to the first point, if the plaintiffs are right upon that, it is quite clear that the action ought to go on, and that the order made by WARRINGTON, J., cannot be sustained. But, in my opinion, that is really not an arguable point. It seems to me perfectly clear that there was nothing illegal in this contract, and

nothing to justify the contention of illegality, for what was the contract? Putting it shortly it was this: "We sell you a lot of sugar at Hamburg, to be delivered f.o.b. either on board ship or in warehouse, or if by reason of war" (under a clause to which I shall now call attention) "that cannot be done, we will pay you a sum of cash." What is the difficulty? There is no illegality at all. It is a contract with two branches, two alternatives: "If we cannot deliver you the specific goods, we will pay you a sum of cash." On the face of the contract that is its true construction and effect, and there is absolutely nothing in the contention of illegality. The war clause which was expressly incorporated in the contract, was as follows:

> "In the event of Germany being involved in a war with either England, France, Russia, and/or Austria, this contract, unless previously closed, shall, on official notice being given that such a state of war exists, be deemed to be closed at the average quotation of the official calls held on the sixth working day counted backwards from the day when such official notice is given (not counting the day of official notice nor any date on which there is no official quotation to count as a working day), and accounts shall be made up with and between the contracting parties, who shall accept such settlement as complete and final; all differences arising therefrom shall be due immediately. . . . The guiding dates to make the war clause operative will be the declaration of war of either belligerent or a proclamation or other notification by the British government in the case of a war between Great Britain and Germany, whichever occur first, and/or the British declaration of neutrality in the case of a war between Germany and another Power."

I find, therefore, on the face of the contract that the outbreak of a state of war was contemplated, and in that event the second alternative of the contract took effect. There was no obligation to deliver the sugar at Hamburg, but, instead of that, there was an obligation to pay a sum of cash ascertained in the manner here stated.

[His Lordship dealt with a point raised by the defendants relating to an embargo placed by the German government on the export of sugar from Germany which does not call for report, and continued:] The second point is this. If there is no ground for saying that the contract is void, or that there is no contract at all, what are the provisions contained in the contract? For that purpose, of course, it is necessary to look at this extraordinary code of many hundred clauses [the regulations of the Sugar Association of London] which is supposed to be incorporated in every contract for the sale and purchase of sugar. There are upwards of 500 clauses. If I refer to r. 351, I find these words: "The committee is the referee of all disputes." The next rule—352—is:

> "Any disputes that may arise out of or in relation to any clearing contract or out of or in relation to any alleged contract . . . shall be referred to the committee."

When you get to the next rule there is an express stipulation that the submission or reference is to be in writing and shall be made a rule of court. It is provided at the end of r. 353 as follows:

> "the obtaining of an award shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any . . . contract."

So that there is as stringent and wide an arbitration clause as it is possible to imagine, and expressly makes the obtaining of an award a condition before which no action can be maintained by either party to the contract. When once we have got to the point that there is a contract which confers rights upon both parties, it seems to me that the case is really at an end. The parties have in terms agreed that their mutual rights and obligations shall be settled by arbitration, and in no other way. It may or may not be a very foolish thing to

have such a term. It is not for me to say what my own view may be in the matter. But as a matter of business I suppose these gentlemen engaged in trade prefer such a tribunal to the courts. It is quite clear that it is no objection to the enforcement of a clause like this that there are difficult questions of law, and may be difficult questions of fact to decide. The parties have selected the tribunal, and in the absence of very special circumstances the court of first instance ought to hesitate greatly before allowing the arbitral tribunal to be in any way interfered with, and certainly when the judge in the court below has exercised judicially his discretion the Court of Appeal ought to think once and think twice before it interferes with the discretion. In my opinion, there is nothing in the present case which justifies a contention that this is not a fit question to be decided by the arbitrators. It is a question which falls within the express language of the arbitration clause, and, in my opinion, it would be very wrong for us to say that this ought not to go to the tribunal which the parties themselves have selected, but ought to be kept in this action in some form. In my opinion, the judgment of WARRINGTON, J., was perfectly right on both points, and this appeal must be dismissed with the usual consequences.

SWINFEN EADY, L.J.—I am of the same opinion. The contract in question is a contract for the sale of a quantity of beet sugar for future delivery—August delivery—and the contract embodies the

> "rules, regulations, and byelaws of the Sugar Association of London and of the Clearing Department thereof."

Further it is

> "subject to the regulations and conditions of the London Produce Clearing House, Ltd., for sugar future delivery business, and subject to war clause as printed overleaf."

The conditions embodied include a submission or reference to arbitration. They provide that disputes are to be settled by arbitration, and then comes r. 353 [supra]. The plaintiffs claim an injunction, but if the contract is subsisting an award is a condition precedent to either party suing the other. The contract was for future delivery, and it is now disputed that under the terms of such contract the sellers had the whole of August in which to deliver the sugar, or to tender the sugar for delivery. The buyers were not entitled to require delivery at any particular date in August. The option lay with the sellers during the whole of the month including the last day when they would tender the sugar. When the sugar was tended, then the buyers had an option with regard to the mode of delivery. It was open to them to give either practicable shipping instructions—that would be to take delivery in the port of Hamburg f.o.b. a ship at Hamburg—or practicable storing instructions, and then the rules define what "practicable storing instructions" meant. It means "the naming of a warehouse within the limits of port of shipment which can receive the sugar within eight days from the date of instructions." Then "At Hamburg only such warehouses allowed as have been approved by the General Agency and are on the list authorised by them." In other words, they can deliver on board a ship at Hamburg or in a permitted warehouse at Hamburg with a view to the sugar being warehoused.

[HIS LORDSHIP dealt with the point relating to the embargo, and continued:] There is nothing illegal in the provision in the contract that in the event of war the contract shall be deemed closed on certain terms, with a payment of difference resulting. There is nothing illegal in such a stipulation. It is a perfectly valid stipulation, providing for an event which actually happened. In those circumstances I am of opinion that whatever the rights of the parties may be, whatever disputes may arise out of the contract, they are within the arbitration clause. The contract is a subsisting contract for the purpose of going to arbitration, and the arbitrators are the proper tribunal. The result, therefore, is that there is a legal subsisting agreement to refer disputes to arbitration, and under

which arbitration is a condition precedent to any action being brought. It, therefore, follows that the disputes must be referred to arbitration and the action stayed. For these reasons I am of opinion that the judge below was right, and that the appeal fails.

PHILLIMORE, L.J.—I agree. The award which the defendants are seeking to get is one from an arbitral tribunal, being the committee of the council of the Sugar Association of London, and is one which will be obtained, if at all, under rr. 352 and 353 of the Rules and Regulations of the Sugar Association of London. I find under rr. 352 and 353, which are incorporated in this contract, an ordinary provision for reference to arbitration before a committee of the council of the association of people engaged in the beet sugar trade.

There is no reason on the face of those rules why arbitration should not be sought. The plaintiffs' first point, however, is that there is no contract, and, if no contract, then, of course, no arbitration clause. They are entitled to submit that decision to the courts, and if they can succeed in maintaining it they are entitled, no doubt, to an injunction restraining arbitration, but I think they have mistaken the force and effect of *Kitts* v. *Moore & Co.* (2) when they say that it is enough for them in these circumstances to show a primâ facie possibility that the contract cannot be enforceable. It either may originally have been invalid or have become unenforceable by reason of the destruction of the subject-matter of the contract or otherwise. That is a state of things supervening which makes it impossible of execution or that the contract was made under such a common mistake of fact as to entitle either party to recission. It is quite true that there are strong expressions in *Kitts* v. *Moore & Co.* (2) as to the practice of the court in granting injunctions when there is a probability, without a certainty, that the contract may turn out to be no contract; but *Kitts* v. *Moore & Co.* (2) was not a case like this, where the obtaining of an award is a condition precedent to any right of recovery, and it would be wrong, in my view, to apply *Kitts* v. *Moore & Co.* (2) in all its force to such a case. I think, therefore, that the plaintiffs here had to make out to our satisfaction that there was no contract.

How have they sought to do that? First of all, they suggested that the contract was an illegal contract or involved an illegality. I think they failed to prove that. There is nothing to prevent two subjects of the King contracting with regard to goods which are in foreign parts in such terms as these: "I will sell and you will buy. I will deliver and you will take delivery, but if war between the country where the goods are and our own country, or war between the country where the goods are and some other country, prevents my delivering and your taking delivery, nevertheless one or other of us shall pay to the other a liquidated sum in respect of our original contract to sell and to buy." Such a contract is a possible contract, and there is no taint of illegality in it so far. At the time when the contract was made, the two nations, Great Britain and Germany, were not at war, and that being so, it was legal to make an arrangement under which goods in Germany should be sold and bought, delivered and received, or, in the alternative, if it became impossible or inconvenient by reason of war with this country or with another country to carry out the contract, that a sum of money should be paid as between the parties.

[His Lordship dealt with the embargo point, and continued:] The only point left to consider is whether there are special reasons for preventing the parties from applying to that domestic tribunal to which they have agreed. There are cases in which the court has exercised a discretion where it has appeared that there is nothing but a point of law which will have to be decided, and where, if the matter goes to arbitrators, the arbitrators could be compelled to send the case back to the courts of law by one or other of the procedures known under the Arbitration Act, 1889. But to begin with, in this particular case the parties have intended if they lawfully can to make the decision of their domestic tribunal conclusive and independent of any act by a court of law; and, secondly, and this is

A the matter which weighs most with me, an arbitration is necessary whatever view is taken, because an award by the arbitrators is a condition precedent to the defendants' right to recover that sum of money to which they claim to be entitled. When the court has exercised its discretion, and has refused to stay an action because it sees that the matter is merely a point of law, it has done so upon the principle that it is a more convenient mode of trial to have the matter B tried directly in the action instead of indirectly by an arbitration and the statement of a case. But it has never refused to stay an action where it is obvious that the case must go to arbitration; and the case must go to arbitration where an award is a condition precedent.

The result is that the application for an injunction unquestionably fails, and that the order to stay was rightly made, because the only tribunal which can determine C this matter is the tribunal which the parties have contemplated.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.*, for *Smith, Dickinson & Co.*, Liverpool; *Rehder & Higgs.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

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SWALLOW *v.* LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (Ridley, Lush and Low, L.JJ.), December 10, 1915]

[Reported [1916] 1 K.B. 224; 85 L.J.K.B. 234; 114 L.T. 368; 80 J.P. 164; 32 T.L.R. 181; 14 L.G.R. 301; 25 Cox, C.C. 295]

F *Weights and Measures—Coal—Weighing on delivery—Request to driver of coal cart by officer of local authority to weigh coal—Refusal to do so or assist officer—"Obstruction"—Weights and Measures Act*, 1889 (52 & 53 *Vict.*, *c.* 21), *s.* 27 (2).

The appellant, driver of a coal cart, was requested by an officer of the respondents to place the coal he was delivering on a weighing machine. He G refused to do so and also refused to assist the officer to do so, but he did not object to the officer weighing the coal. An information was preferred against him under s. 27 (2) of the Weights and Measures Act, 1889, for having obstructed the weighing of the coal and he was convicted.

Held: section 27 did not oblige the appellant to weigh the coal, and, therefore, his refusal was not an "obstruction" under sub-s. (2), and he was H wrongly convicted.

Notes. As to the application of the Weights and Measures Acts to coal, see 33 HALSBURY'S LAWS (2nd Edn.) 684–690 and as to the weighing of coal see ibid., 688; for the Weights and Measures Act, 1889, s. 27, see 26 HALSBURY'S STATUTES (2nd Edn.) 1269; and for cases see 44 DIGEST 138 et seq.

I Cases referred to:

(1) *Alty* v. *Farrell*, [1896] 1 Q.B. 636; 65 L.J.M.C. 115; 74 L.T. 492; 60 J.P. 373; 12 T.L.R. 346; 40 Sol. Jo. 460; 18 Cox, C.C. 321, D.C.; 44 Digest 141, *87.*

(2) *Kent County Council* v. *Humphrey*, [1895] 1 Q.B. 903; 64 L.J.M.C. 190; 72 L.T. 563; 59 J.P. 520; 11 T.L.R. 386; 43 W.R. 506; 39 Sol. Jo. 470; 18 Cox, C.C. 163; 15 R. 414, D.C.; 44 Digest 141, *86.*

Case Stated by a metropolitan police magistrate sitting at Clerkenwell.

On May 3, 1915, Edward Henry Pineles, an officer of the respondents, the

local authority within s. 27 of the Weights and Measures Act, 1889, saw the appellant in charge of a van containing a load of coal in sacks, close to the premises of the Cannon Brewery Company, which coal the appellant was about to deliver there. Pineles required that the coal should be weighed by a duly stamped instrument which he had with him, and he requested the appellant to place the coal on the scale of such instrument. The appellant refused to put the coal on the scale or to assist the man by whom Pineles was attended in so doing, but raised no objection to Pineles himself or by his man placing the coal on the scale and weighing it.

The magistrate was of opinion that the word "require" in s. 27 implied a command, and the refusal to obey was disobedience to a lawful order which on the facts mentioned amounted to an unlawful obstruction of the officer of the local authority, and accordingly convicted the appellant and fined him 40s.

By the Weights and Measures Act, 1889, s. 27:

"(1) Any seller or purchaser of coal, person in charge of a vehicle in which coal is carried, inspector of weights and measures, or other officer appointed for the purpose by the local authority, may require that any coal or any vehicle used for the carriage of coal in bulk be weighed or reweighed by any weighing instrument stamped by an inspector of weights and measures. . . . (2) If any person obstructs any weighing or reweighing authorised by this section he shall be liable to a fine not exceeding five pounds.

Disturnal, K.C. (*Morle* with him), for the appellant.
Daldy for the respondents.

RIDLEY, J.—The appellant, who was in charge of a vehicle containing coal, did not, when required to do so by the respondents' officer, assist in the weighing of the coal, but simply stood by and did nothing. The magistrate held that the appellant's refusal to assist in the weighing of the coal amounted to an "obstruction" of the weighing within s. 27 (2) of the Weights and Measures Act, 1889. The difficulty in the way of counsel for the respondents is that the appellant did nothing to prevent the weighing of the coal. If the statute had made it an offence to refuse to weigh the coal, the appellant would then have been in the same position as is the seller of bread under s. 32; and in that case it might be said that to refuse to weigh might be obstructing the weighing. But s. 27 does not go as far as s. 32; the legislature appears to have deliberately refrained from saying that the person in charge of a vehicle and delivering coal is to take part in the weighing thereof. Section 27 contains a provision that the seller of coal or person in charge of a vehicle in which coal is carried shall not be required to go beyond a certain distance when the coal is to be weighed. There is no connection between that and the weighing, which is not by this section put upon the carman at all. The legislature has not enacted that it is an obstruction within the proper meaning of that word for the carman to stand by and do nothing. In my opinion the appellant committed no offence when he simply stood by and refused to assist in the weighing. That being so, I think the magistrate was wrong, and that the conviction must be quashed.

LUSH, J.—If the legislature had intended to impose upon the carman the duty of weighing coal—by that I mean the taking of an active part in the weighing—and had intended to make him liable to a penalty if he refused, it would have been very easy to use language enacting this in clear terms. If one looks at s. 25, where the legislature has put upon the seller the duty of weighing coal it has said so in terms. That section deals with the sale in small quantities of coal for delivery at the place where it is kept for sale, and it says that the seller shall, if so required by the purchaser or inspector, weigh any coal before the sale or delivery thereof. Contrast that language with that of s. 27, where not a word is said to the effect that the seller by his servant shall weigh the coal. Again, the language of s. 27 (2), the subsection which imposes the penalty, is not that if any

A person refuses to weigh, but that "if any person obstructs any weighing or re-weighing authorised by this section he shall be liable to a fine." In my opinion, in order to expose a person to the penalty under s. 27 (2) there must be an active obstruction by him of the person who is weighing the coal. Here there was no obstruction if by obstruction is meant actively putting an obstacle in the way of the person wishing to weigh the coal. Although it is conceivable that the B expression "obstruction" might have been used in reference to what the appellant did, if a duty to weigh had been cast upon him, it is impossible to say, where no duty to weigh is imposed upon him, that he is guilty of obstructing the weighing by refusing to assist in the weighing. Counsel for the respondents referred to the case of *Alty* v. *Farrell* (1). There a local authority made a byelaw which required every person in charge of a vehicle carrying coal for sale in small quanti-C ties to carry a perfect weighing instrument of an approved form and reweigh the coal on being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights and measures, or by any constable. The court held that the byelaw was unreasonable. LORD RUSSELL OF KILLOWEN, C.J., was content to put his judgment upon the ground that the byelaw might necessitate several weighings, and also that to authorise any constable to require D the carman to weigh the coal was unreasonable. WRIGHT, J., expressed a doubt whether the byelaw was good on other grounds. But if one looks at the earlier case of *Kent County Council* v. *Humphrey* (2) which was cited in *Alty* v. *Farrell* (1), it will be seen that it was thought doubtful whether the power to make a byelaw that the carman should weigh the coal was intra vires. There the byelaw said that

E > "every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such person shall re-weigh the coal on being requested to do so."

F The byelaw therefore imposed a duty upon the carman to re-weigh. It is true that the court did not say that it was ultra vires. CHARLES, J., held that the first part of the byelaw was good, but he said ([1895] 1 Q.B. at p. 906):

> "It is not necessary for us to give any opinion as to whether the latter clause in the byelaw may or may not be ultra vires, because the earlier clause, on which the charge against the respondent was founded, is clearly good."

G WRIGHT, J., said (ibid.):

> "It may well be that the provision authorising the making of a byelaw directing that an instrument shall be carried has the effect of authorising a byelaw directing that such instrument shall be used. It is unnecessary, however, for the purposes of our decision, to say more than that the first part of the byelaw is valid."

H The court therefore left the question open whether the local authority could properly impose the duty of re-weighing upon the carman, but if a byelaw is necessary for that purpose it seems to me to follow pretty clearly that the section does not impose the duty. In my opinion the section does not impose that duty. I agree, therefore, that the conviction was wrong and must be quashed.

I **LOW, J.**—In the absence of any provision in the statute to show that there is a liability on the part of the carman to do the act which the present appellant refused to do, it would be a mere abuse of language to call what happened in this case "obstruction." I agree that the conviction should be quashed.

Appeal allowed.

Solicitors: *Geoffrey B. Gush*; *E. Tanner.*

[*Reprinted by* W. W. ORR, ESQ., *Barrister-at-Law.*]

PAPWORTH *v.* BATTERSEA BOROUGH COUNCIL

[COURT OF APPEAL (Pickford, and Bankes, L.JJ., and Neville, J.), December 3, 6, 1915]

[Reported [1916] 1 K.B. 583; 85 L.J.K.B. 746; 114 L.T. 340; 80 J.P. 177; 60 Sol. Jo. 120; 14 L.G.R. 236]

Highway—Negligence—Construction by highway authority in accordance with universal practice—Gully and grating in highway—Undue depression below level of road—Accident to cyclist—Negligence negatived by jury—Liability of authority.

When making up a road in their district in 1883, a local authority constructed a gully with a grating on top in accordance with the universal method of construction at the time. When cycling along the road in 1912, a cyclist skidded on the grating, fell, and was injured. In an action for damages brought by the cyclist against the local authority, the jury made no finding of negligence, but found that the accident was due to the excessive depression of the grating in the road as originally constructed and that the local authority could not with reasonable care have known of the defect at the time of the accident.

Held: in the absence of any finding of negligence, the local authority must be presumed to have exercised reasonable care and skill in constructing the gully and grating, even if the best opinion at the time produced something which was found to be dangerous, and they were, therefore, not liable.

McClelland v. *Manchester Corpn.* (1), [1912] 1 K.B. 118, applied.

Notes. Referred to: *Nash* v. *Rochford Rural Council*, [1916–17] All E.R.Rep. 299; *Skilton* v. *Epsom and Ewell Urban Council*, [1936] 2 All E.R. 50.

As to negligence in the making up of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 312; and for cases see 26 DIGEST (Repl.) 533 et seq.

Cases referred to:

(1) *McClelland* v. *Manchester Corpn.*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 28 T.L.R. 21; 9 L.G.R. 1209; 26 Digest (Repl.) 428, *1313*.

(2) *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, H.L.; 38 Digest (Repl.) 16, *64*.

Also referred to in argument:

Shoreditch Corpn. v. *Bull* (1904), 90 L.T. 210; 68 J.P. 415; 20 T.L.R. 254; 2 L.G.R. 756, H.L.; 26 Digest (Repl.) 531, *2075*.

Blackmore v. *Mile End Old Town Vestry* (1882), 9 Q.B.D. 451; 51 L.J.Q.B. 496; 46 L.T. 869; 47 J.P. 52; 30 W.R. 740, C.A.; 26 Digest (Repl.) 419, *1286*.

White v. *Hindley Local Board* (1875), L.R. 10 Q.B. 219; 44 L.J.Q.B. 114; 32 L.T. 460; 23 W.R. 651; sub nom. *White* v. *Wigan Local Board*, 39 J.P. 533, D.C.; 26 Digest (Repl.) 532, *2077*.

A.-G. v. *Theobald* (1890), 24 Q.B.D. 557; 62 L.T. 768; 38 W.R. 527; 42 Digest 706, *1237*.

Nevill v. *Fine Art and General Insurance Co.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 72, *1010*.

Seaton v. *Burnand*, *Burnand* v. *Seaton*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 16 T.L.R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H.L.; 26 Digest (Repl.) 221, *1707*.

Newberry v. *Bristol Tramways and Carriage Co., Ltd.* (1912), 107 L.T. 801; 29 T.L.R. 177; 57 Sol. Jo. 172; 11 L.G.R. 69, C.A.; 8 Digest (Repl.) 76, *508*.

Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. *A.-G.*, ante, p. 355; [1915] A.C. 654; 84 L.J.K.B. 907; 112 L.T. 826; 79 J.P. 305; 31 T.L.R. 254; 59 Sol. Jo. 381; 13 L.G.R. 563, H.L.; 26 Digest (Repl.) 647, *2925*.

A *Lambert* v. *Lowestoft Corpn.*, [1901] 1 K.B. 590; 70 L.J.K.B. 333; 84 L.T. 237; 65 J.P. 326; 49 W.R. 316; 17 T.L.R. 273; 45 Sol. Jo. 295; 26 Digest (Repl.) 531, *2071*.

Saunders v. *Holborn District Board of Works*, [1895] 1 Q.B. 64; 64 L.J.Q.B. 101; 71 L.T. 519; 59 J.P. 453; 43 W.R. 26; 11 T.L.R. 5; 39 Sol. Jo. 11; 15 R. 25, D.C.; 26 Digest (Repl.) 532, *2080*.

B *Maguire* v. *Liverpool Corpn.*, [1905] 1 K.B. 767; 74 L.J.K.B. 369; 92 L.T. 374; 69 J.P. 153; 53 W.R. 449; 21 T.L.R. 278; 49 Sol. Jo. 296; 3 L.G.R. 485, C.A.; 26 Digest (Repl.) 420, *1294*.

Short v. *Hammersmith Corpn.* (1910), 104 L.T. 70; 75 J.P. 82; 9 L.G.R. 204, D.C.; 26 Digest (Repl.) 420, *1296*.

Appeal by the plaintiff against an order of SCRUTTON, J., 84 L.J.K.B. 1881, dismissing an action for damages for personal injuries.

C The plaintiff's injuries were sustained on June 26, 1912, through falling off her bicycle under a victoria owing, as she alleged, to the defective condition of a gully in Lombard Road in the borough of Battersea. The gully and its grating had been constructed in connection with a sewer in 1883 by Wandsworth District Board of Works, in whose area Lombard Road then was.

D By s. 68 of the Metropolis Management Act, 1855, all sewers situate in any parish mentioned in Sch. A to the Act, with the gullies, grates, works, and things thereunto appertaining, and the materials thereof, became vested in the vestry of such parish, and all sewers situate within any district mentioned in Sch. B to the Act, with all such works and things appertaining thereto, became vested in the board of works for such district. Schedule B, Part 1, to the Act E included the Wandsworth district, and, as one of its parishes, the parish of St. Mary, Battersea (excluding Penge). By s. 69 the vestries and district boards were bound to repair and maintain all sewers vested in them. By s. 96 the powers and duties of surveyors of highways were vested in the vestries and district boards.

By s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, the parish of St. Mary, Battersea (excluding Penge), ceased to form part of the F Wandsworth district, and

> "the principal Act shall be read and have effect as if the said parish, excluding Penge, had been named in Part II of Sched. A of the said Act, and the vestry of the said parish shall become and be a body corporate by the name of the Vestry of the Parish of St. Mary, Battersea."

G By s. 4 of the London Government Act, 1899, the powers and duties, property and liabilities of the vestry of St. Mary, Battersea, were transferred to the defendant council.

At the first trial, before HORRIDGE, J., and a common jury, reported [1914] 2 K.B. 89, the jury awarded the plaintiff £1,961, and on further consideration the learned judge held that s. 4 of the Metropolis Management (Battersea and West- H minster) Act, 1887, did not transfer to the parish of St. Mary, Battersea, any existing liability of Wandsworth District Board of Works as highway authority in respect of the defective gully, and therefore that no liability in connection with it was transferred to the defendants by s. 4 of the London Government Act, 1899, but that the defendants were liable as sewer authority for not repairing the defect in the gully. The learned judge accordingly entered judgment for the plaintiff. I The Court of Appeal set that judgment aside and ordered a new trial on the grounds inter alia that there had been no proper finding at the trial whether the gully was in the possession of the defendants as road authority or sewer authority, nor whether the defendants had knowledge or ought to have known of the defect ([1915] 1 K.B. 392).

At the second trial before SCRUTTON, J., the judge left certain questions to the jury, which, with their answers thereto, were as follows:

(i) At the time of the accident was a piece of the frame of the grating missing? —Yes. (ii) Was the grating at the time of the accident dangerous to a careful

cyclist; if so, in what respect?—No, not the grating itself. (iii) Was the danger due to the original construction; if so, what was the defect?—Yes, excessive depression. (iv) Or to some subsequent alteration of position; if so, what caused it? —No. (v) and (vi) Was the plaintiff's injury caused (a) by the broken frame; or (b) by the dangerous condition of the grating?—No, not specifically. (vii) Could the plaintiff have avoided her injury by the exercise of reasonable care and skill?— No; considering the presence of the victoria and the state of, and depression in, the road. (viii) Was the grating part of the road or part of the sewer?—Part of the road. (ix) Who placed the grating in the road?—The Board of Works for the Wandsworth District. (x) Who paid for it?—The frontagers. (xi) Who controlled and maintained it—the road authority or the sewer authority?—The road authority. (xii) Did the road authority or the sewer authority by their servants, at the time of the accident, know, or could they by the exercise of reasonable care have known, of the defect, if any, in the grating or frame, and remedied it? —No. (xiii) What damages has the plaintiff suffered from the accident?—£740 doctor, £15 additional. In answer to the supplementary questions, the jury found that the grating and frame in the original depression were dangerous. With regard to the answer to questions (v) and (vi) they said that the accident was caused by the broken frame and grating in the excessive depression.

On these findings SCRUTTON, J., gave judgment for the defendants and the plaintiff appealed.

F. A. Greer, K.C., and *Sidney Lamb* (*Cecil Fitch* with them) for the plaintiff.
Lewis Thomas, K.C., and *Walter Warren* for the defendants.

PICKFORD, L.J.—The plaintiff appeals against the judgment of SCRUTTON, J., after a trial before him and a special jury. The case is a difficult one, and it is made more difficult by some confusion in the answers given by the jury. The facts, so far as it is necessary to state them for the purposes of the case, are these: the plaintiff was riding a bicycle along a street in the borough of Battersea. There was somewhere near a horse-drawn vehicle—I think a brougham or victoria —to avoid which the plaintiff appears to have inclined her bicycle towards the side of the road. At the side of the road there was a grid covering a gully which was made for the purpose of draining the surface water from the road down into the sewer. Over the gully there was a grating. The plaintiff's bicycle, we must take it, according to the answers of the jury, slipped, skidded, or side-slipped on this grating. She came down and suffered very considerable injuries from being run over by the carriage she was trying to avoid. She alleged that the cause of those injuries was the negligence of the defendants, or of some other public body whose liability was transferred to them, in having an improper and dangerous grating in the highway. She alleged that two things were wrong; first, she said that there was a piece broken out of the grating which made the wheel of a bicycle likely to catch in it, and, secondly, she said that the grating (which was a curved grating, as these gratings so often are if they are at the sides of roads) was at an excessive distance below the surface of the road. The case which was really set up at the trial as to the depression was that the grating had sunk in consequence of improper construction in a manner which I need not detail, and had gone down considerably from the position in which it had originally been placed. That was negatived by the jury, and we need not trouble about that.

The findings of the jury are rather odd, but I think they found in effect that the grating and the frame had been put in such a position as to be too low in relation to the adjoining surface of the road, and that that was occasioned not only by the curve of the grating itself, but by the surface being brought at an incline on each side down to the frame and to the edge of the grating. It was said that it was "dished," and the word "dishing," as used certainly by most of the witnesses, and I think practically by all, with the possible exception of the witness Mr. Foster, referred not only to the curve of the grating but also to the

curve of the adjoining setts—I think they were setts at that time—down to the edge of the grating, which was done for the purpose of allowing the water to run down and allowing débris to get away. The jury found these findings [HIS LORDSHIP read the questions left to the jury and their answers and said:] I take the answer to question (ii) to mean that no danger was occasioned to a careful cyclist from the piece being missing from the grating. The answer to question (iv) is the finding to which I alluded when I said that the jury disposed of the question of subsidence in consequence of the grating being improperly constructed—I mean subsidence after it was put there—and they therefore found that the danger was due to the excessive depression in original construction. Some of these findings are rather difficult to reconcile one with the other, and some of them a little difficult to understand, but I think the effect of them is this, that the accident was caused by the condition of the grating and the depression in the road—i.e., the depression of the grating below the surface of the road—that that depression was extreme, that that was a part of the original construction, and that the defendants were not negligent and not liable for any negligence in not having discovered that that extreme depression was dangerous. The findings about the road and the sewer authority were, of course, for the purpose of determining whether it was misfeasance or non-feasance, and whether the sewer authority were the persons responsible for it. The jury have also found that the grating and adjoining parts of the road were constructed by Wandsworth District Board in 1883. They have found that it was dangerous, but they have not in terms found that there was anything negligent in Wandsworth District Board in constructing it in that way.

It remains to be seen whether there is any implied finding of negligence. I think an implied finding of negligence is a dangerous thing and, if negligence is to be relied on as a foundation for an action, I think it should be expressly and specifically found. The contention before us is that when the jury found that there was danger due to the original construction in the excessive depression of the grating they must have found that it was negligent, because they could not have found that it was so put as to be dangerous without its being negligent on the part of those who put it there. That, as a general proposition, on such a finding may perhaps have something to support it, but to see whether it is well-founded in any particular case one must look at what was before the jury in that case. The evidence was substantially uncontradicted—I say substantially because there may perhaps be some very small amount of evidence on the part of the plaintiff to the contrary, though I rather doubt it; it was substantially unanimous—that this method of construction, both of the grating and of the frame of the grating, and the parts of the road adjoining the frame and the grating, was the universal method of construction at the time when this was done. There are now, it was said, thousands—hundreds, at any rate—of such gratings, and so placed, within this very borough, and there are probably thousands in the London district. The jury have found that this was in fact dangerous, but looking at the evidence which they had in regard to the state of things and the state of knowledge and the state of professional skill at the time when it was done, I do not think that it can be implied from their finding that they intended to find that it was a negligent thing to do. It is possible that experience may have shown a thing to be a danger, and yet there may not have been any negligence; the best skill and information available at the time may have been employed in putting it down. Therefore I do not think that the jury can be taken to have implied a finding of negligence by them. There certainly is, as I have said, no specific finding.

If there be no finding of negligence, we have to look at it, I think, from this point of view. Wandsworth District Board, exercising proper and reasonable skill and care, when they were making up this road thirty years ago, put down a grating in a way which the jury have found to be, in the circumstances of this case, dangerous. Are they responsible for that? As I have said, if that be the

proper way of looking at it, they have done it without negligence. In my opinion they are not responsible for it, and for this reason—they did it under the provisions of the Metropolis Management Act, 1855, which in s. 105 provides: [His Lordship read the section and said:] Acting under the powers of that section, Wandsworth District Board made up this road and adopted it, and in doing so they put in this grating in the way in which it was put in. I cannot say, perhaps, that they were fulfilling a statutory obligation, because that particular section only empowers them to pave, and does not oblige them to do so. The question is, what was their duty? I think their duty when they exercised their statutory powers was very properly laid down by Lush, J., in dealing with a public authority which was exercising similar powers in *McClelland* v. *Manchester Corpn.* (1). Dealing here with the question of misfeasance and non-feasance, he says ([1912] 1 K.B. at pp. 129, 131):

> "It is no doubt true that when a road is dedicated as a highway the public, or the road authority, if they accept it, take it as it is with all its defects. But if a road authority undertake a duty with regard to it, and make it up, and open it to the public as a made up street, they must, in my opinion, exercise due care and have due regard to the safety of those who will use it. It is, I think, clear law that when a local authority undertakes and performs a duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which, if carelessly done, may cause injury to others. . . . They had general powers, permissive, not imperative, to make up any street within their district in the way they thought fit, and they were bound, as it seemed to me, to act reasonably in the exercise of those powers."

That seems to me to be an accurate statement of the duty laid on a local authority which is fulfilling its statutory powers in the way in which Wandsworth District Board was doing. I do not think that it imposes a higher duty. I do not think a duty is imposed on them of absolutely making the road perfectly safe. If they do something which turns out to be dangerous, but do that without any absence of reasonable care and skill, then, in my opinion, they are not responsible; and, as far as I can see, that is what took place in this case. In the course of making up this road, in order to drain it and prevent surface-water settling on it, they had to make an escape for the surface-water into the adjacent sewer. When they had done that, which they did by making a hole in the road and a gully for the water to pass through, they had to make the road safe for persons who were travelling along it by putting a covering over the hole they had made; and, if they exercised reasonable care and skill, and did the work according to the best opinion prevailing at the time when they did it, then, in my opinion, they were not responsible for its in fact turning out to be dangerous a good many years afterwards. Of course, if the state of things had been such that as time went on it became obvious to persons like the local authority or their surveyor or other surveyors that this grating so placed was dangerous, and if they or their successors allowed it to remain so, then they or their successors might be responsible because, although they were not negligent in the original construction, they might be said to be negligent in not having altered it when it became clear that it was dangerous; but any such case as that has been negatived by the jury, because Battersea Corporation, or their predecessors, Battersea Vestry, have had possession and control of this thing for nearly thirty years, and the jury have found that there was nothing negligent in their not having found out that this particular grating was dangerous. As I say, it may be a little difficult to reconcile all the findings of the jury. I do not know, and it is perhaps dangerous to speculate, but I think probably what they meant by that was that, although it was possible for them by an inspection to see, and although they probably did see, the actual state of

things which was existing, there was nothing to call their attention to the fact that it was dangerous. But, on the other hand, there is the finding, and therefore it remains, as I have said, a construction done by Wandsworth District Board without negligence, but in fact, in the opinion of the jury, turning out to be dangerous. That does not impose, in my opinion, any liability on Wandsworth District Board. That really is sufficient to dispose of the case. The nice and difficult questions of whether this was part of the road or part of the sewer, whether it was under the control of the local authority as a road authority or as a sewer authority, and whether what happened may be properly called misfeasance or non-feasance, become immaterial if that is the correct view of the case, and therefore I do not think it necessary to discuss them.

Another nice and difficult question has been discussed before us, which was this: Wandsworth District Board was the creation, I think, of the statute to which I have referred of 1855. In 1887 Battersea, or Battersea including Penge, was taken out of the district of Wandsworth District Board, and handed over to the Vestry of Battersea. In 1899 the powers and liabilities of the Vestry of Battersea were transferred to the present defendants, Battersea Corporation, and nice and somewhat difficult questions were raised as to whether the effect of that legislation was or was not to transfer any liability which there might be upon Wandsworth District Board to the Vestry of Battersea, and from them to the present defendants. As I take the view that Wandsworth District Board were not liable—that no liability was imposed on them—it is not necessary to inquire whether that liability was transferred. It is a very difficult question, and I do not think it necessary to express any opinion on it, and therefore I shall not do so.

In my opinion the appeal fails on the ground that I have stated, that there was no evidence of negligence on the part of Wandsworth District Board, and without negligence they are not responsible for exercising the statutory powers that they were exercising when they put this grating and gully into the road in the way they did. In my opinion the appeal fails and must be dismissed.

BANKES, L.J.—I agree. The plaintiff in this unfortunate litigation seems to have made a twofold case against the defendants. She alleged that the condition of this gully or grating was defective in two respects, first because a portion of the grating itself or the setting in which it was placed was broken, and, secondly, because owing to defective construction the surface of the grating had sunk; and it was also alleged that the defendants were responsible for that condition of things because they were the sewer authority for the district, and their responsibility in respect of this gully or grating was the responsibility of the sewer authority, and as such it was not open to them to raise this question about non-feasance or misfeasance. But they had a second string to their bow in alleging that, whether they were right or wrong in that first condition, this gully or grating had been originally wrongly or improperly constructed, that the liability for that original construction passed to Battersea Vestry under the statute, and that that was a misfeasance for which Battersea Vestry, even if their responsibility in respect of this gully or grating was that of a highway authority, would be liable. On the other hand, the defendants said: "We have nothing to do with the grating or gully as sewer authority, and there is in fact really nothing wrong with this grating; it was constructed many years ago by Wandsworth District Board, and they put it in in accordance with the best engineering opinion of the time, and nothing now really can be said against this construction in any shape or form. There has been no sinking, and we are not liable."

In those circumstances several questions were put to the jury, and, as often happens in such cases, although the jury may have a very clear idea of what they intend and desire to say, when they come to split it up amongst the answers to a number of questions they do not make their meaning very clear. It is very easy to criticise the answers that were given and to say they were not, on the face of them, at all clear; I do not think they are, but I agree with what

SCRUTTON, J., said with regard to the meaning of the findings when he says (84 L.J.K.B. at p. 1884) that the jury

> "find that the frame of the grid was broken and part of it was missing; but I think the effect of their twelfth finding is that that broken part was so full of detritus that it was not negligent not to have discovered that it was broken; and they find that what caused the accident was that in the original construction of the channelling, gully and the grating, the surface level of the grating was placed so much lower than the surrounding road that it was in fact a danger; but as I read it they also find that, though it was a danger, it was not negligence not to have seen that it was a danger, which I think must mean that they thought it was the ordinary method of construction at the time it was made."

It seems to me, on reading these answers, that that is clearly what the jury did intend to convey. They did not really accept the case either of the plaintiff or of the defendants, but they took their own line with regard to it, and they found that this gully or grating in its original construction was a danger, having regard to the fact that this accident had happened, but that, owing to the state of engineering knowledge and practice with regard to this gully at the time it was put in, there was no ground for suggesting that either the persons who originally put it in or the persons in whose charge it had been subsequently were negligent in not having discovered or noticed that there was any defect in it.

In those circumstances, what is the position of the plaintiff? The plaintiff appeals here, but she does not ask that any further questions should be submitted to the jury and does not complain that any question was not submitted to the jury which ought to have been; and she is content to rest her case on the findings as they stand. It seems to me that this case falls within the principle of *Geddis* v. *Proprietors of Bann Reservoir* (2), and that is in accordance with the view taken by LUSH, J., in *McClelland* v. *Manchester Corpn.* (1), which has been referred to by PICKFORD, L.J. In *Geddis* v. *Proprietors of Bann Reservoir* (2) LORD BLACKBURN said (3 App. Cas. at pp. 455, 456):

> "It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

If that is the law applicable to this case, as I believe it is, it is incumbent on the plaintiff to establish that there was negligence on the part of the Wandsworth District Board in the original construction of this gully or grating. There is no such finding, and, on the contrary, if SCRUTTON, J.'s view of what the jury meant is accepted, the jury negatived that. In those circumstances, in my opinion, the appeal fails.

But there is this other point on the statute which has been already before two learned judges; and I must say that I think the case of the respondents is right on that point also. Section 4 of the Act of 1887, on which this question arises, provides not that the Vestry of St. Mary, Battersea, shall, in the Act of 1855, be substituted for Wandsworth District Board, and that that Act has to be read as though wherever the words "Wandsworth District Board" appear "the Vestry of Battersea" is to be substituted; but it provides that:

> "The parish of St. Mary, Battersea, excluding Penge, shall cease to be united with the parishes mentioned in Sch. B of the principal Act as forming the Wandsworth District, and the principal Act shall be read and have effect as if the said parish, excluding Penge, had been named in Part 2 of Sch. A of the said Act."

If it had been named—and, of course, that means originally named—then the effect would have been that the vestry of the parish of St. Mary, Battersea, would have had the right to do the work to this road which was in fact done by Wandsworth District Board; but the fact that the statute gave them the right to do it does not seem to me to impose an obligation on or to pass over a liability to them, if in fact they had not done it, but Wandsworth District Board had in fact done it; and, so far as I can see, there are no words which pass the liability of Wandsworth District Board for what they had done to Battersea Vestry, who had not done or attempted to do the work, although in consequence of the provisions of s. 4 of the Act of 1887 the Act of 1855 must be read as though they had the powers. In my opinion, on both grounds the appeal fails.

NEVILLE, J.—I think that the whole question really turns on how we are to understand the findings of the jury. I agree that, even though when the gully was constructed in 1883 it was so constructed that many years afterwards it proved to be a danger to passengers, still that would not be such misfeasance as to make the road authority liable unless they had failed in reasonable care in the original construction of the gully; and after all the consideration that I can give to the findings of the jury, I agree with the Lords Justices that there is no finding by the jury of any such want of reasonable care. That, of course, determines the case. I do not wish it to be understood that if Wandsworth District Board had been guilty of negligence in the construction of the gully the defendants in the present case would not have been liable, because I am not satisfied that the whole of their liabilities were not, by force of the words of the statute of 1899, transferred to the present defendants. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. W. Young, Son, & Ward*; *Paul Caudwell.*

[*Reported by* EDWARD J. CHAPLIN, ESQ., *Barrister-at-Law.*]

McVITTIE *v.* TURNER

[COURT OF APPEAL (Swinfen Eady, Phillimore and Bankes, L.JJ.), July 29, 1915]

[Reported 85 L.J.K.B. 23; 113 L.T. 982; 80 J.P. 25; 60 Sol. Jo. 238; 13 L.G.R. 1181]

Cinematograph—Entry on premises—Constable—Need of special appointment by county council—Validity of entry—Trespass—Entry to see whether provisions of Cinematograph Act, 1909, *complied with—Further purpose to check compliance with other statutory provisions—Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *s.* 4.

A constable entering premises to see whether the provisions of the Cinematograph Act, 1909, have been complied with need not be specially "appointed for the purpose by [the] county council," those words in s. 4 of the Act applying only to an officer appointed by the council and not to a constable.

If a constable, following the instructions of his superior officer, enters premises to see whether the provisions of the Act have been complied with, e.g., those relating to the use of inflammable films, his entry will not constitute a trespass because he is instructed also to look for other matters, e.g., the provision of music without a licence, even though those other matters are more important in the mind of the person who sent him.

Notes. As to entry by a constable on premises under the Cinematograph Act, 1909, s. 4, see 32 HALSBURY'S LAWS (2nd Edn.) 74. For the Cinematograph Act, 1909, s. 4, see 25 HALSBURY'S STATUTES (2nd Edn.) 42.

Case referred to in argument:

Alty v. *Farrell*, [1896] 1 Q.B. 636; 65 L.J.M.C. 115; 74 L.T. 492; 60 J.P. 373; 12 T.L.R. 346; 40 Sol. Jo. 460; 18 Cox, C.C. 321, D.C.; 44 Digest 141, *87*.

Appeal by the defendant against a judgment of SANKEY, J., sitting with a jury at Manchester Assizes.

The plaintiff, who was the proprietor of premises not licensed for cinematograph performances, sued the defendant, who was chief constable of Oldham, for trespassing by his inspector and constables on the plaintiff's premises against the plaintiff's will. SANKEY, J., left two questions to the jury: (i) Had the defendant reason to believe that inflammable films were being used or about to be used at the plaintiff's theatre? (ii) Were the police officers sent for the bona fide purpose of finding out what sort of films were being used or about to be used, and finding out whether the provisions of the Act were being complied with? The jury answered both questions in the negative, and assessed the damages against the defendant at £100. The defendant appealed.

Gordon Hewart, *K.C.*, and *Oliver* for the defendant.
Ernest Wild, *K.C.*, and *A. L. Bridge* for the plaintiff.

SWINFEN EADY, L.J.—The appeal is by the defendant David Henry Turner, who is the chief constable of Oldham, asking us to set aside the verdict and judgment, and to have a new trial, on two grounds: first, that the verdict was against the weight of the evidence, and secondly, that the trial was unsatisfactory, and that the summing-up, especially on the second point submitted to the jury, did not give the jury that assistance which they ought to have had, and so rendered the trial unsatisfactory.

The proprietor of a picture palace or cinematograph show at Oldham is plaintiff, and he claims damages for trespass by the defendant on the plaintiff's premises by attending the cinematograph by his constables and an inspector, and claiming a right to be there, and entering against the will of the plaintiff. On several occasions the constables have paid for admittance; and no complaint is made as to those entries. But it is conceded that what has taken place would be a trespass which the defendant has to justify, and that the defendant must fail unless he can justify his acts in claiming to enter the theatre as of right. There has been no leave and licence, and no invitation by the plaintiff to the defendant to enter the theatre. The defendant accepts that position, and has dealt with it on that footing.

The plaintiff claims under the Cinematograph Act, 1909, s. 1 of which provides:

> "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or save as otherwise expressly provided by this Act elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

So that inflammable films cannot be used (i) except in premises licensed for the purpose, and (ii) unless certain regulations made by the Secretary of State have been complied with. The plaintiff's premises have not been licensed for the purpose in accordance with the provisions of the Act, so they are unlicensed premises; therefore no exhibition for which inflammable films are used can be given in those premises. It is not a question of whether the regulations made by the Secretary of State are complied with; whether they are or not is immaterial for this purpose, because the premises are not licensed, and unless they are licensed, whatever the

conditions and regulations with regard to safety may be that are observed, the films cannot be exhibited there.

Section 4 under which the defendant justified entry as a police officer provides:

> "A constable or any officer appointed for the purpose by a county council may at all reasonable times enter any premises, whether licensed or not, in which he has reason to believe that such an exhibition as aforesaid is being or is about to be given, with a view to seeing whether the provisions of this Act, or any regulations made thereunder, and the conditions of any licence granted under this Act, have been complied with. . . ."

That is the power of entry, and it is subject to two limitations. One is that the constable must have reason to believe that such an exhibition is being, or is about to be, given. Unless he has reason to believe that, he is not entitled to enter, for mere suspicion does not give him a right of entry. The second point is that the entry must be made with a view of seeing whether the provisions of the Act have been complied with. That must be the object of the visit. It was urged here that according to the true construction of this section the constable must be specially appointed for the purpose by a county council. But I do not read the section in that way. In my opinion the true construction of the section is this: A constable may at all reasonable times enter, or any officer appointed for the purpose by a county council may at all reasonable times enter, and he need not be appointed for the purpose by a county council. If that had been intended the section would probably have run: "A constable or other officer appointed for the purpose," but it runs: "A constable or any officer."

[HIS LORDSHIP reviewed the evidence and held that the verdict of the jury on the first question left to them that the defendant did not have reason to believe that inflammable films were being used or were about to be used at the plaintiff's premises was one which no reasonable men could have properly given, and continued:] The second question that the learned judge left was:

> "Were the police officers sent for the bona fide purpose of finding out what sort of films were being, or were about to be used, and finding out whether the provisions of the Act were being complied with?"

The jury answered in the negative as they had answered the first question. In my opinion the summing up on this question being left to the jury was not satisfactory. The case of the plaintiff is that it was complained that he, a much persecuted man, had music at this cinematograph theatre, the premises not being licensed premises, and that the real purpose for which the police were sent was not to obtain evidence, or to make inquiries, or with a view to seeing whether the provisions of the Act with regard to films were being observed, but to see whether music was being given at the entertainment contrary to the provisions of the statute. [HIS LORDSHIP referred to previous visits to the premises and prosecutions for providing music there, and continued:] It is urged that in May visits were made by at least two constables with a view to obtaining further evidence to justify convictions on the music question. It is said that the only right of entry was with a view to seeing whether the provisions of the Cinematograph Act were being complied with, and that the defendant had no right to send the police there with regard to the music question. [HIS LORDSHIP referred to confusion in the summing up with regard to seeing if the regulations were being complied with, although they did not apply because the premises were not licensed premises, and continued:] But the object of the police inspecting here was to see whether inflammable films were used, and that involved making inquiries that Inspector Longson gave evidence of having made.

I think that in the summing-up the learned judge has not left clearly to the jury the position on this part of the case. In my opinion, it would be sufficient if the police officer were sent for the bona fide purpose of finding out what sort of films were being used, or about to be used. That would be a sufficient compliance

with the statute, and would be a justification for their entry, even though, at the same time, they had been told to keep their eyes and ears open to any other matters that might arise with regard to music or anything else; but, if they were sent for the bona fide purpose of dealing with the films, it would not render their presence invalid, illegal, or unauthorised if they had also instructions to observe anything else that was going on at the same time.

For these reasons, on both grounds, I think the trial was unsatisfactory. On the first point it cannot be allowed to stand, nor, on the second point, owing to the way it was summed up by the judge; and therefore the verdict of the jury must be set aside, and there must be a new trial.

PHILLIMORE, L.J.—I am of the same opinion. The first point one has to address oneself to is the construction of s. 4 of the Cinematograph Act, 1909, and I agree with what I understand is the view taken by the learned judge, and has been expressed by SWINFEN EADY, L.J., that under s. 4 either a constable or any other officer appointed for that purpose by the council has the power which that section gives. In county boroughs, and only in county boroughs, the constable is to be appointed by the county borough council, and even then not directly by the watch committee. In the county of London the police are not appointed by the county council, either in London or outside the City, and in all counties it is the standing joint committee of the county council, and the magistrates, who exercise police jurisdiction. Therefore, there would be two classes of authorities; it may well be that the county council in a particular place desire to have their own officers appointed for this purpose, and it is probably for that reason that the two classes of authorities are mentioned in the section. But having got as far as that one has to consider whether the defendant, who has to justify some of these trespasses complained of, brings himself within s. 4. I say "some of them," because it might well be material on s. 5 to consider whether there was any trespass at all; i.e., some of the earlier visits. I agree that, in order to justify, the defendant has to show two things: he has to show that he has reason to believe that there is such a cause as the Act mentions, and, if he goes in, or sends a man in, to see whether the provisions of the Act have been complied with, he must, no doubt, support both those contentions, and therefore it was right to put two questions.

[HIS LORDSHIP held that the verdict of the jury on the first question was such as no reasonable men could give and was perverse and should be set aside, criticised the judge's summing-up on the second question as not giving the jury sufficient assistance, and continued:] Secondly, I am sure I do not know what his own view was; I am sure if I had been the jury I should not have known what his own view was as to whether a constable should have been sent in for two purposes. To my mind, if he was sent in with a view of seeing whether any particular provision of the Act, such as not having inflammable films, was complied with or not, if he was sent in for that purpose, it does not matter whether he was told at the same time that he might look for half-a-dozen other purposes; nor does it matter if it was proved that in the mind of the person who sent him in some of the other purposes were more important than the purpose under which he had authority to go in. When authority is given to a man to do that which otherwise would be a trespass, if he pursues the authority and satisfied the conditions of the authority, all other inquiries are superfluous. As regards the form of the question, I think it is unfortunate that the words "bona fide" were introduced. They immediately lead the jury, which, obviously, would be sympathetic to the plaintiff, to think that there was a loophole with regard to their verdict. But, apart from that, there is the danger of the double sentence which leads the jury back to the old trouble between licensed and unlicensed houses; but worse than all that is the fact that they did not get sufficient assistance to enable them to understand what was the point which they had to determine. The point they had to determine was whether these people, for whatever other purposes they were also sent,

were sent with a view to seeing whether the provisions of the Act as to non-inflammable films had been complied with or not. I think for these reasons, which are substantially those that have been already indicated by SWINFEN EADY, L.J., that this verdict cannot stand, and there must be a new trial.

BANKES, L.J., held that the summary upon the first part of the case was not satisfactory and that there had been a clear misdirection on the second point, and concluded: On those grounds I agree there ought to be a new trial in this case.

Appeal allowed. New trial ordered.

Solicitors: *Johnson, Weatherall & Co.*, for *J. H. Hallsworth*, Oldham; *Hargrave, Son & Barrett*, for *March, Pearson & Akenhead*, Manchester.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* NOEL

[COURT OF CRIMINAL APPEAL (Ridley, Lord Coleridge and Scrutton, JJ.), July 8, 1914]

[Reported [1914] 3 K.B. 848; 84 L.J.K.B. 142; 112 L.T. 47; 24 Cox, C.C. 486; 10 Cr. App. Rep. 255]

Criminal Law—Evidence—"Act disclosed in consequence of compulsory process of any court"—Act first disclosed by witness while under cross-examination, without protest, in civil action—Larceny Act, 1861 (24 & 25 *Vict.*, *c.* 96), *s.* 85.

A voluntary witness in a civil action who discloses while under cross-examination, without objection, that he has committed a misdemeanour under the Larceny Act, 1861, is not protected by s. 85 of that Act (which provides that no person may be convicted of any of the misdemeanours enumerated in the first ten sections of the Act by any evidence first disclosed by him in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been bona fide instituted by any party aggrieved), since such offence is not disclosed in consequence of any compulsory process of a court of law within the meaning of the section, and, therefore, he may be prosecuted for the offence so disclosed.

Notes. Applied: *R.* v. *Tuttle*, [1929] All E.R.Rep. 107. Distinguished: *R.* v. *Maywhort*, [1955] 2 All E.R. 752.

As to statements made by accused in other legal proceedings, see 10 HALSBURY'S LAWS (3rd Edn.) 477, 478; and for cases see 14 DIGEST (Repl.) 463 et seq. See also Larceny Act, 1916, s. 43 (2). For Larceny Acts, 1861 and 1916, see 5 HALSBURY'S STATUTES (2nd Edn.) 727, 1011.

Cases referred to in argument:

R. v. *Garbett* (1847), Car. & Kir. 474; 1 Den. 236; 9 L.T.O.S. 51; 13 J.P. 602; 2 Cox, C.C. 488, Ex. Ch.; 14 Digest (Repl.) 465, *4494*.

R. v. *Skeen and Freeman* (1859), Bell, C.C. 97; 28 L.J.M.C. 91; 23 J.P. 101; 5 Jur.N.S. 151; 7 W.R. 255; 8 Cox, C.C. 143, C.C.R.; 14 Digest (Repl.) 464, *4474*.

R. v. *Gunnell* (1886), 55 L.T. 786; 51 J.P. 279; 3 T.L.R. 209; 16 Cox, C.C. 154, C.C.A.; 14 Digest (Repl.) 507, *4922*.

R. v. *Oliver* (1909), 3 Cr. App. Rep. 246, C.C.A.; 14 Digest (Repl.) 465, *4490*.

Appeal from a conviction at the Central Criminal Court upon an indictment under s. 1 of the Larceny Act, 1901 [now s. 20 of the Larceny Act, 1916, 5 HALSBURY'S STATUTES (2nd Edn.) 1022].

The indictment contained several counts which charged the appellant with fraudulently converting to his own use a cheque for £1,000 and the proceeds thereof received for or on account of another person, or intrusted to him for a certain purpose, or intrusted to him for safe custody. The cheque for £1,000 was handed to the appellant by his employer. The appellant paid the cheque into a banking account on which he only could draw, and he drew out the full amount of the cheque. An action to recover the sum of £1,000 was brought in the High Court against the appellant and his employer. The appellant voluntarily gave evidence in the action, and while under cross-examination he was asked for the pass-book which had relation to the banking account. The pass-book was not in court, but on being told to fetch the book the appellant did so and produced it without any objection. The book was the first disclosure of the payment of the cheque for £1,000 into his banking account referred to, and of the drawing out of that sum by the appellant. A prosecution was thereupon instituted against the appellant.

At the trial part of the defence set up was that he could not be convicted because of the provisions of s. 85 (1) of the Larceny Act, 1861, the acts upon which the charge was founded having been first disclosed by him as already stated. This defence was held not good and the appellant was convicted. The appeal was based upon the defence set up at the trial.

Section 85 (1) of the Larceny Act, 1861, provides:

> "Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceedings in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceedings which shall have been bona fide instituted by any party aggrieved."

A. Powell, K.C., and *Arthur Lawton* for the appellant.
Travers Humphreys for the Crown.

RIDLEY, J., delivered the following judgment of the court. The contention raised on behalf of the appellant is that he was not liable to conviction because the acts which led to the charges against him had, previously to such charges, been first disclosed by him on oath in consequence of a "compulsory process" of the court within the meaning of s. 85 of the Larceny Act, 1861. It is urged that if a witness is cross-examined his answers are given in consequence of a compulsory process of the court, and that, therefore, no criminal proceedings can be put in force for the acts disclosed by such answers.

We think that the expression "compulsory process" in s. 85 means something more than merely putting to a witness a question which he may be unwilling to answer. If there were a compulsory examination as in bankruptcy or by interrogatories, or by a bill in equity, there would be a compulsory process of a court of law or equity. Again possibly, if a witness refuses to answer a question on the ground that his answer may incriminate him and he is ordered by the court to answer the question, that may be a "compulsory process" of the court within the meaning of s. 85. That point, however, does not arise in the present case, and we

do not wish to decide it. No privilege was claimed in this case, and we need only say that where a witness voluntarily gives evidence in proceedings in a court of law or equity such evidence is not given in "consequence of any compulsory process of a court of law or equity" within the meaning of s. 85.

Appeal dismissed.

Solicitors: *Adrian*, for *Henry & Co.*; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

ROBSON *v.* PREMIER OIL AND PIPE LINE CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.), April 26, May 6, 1915]

[Reported [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 31 T.L.R. 420; 59 Sol. Jo. 475]

Alien—Enemy—Company—Enemy shareholder—Right to vote by proxy at company meeting.

All intercourse with enemy aliens whether commercial or not which tends to the detriment of Great Britain or advantage to her enemies inconsistent with a state of war between the two countries is forbidden on the ground of public policy.

During the 1914–18 war between Great Britain and Germany a British trading company which owned a large amount of property in Germany held a meeting of the company for the purpose of electing directors. The chairman of the meeting disallowed the proxies of a German bank, which had employed British subjects to exercise their voting power, on the ground that a shareholder who was an alien enemy could not during the war vote at a meeting of the company. Had the proxies been allowed directors other than those elected would have been elected and gained control and management of the company.

Held: the proposed exercise of the power of voting by the enemy shareholders was for the purpose of gaining control and management of a British trading company which owned large property in the enemy country; this was to the detriment of Great Britain and of advantage to the enemy; and, therefore, the rejection of the votes was justified.

Quære: whether intercourse with an alien enemy whether commercial or not which was not to the detriment of Great Britain would be prohibited.

Notes. The Trading with the Enemy Act, 1914, and the Trading with the Enemy Proclamation, 1914, No. 2, have been respectively repealed and revoked.

Considered: *Zinc Corpn.* v. *Hirsch*, post, p. 487; *Tingley* v. *Müller*, [1916–17] All E.R.Rep. 470; *Bevan* v. *Bevan*, [1955] 2 All E.R. 206. Referred to: *Jebara* v. *Ottoman Bank*, [1927] 2 K.B. 254; *Re Anglo-International Bank, Ltd.*, [1943] 2 All E.R. 88; *Boissevain* v. *Weil*, [1948] 1 All E.R. 893; *Arab Bank, Ltd.* v. *Barclays Bank (D.C. & O.)*, [1954] 2 All E.R. 226.

For cases on what constitutes trading with the enemy, see 2 DIGEST (Repl.) 258 et seq.

Cases referred to:

(1) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 276, *639*.

(2) *The Cosmopolite* (1801), 4 Ch. Rob. 8; 2 Digest (Repl.) 278, *653*.

(3) *The Panariellos* (1915), 84 L.J.P. 140; 112 L.T. 177; 31 T.L.R. 326; 59 Sol. Jo. 399; 13 Asp.M.L.C. 52; affirmed (1916), 85 L.J.P. 112; 114 L.T. 670; 32 T.L.R. 459; 60 Sol. Jo. 427; 13 Asp.M.L.C. 484, P.C.; 2 Digest (Repl.) 276, *640*.

(4) *Kershaw* v. *Kelsey* (1868), 100 Mass. 561; 1 Amer. Rep. 142.

Also referred to in argument:

Ex parte Boussmaker (1806), 13 Ves. 71; 33 E.R. 221; 2 Digest (Repl.) 243, *457*.

R. v. *L.C.C., Ex parte London and Provincial Electric Theatres, Ltd.*, [1915] 2 K.B. 466; 84 L.J.K.B. 1787; 113 L.T. 118; 79 J.P. 417; 31 T.L.R. 329; 59 Sol. Jo. 382; 13 L.G.R. 849, C.A.; 2 Digest (Repl.) 223, *341*.

Orenstein and Koppel v. *Egyptian Phosphate Co., Ltd.*, 1915 S.C. 55; 52 Sc.L.R. 54; [1914] 2 S.L.T. 293; 2 Digest (Repl.) 262, **413*.

Grinswold v. *Waddington* (1819), 16 Johnson's Cases, 438.

Appeal from an order of SARGANT, J.

The plaintiff moved before SARGANT, J., on behalf of himself and all other the shareholders of the defendant company, which was an English company incorporated under the Companies (Consolidation) Act, 1908, except five shareholders, who were defendants, for an order that these five defendants and each of them might be restrained until the trial of the action or further order from acting or purporting to act as directors or a director of the defendant company, and that the company might be restrained from allowing its five co-defendants and each of them to act or purport to act as such directors or director as aforesaid. A meeting had been held for the election of directors of the company, and the chairman of the meeting, Sir Frank Crisp, had disallowed the proxies of Direction der Disconto-Gesellschaft, a German bank with its head office in Berlin and a branch in London, on the ground that a shareholder who was an alien enemy could not during the war vote at a meeting of the company. Had these proxies been allowed, directors other than the five defendants, who were in fact elected at the meeting, would have been elected. The business of the Direction der Disconto-Gesellschaft was being conducted in the United Kingdom under a licence to trade granted by the Secretary of State in pursuance of the power conferred on him by the Aliens Restriction (No. 2) Order in Council, 1914, made under the Aliens Restriction Act, 1914, Sir William Plender being appointed controller. The writ was issued in the action asking for (i) a declaration that none of the defendants, John Broad, Thomas Lennox Gilmour, Charles James Jackson, Scott Lings, and Arthur Whittaker, had been validly appointed directors or director of the company; (ii) an injunction until the trial of the action or further order restraining (a) the defendants and each of them from acting or purporting to act as directors or a director of the defendant company, and (b) the defendant company from allowing the defendants or any of them to act or to purport to act as such directors or director as aforesaid. On Mar. 31, SARGANT, J., held that the fact that the Trading with the Enemy Act, 1914, and the Trading with the Enemy Proclamation, 1914, No. 2, was silent as to the rights of alien enemies to vote at meetings of British companies did not relieve from any prohibition at common law; that at common law all intercourse with alien enemies was forbidden, whether commercial or not; and since the licence to trade given to the London branch of the German bank did not authorise the exercise of the voting power in question, the proxies had been rightly rejected by the chairman of the meeting. From that decision the plaintiff appealed.

Gore-Browne, K.C. (with him *Fairfax Luxmoore*), for the plaintiff.

Martelli, K.C., and *H. E. Wright* for the defendant company, and *G. M. Simmonds* for other defendants, were not called on to argue.

Cur. adv. vult.

May 6, 1915. **PICKFORD, L.J.**, read the following judgment of the court: The plaintiff, suing on behalf of himself and all other the shareholders in the

defendant company except the five last-mentioned defendants, asked for a declaration that certain persons were not validly elected as directors of the defendant company. This involves the question whether a number of votes for which a proxy was tendered were rightly rejected. If they were, the directors were validly elected; if they were not and should have been counted, then other persons were elected as directors. The ground on which they were rejected was that they were tendered on behalf of an alien enemy—i.e, a German corporation, the Disconto-Gesellschaft—carrying on business in an enemy country, but having an establishment in London to which a licence has been granted in pursuance of the Aliens Restriction (No. 2) Order in Council of Aug. 10, 1914.

The case raises two questions, one of general importance and one of a subsidiary nature, namely, Have alien enemy shareholders a right of voting in respect of shares in a British company during the war, and of exercising that right by proxy; and, secondly, if there be not that general right, had these shareholders, by reason of the circumstances of this case, that right?

On the general question the argument of the appellants may, we think, be summarised in two contentions—(i) that the prohibition at common law of intercourse with an alien enemy is limited to commercial intercourse or trading; and (ii) that the transaction in this case did not come within the definition of commercial intercourse. In our opinion, neither of these contentions is correct. The prohibition of intercourse was stated as extending to much wider limits by LORD STOWELL in *The Hoop* (1), and *The Cosmopolite* (2), and reference was made in the judgment to writings of jurists on the subject. The statement there contained has been followed in several cases in the courts of this country, and also in America by such great authorities as STORY and KENT. It is not necessary, in our opinion, to examine these cases in detail, as they were very carefully considered quite recently by the President of the Probate, Divorce, and Admiralty Division in *The Panariellos* (3), and will be found collected in that judgment. We have not been referred to, and we do not know, of any case in this country in which any doubt has been thrown upon the statement of the law by LORD STOWELL, which is adopted by the learned President in the case mentioned. It was argued before us that these statements were all dicta not necessary for the decision of the cases in which they were made. Assuming this to be the case they are dicta of such high authority that we should hesitate to differ from them. But in our opinion, so far as they state that the prohibition extends beyond commercial intercourse, they are correct. We were, however, referred to *Kershaw* v. *Kelsey* (4), in which it was held, after a very careful examination of these cases and dicta, that they were not correct and that no intercourse was prohibited except commercial intercourse or trading with the enemy. This case has been followed in other cases in America. As we have already said, no such limitation is to be found suggested in any English case, and we cannot agree with it.

The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country, or advantage to the enemy, is permissible, because it cannot be brought within the definition of a commercial transaction. Judge GRAY, in *Kershaw* v. *Kelsey* (4), states the law in our opinion correctly when he says that the law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries. But we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse. We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to the country or advantage to the enemy. It is enough to say that, in our opinion, all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the lan-

guage of the learned judge before mentioned, inconsistent with the state of war between the two countries, and therefore forbidden.

That this transaction has such a tendency is clear. The proposed exercise of the votes is for the purpose of obtaining the control and management, or a large voice in them, of a British trading company which owns large property in the enemy's country, and that this may be to the detriment of the interests of this country and the advantage of the enemy cannot be doubted. We think also that the rejection of these votes may be justified on the narrower ground that this was a commercial transaction. Commercial intercourse is not confined to making contracts between an alien enemy and a British subject, and such a transaction as this directed to obtaining the control of a trading company is, in our opinion, commercial. It follows from what has been said that the employment of a British subject as proxy to exercise the voting power is an intercourse between him and the alien enemy which is prohibited. On the subsidiary point we do not think it is necessary to add anything to what has been said by SARGANT, J. Whatever may be the proper definition of a branch or transactions with a branch within the meaning of cl. 6 of the proclamation, we think it clear that this is not such a transaction with a branch. The licence does not authorise such a transaction, and it was not argued before us that it did. In our opinion the judgment of SARGANT, J., was quite right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Mayo, Elder & Co.*; *Ashurst, Morris, Crisp & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WILLESDEN URBAN DISTRICT COUNCIL *v.* MORGAN

[KING'S BENCH DIVISION (Ridley, Avory and Lush, JJ.), November 24, 25, 1914]

[Reported [1915] 1 K.B. 349; 84 L.J.K.B. 373; 112 L.T. 423; 79 J.P. 166; 31 T.L.R. 93; 59 Sol. Jo. 148; 13 L.G.R. 390; 24 Cox, C.C. 546]

Shop—Hours of closing—Early closing day—Shop closed—Automatic machine attached to door of shop for supply of goods—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *ss.* 4 (1), 9.

By s. 4 (1) of the Shops Act, 1912 [now s. 1 (1) of the Shops Act, 1950]: "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one week-day in every week." By s. 9 of the Act [now s. 12 of the Shops Act, 1950]: "It shall not be lawful in any locality to carry on in any place, not being a shop, retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class, and, if any person carries on any trade or business in contravention of this section, this Act shall apply as if he were the occupier of a shop and the shop were being kept open in contravention of this Act."

The respondent, a dairyman, had fitted to the entrance door of his shop an automatic machine by means of which a supply of milk from a reservoir inside the shop was made available to the public on the insertion of a coin in the slot provided for that purpose in the machine when the shop was closed. On the afternoon of the day of the week appointed for the weekly half-holiday the respondent's shop was closed, but the machine was being used by members of the public who wished to buy milk.

Held: the words "for the serving of customers" in s. 4 (1) meant for the personal serving of customers; as the reservoir containing the milk was inside the shop there was no carrying on of the retail trade of dairyman at a place not being a shop, contrary to s. 9 of the Act; and, therefore, the respondent was not guilty of an offence against either of those sections.

Notes. The Shops Act, 1912, was repealed by the Shops Act, 1950, s. 1 (1) and s. 12 of which re-enacts s. 4 (1) and s. 9 of the Act of 1912.

As to shop hours, see 17 HALSBURY'S LAWS (3rd Edn.) 194 et seq.; and for cases see 24 DIGEST (Repl.) 1111 et seq.

Special Cases stated by Middlesex justices.

The appellants, the Willesden Urban District Council, through one of their inspectors appointed to carry out the provisions of the Shops Act, 1912, laid two informations against the respondent, Morgan, for that he the respondent, in contravention of s. 4 of the Shops Act, 1912, failed to close his shop on Feb. 26, 1914, on the weekly half-holiday, and also, in contravention of s. 9 of the same Act, carried on on the same date in a place not being a shop the retail trade or business of a dairyman by means of an automatic machine.

Upon the hearing of the informations it was proved or admitted that an order was duly made and confirmed, extending, as regards Willesden, the provisions of s. 4 of the Shops Act, 1912, so as to include the retail trade or business of a dairyman, which was otherwise exempt under sub-s. (6) of s. 4. The respondent carried on the retail trade or business of a dairyman at Willesden. On Feb. 26, 1914, the appellants' inspector noticed that the respondent had had an automatic machine fitted to the door at the entrance of his shop, by means of which a supply of milk was afforded to the public in quantities of one half-pint on the insertion of a penny in the slot provided for that purpose and forming part of the machine. On the afternoon of Feb. 26, 1914, being the time when the respondent's shop was required to be closed for the usual weekly half-holiday, the inspector inserted a penny in the slot and, after complying with all the instructions appearing on the machine, obtained a half-pint of milk from the reservoir of the machine, the reservoir being situated within the shop. The respondent's shop was locked, the blinds were drawn, no goods were exhibited for sale, and it was not possible for any would-be customer to obtain access to the interior of the shop.

On behalf of the appellants it was contended that there was a complete legal contract of sale created between the inspector and the respondent when the former put his penny in the slot and received the milk; that the sale of milk as found in the manner described was a carrying on of a retail trade or business in a shop within the definition of s. 19 (1) of the Act; that the sale was carried out when the shop ought to have been closed for the usual weekly half-holiday; and that, consequently, there had been an infringement of the provisions of s. 4. It was further contended that the respondent had carried on his retail trade or business of a dairyman in a place not being a shop at a time when it was unlawful to keep a shop open for the purpose, and that, therefore, there had been a contravention of the provisions of s. 9. On behalf of the respondent it was contended that there was no "serving of customers" within the meaning of s. 4 (1) of the Act by using the automatic machine; that the respondent did not carry on on the day in question the retail trade or business of a dairyman in a place which was not a shop; and that s. 9 did not apply to automatic selling wherever it was carried on.

The justices found that there had been no infringement of the Act by the setting up of the automatic machine; that on the day in question the respondent's shop had been closed for the serving of customers within the meaning of s. 4; and that, as the automatic machine formed a part of the respondent's shop, there had been no carrying on by the respondent of the retail trade or business of a dairyman in a place which was not a shop. They therefore dismissed both informations.

The sections of the Shops Act, 1912, referred to in the case are sufficiently set out in the headnote.

Macmorran, K.C., and *Rentoul* for the appellants.
Colam, K.C., and *Woodcock* for the respondent.

RIDLEY, J.—The question that arises for our decision in this case is whether the respondent has done anything in contravention of s. 4 or of s. 9 of the Shops Act, 1912. In other words, did the respondent omit to have his shop closed for the serving of customers according to law, or did he carry on his retail trade or business of a dairyman at a place other than a shop during the prohibited period when his place of business should have been closed. I must confess that the case on the whole is not free from difficulty, but I have come without any doubt to the conclusion on the second point, that as the reservoir containing the milk was inside the shop, and as the milk was simply obtainable from this reservoir by means of a mechanical contrivance fixed to the door, the place where the milk was supplied was part of the shop, and that there was no carrying on of the retail trade or business of a dairyman at a place not being a shop.

That point being disposed of, it is only necessary to consider s. 4 of the Act. There are two ways in which this section may be read. The expression "for the serving of customers" may mean, as has been contended on behalf of the appellants, that a person who is able to get goods is a customer who has been served, although there has been no personal service to him by any of the shop assistants. In one sense it may be said that such a customer is served because the automatic machine has been provided and put in a place where it is for the use and benefit of those who wish to take advantage of it. On the other hand, the expression may be used exclusively to mean the personal serving of customers. This is where the difficulty arises. We have to choose between the two interpretations of the section which I have just mentioned. The Shops Act, 1912, was undoubtedly passed for the benefit of those persons who are engaged as shop assistants. It must not be forgotten, however, that any infringement of its provisions is visited with penalties, and consequently the utmost care is required in the construction of those provisions. Of course we must give the statute a fair reading, but we must not be too wide in our construction. As the Act was really intended, as I have said, for the benefit of those who were engaged as shop assistants, it must not be lost sight of that there is nothing in it to prevent people buying goods so long as their doing so in no way interferes with its provisions. I should never assent to any construction of the Act which would prevent shop assistants obtaining their weekly half-holiday. But I do not think that we can so construe it as to make it apply to the supply of articles by automatic machines unless the language of the Act compels us to do so.

In my opinion, s. 4 is satisfied by reading the words "for the serving of customers" as meaning "for the personal serving of customers." The construction contended for on behalf of the appellants appears to me to be going too far beyond the object of the Act. In the present case the respondent has not, by his action, done anything to interfere in the least with the weekly half-holiday of his shop assistants. The shop was locked up, the assistants were away, and the automatic machine, previously filled with milk, did not require the personal attendance of anyone to enable a customer to obtain a supply of milk if he wished to get any. As I stated at the beginning, I have felt some difficulty as to this case, but upon the whole I think that the narrower construction of s. 4—namely, personal service—is the correct one. In my view, therefore, the justices were quite correct in the decisions at which they arrived, and these appeals must be dismissed.

AVORY, J.—I must also admit that I have felt some considerable doubt as to these cases, but upon the whole I shall content myself with expressing my doubt and I shall not differ from the conclusion arrived at by RIDLEY, J. There cannot, I think, be any disagreement as to the primary object of the Shops Act, 1912

—namely, to secure a weekly half-holiday for shop assistants. But it appears to me that the legislature may have thought that that object might best be secured by imposing an absolute prohibition upon the carrying on of a business of a shop on the weekly half-holiday. If that is the case the scheme of the legislature may be that shops are to be closed for all purposes of business on that particular afternoon. That appears to me to be quite a reasonable interpretation of the words "shall be closed for the serving of customers." I cannot help thinking that the construction which the court is putting upon the words of s. 4—namely, that they are to be held to be limited to the personal serving of customers—is a narrow construction, but, at the same time, I am not prepared to differ from the view that it is a possible construction of the words "the serving of customers."

As to s. 9 of the Act, I do not think that this case comes within it at all. I agree that the business, whatever it was, carried on during the particular afternoon was carried on at the respondent's shop, and therefore s. 9 has no application at all. The real difficulty seems to me to be whether s. 9 ought to be limited in its operation by reference to s. 4. I think that this point must be left to be decided upon some future occasion when the question arises in a concrete form. At the present moment I have not formed any definite conclusion upon it. I agree that these appeals must be dismissed.

LUSH, J.—I also agree that the appeals should be dismissed, but, as the questions raised are of considerable importance, I propose to state the reasons for my decision. The case is one in which I think that it is most necessary to apply that fundamental rule—a rule founded on good sense rather than on law—that where words in a statute are capable of two different meanings, it is necessary to consider carefully, before determining which of the two meanings should be attributed to them, what is the peculiar mischief which the statute was intended to obviate. It is important to bear in mind that the Shops Act, 1912, is one of a series which began in the year 1892. Recollecting this fact, it seems to me to be quite clear that the one object which the legislature had in view in passing this statute was to restrict the hours during which persons engaged as shop assistants should be employed in serving customers. I quite agree with what counsel for the appellant said, that when we come to construe s. 4, and still more when we consider s. 9, the words used are quite capable of the meaning which he asks us to attribute to them—namely, that the shop shall be closed in such a way that no business at all shall be carried on during prohibited hours. But it must not be lost sight of that the legislature, as clearly appears from the Act itself, did not wish to debar people from obtaining goods which they might require during prohibited hours, but only to restrict the hours of employment of those who served customers. And bearing this in mind, I think that, if we reasonably can do so, we ought to adopt the other construction—namely, that the words used in s. 4 mean that the premises are to be closed in such a way that no one is to be employed to serve. It cannot be denied, as it seems to me, that the words are quite capable of that construction.

The justices arrived at the conclusion that the present case came within s. 4 so far as the question was concerned whether this was a shop or not. They also came to the conclusion that as there was no personal service during prohibited hours, there was no offence under s. 4. With that conclusion I agree, for the reason which I have already stated. It is quite true that this shop was not so effectively closed as to prevent customers from obtaining milk if they wished to do so; but it is equally true that it was effectively closed so far as any personal service of the purchaser was concerned. I cannot help being struck by the fact that in another statute passed in 1910, in which the intention of the legislature clearly was to prevent persons having a supply of goods, very different language was used from that employed in the Shops Act, 1912. The Act to which I refer is the Licensing (Consolidation) Act, 1910, and s. 61 of that Act does not speak of serving customers, but it actually prohibits the sale of intoxicating

liquor and the opening of licensed premises during certain hours. Why was not similar language used in the Shops Act, 1912, if the same thing was intended by the legislature? So far from its being used, the language actually employed is to my mind only intended to ensure that shop assistants shall not be in the shop. The justices have found that the shop was closed, and that there was no employment of the shop assistants. In my opinion, therefore, no offence was committed.

As to s. 9, I think that that section is a little more in counsel for the appellant's favour, because the language there used is:

> "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class."

But there again it is perfectly consistent with that language to say that what is prohibited is the personal carrying on of the business. The section must have the same meaning as s. 4, as, if not, the extraordinary result would follow that, whereas in a shop it is lawful to use an automatic machine, it is not lawful to use a machine for precisely the same goods in a place which is not a shop. I cannot conceive that the legislature intended to prohibit these machines in places not shops when it permits them to be used in shops. For these reasons I think that under s. 9 also it is the personal carrying on of the trade or business that is forbidden.

Appeals dismissed.

Solicitors: *W. G. Greig*; *Charles May.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

BRITISH COLUMBIA ELECTRIC RAIL. CO., LTD. *v.* LOACH

[PRIVY COUNCIL (Viscount Haldane, Lord Parker of Waddington and Lord Sumner), July 6, 7, 26, 1915]

[Reported [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946; 8 W.W.R. 1263; 32 W.L.R. 169; 20 C.R.C. 309; 23 D.L.R. 4]

Negligence—Effective cause—Responsibility—Negligence by person killed in accident—Subsequent failure by defendant, due to negligence, to avoid accident.

When a situation of imminent peril has been created either by the joint negligence of both the plaintiff and the defendant or by the plaintiff alone in which, after the danger is apparent or should be apparent, there is a period of time during which either or both might avert the impending disaster, and if, notwithstanding the difficulties of the situation, efforts to avoid the injury duly made would have been successful but for some self-created incapacity which renders the efforts inefficacious, the negligence which produces such disability is not merely part of the inducing causes, but is the efficient, proximate, and decisive cause of the incapacity, and, therefore, of the mischief. Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence constitutes the ultimate negligence rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff.

Two persons drove a laden cart and horses on to a level crossing without taking reasonable precautions to see that the line was clear. They became aware of a tram-car owned by the appellant company approaching them 150 yards away but they were then unable to do anything to prevent an accident.

The driver of the tram-car saw the cart when he was 400 yards away from the crossing and at once applied his brakes, but they were defective and inefficient, and he could not stop the tram-car in time and overran the crossing some distance, knocking over the cart and killing one of the men. The brakes of the tram-car had been in a defective condition when the tram-car came out in the morning. The jury found that the tram-car was travelling at an excessive speed but could have stopped in time to prevent an accident if the brakes had been in working order.

Held: the negligence of the appellant company was the sole cause of the accident and, therefore, they were liable notwithstanding the contributory negligence of the deceased.

Judgment of ANGLIN, J., in *Brenner* v. *Toronto Rail. Co.* (1) (1907), 13 O.L.R. 423, applied and approved.

Notes. The common law rule that contributory negligence was a complete defence to a claim in negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1): 17 HALSBURY'S STATUTES (2nd Edn.) 12.

Applied: *Columbia Bitulithic* v. *B.C. Electric* (1917), 55 S.C.R. 1; *Critchley* v. *C.N.R.*, [1917] 2 W.W.R. 538; *Ontario Hughes-Owens* v. *Ottawa Electric* (1917), 40 O.L.R. 614; *McGintie* v. *Gougeau*, [1921] 3 W.W.R. 250; *Campbell* v. *C.P.R.*, [1920] 3 W.W.R. 182; *Allen* v. *Edmonton*, [1930] 2 W.W.R. 25; *Jeremy and Jeremy* v. *Fontaine*, [1931] 3 W.W.R. 203; *Topping* v. *Oshawa Street Railway Co.* (1931), 66 O.L.R. 618; *Shust* v. *Harris*, [1936] 2 W.W.R. 54; *Reopel et al.* v. *Ross*, [1937] 4 D.L.R. 571; *Barr* v. *Miller*, [1938] 2 W.W.R. 563; *Towne* v. *B.C. Electric Railway Co.*, [1943] 3 D.L.R. 572; *Cubit* v. *Fortin (No. 2)*, [1945] 1 W.W.R. 147; *Maltais* v. *C.P.R.*, [1950] 2 W.W.R. 145; *Service* v. *Sundell* (1929), 45 T.L.R. 569. Considered: *Cooper* v. *Swadling* (1929), 46 T.L.R. 73; *Hargrove* v. *Burn* (1929), 46 T.L.R. 59; *M'Lean* v. *Bell*, [1932] All E.R.Rep. 421; *Vaile Bros.* v. *Hobson, Ltd.*, [1933] All E.R.Rep. 447; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1934] 2 K.B. 132; *The Eurymedon*, [1938] 1 All E.R. 122. Distinguished: *Parsons* v. *Toronto Railway Co.* (1919), 45 O.L.R. 627; *Griffin* v. *Cape Breton Electric Co.* (1921) 63 D.L.R. 251; *Clark* v. *C.N.R.* (1922), 67 D.L.R. 674; *Morris* v. *Hamilton Radial Electric Railway Co.* (1922), 52 O.L.R. 120; *Skidmore* v. *B.C. Electric Railway* (1922) 68 D.L.R. 32; *St. John Motor Line Ltd.* v. *C.N.R.* (1929) 2 M.P.R. 55; *Maltais* v. *C.P.R.* (1951), 67 *C.R.T.C.* 103; *Compania Mexicana de Petroleo "El Aguila"* v. *Essex Transport Co.*, [1929] All E.R. Rep. 589. Referred to: *Sitkoff* v. *Toronto Railway Co.* (1916), 36 O.L.R. 97; *Field* v. *Sarnia Street Railway* (1921), 50 O.L.R. 260; *Grand Trunk Pacific Railway Co.* v. *Earl*, [1923] S.C.R. 397; *Nelson* v. *Dennis & Dennis*, [1930] 1 W.W.R. 656; *Stanley* v. *National Fruit Co., Ltd.*, [1931] S.C.R. 60; *B.C. Electric Railway Co.* v. *Key*, [1931] 3 D.L.R. 587; *Veniot et al* v. *Black et al.*, [1933] 2 W.W.R. 198; *Wageler* v. *Craig*, [1937] 3 W.W.R. 513; *McLean* v. *McConnell*, [1938] O.R. 37; *Whitehead* v. *North Vancouver*, [1939] 1 W.W.R. 369; *Servhall* v. *T.T.C.*, [1939] S.C.R. 287; *Jacobson* v. *Vancouver, Victoria & Eastern Railway Co.*, [1941] 3 D.L.R. 140; *Lind* v. *C.P.R.*, [1942] 3 W.W.R. 577; *Alonzo* v. *Bell et al.*, [1942] 3 W.W.R. 657; *Eggins* v. *Beechey*, [1943] 2 D.L.R. 699; *Leadbetter* v. *Western Shoe Co., Ltd.*, [1944] O.W.N. 238; *Ozas* v. *Pfeifer & Moore's Taxi Ltd.*, [1946] 3 D.L.R. 527; [1946] 2 W.W.R. 305; 54 Man.R. 183; *Harper et al.* v. *Knechtels, Ltd.*, [1947] O.W.N. 697; *Starr* v. *Winnipeg Electric Co.*, [1949] 4 D.L.R. 692; *Nance* v. *B.C. Electric Railway Co.*, [1950] 3 D.L.R. 64; *Gard* v. *Slobodian* (1951), 4 W.W.R. (N.S.) 97; *Porter & Co.*, v. *Irving Oil Co.*, [1954] 3 D.L.R. 295; *Kinnear* v. *Nova Scotia Light & Power Co.* (1957), 8 D.L.R. (2d) 762; *Singleton Abbey (Owners)* v. *Paludina (Owners)*, [1926] All E.R.Rep. 220; *Duncan* v. *Cammell Laird, Ltd.* (1944), 171 L.T. 186; *Admiralty Comrs.* v. *North of Scotland, etc., Steam Navigation Co.*, [1947] 2 All E.R. 350.

As to effective cause of accident, see 28 HALSBURY'S LAWS (3rd Edn.) 27 et seq.; and for cases see 36 DIGEST (Repl.) 177 et seq.

Cases referred to:

(1) *Brenner* v. *Toronto Rail. Co.* (1907), 13 O.L.R. 423; 9 O.W.R. 198; reversed 15 O.L.R. 195; 8 C.R.C. 100; affirmed (1908), 40 S.C.R. 540; 8 C.R.C. 108; 36 Digest (Repl.) 138, **1106.*

(2) *Tuff* v. *Warman* (1858), 5 C.B.N.S. 573; 27 L.J.C.P. 322; 5 Jur.N.S. 222; 6 W.R. 693; 141 E.R. 231, Ex. Ch.; 36 Digest (Repl.) 170, *912.*

(3) *Rice* v. *Toronto Rail. Co.* (1910), 22 O.L.R. 446; 12 C.R.C. 98.

(4) *Snow* v. *Crow's Nest Pass Coal Co.* (1907), 13 B.C.R. 145.

(5) *Scott* v. *Dublin and Wicklow Rail. Co.* (1861), 11 I.C.L.R. 377.

Appeal by the defendant company by special leave from a judgment of the Court of Appeal for British Columbia, dated Jan. 6, 1914, and reported 6 W.W.R. 322, setting aside a judgment of MURPHY, J., at the trial in favour of the defendant company, dated Sept. 5, 1913.

On Aug. 3, 1912, Benjamin Sands, while being driven by one Hall along the highway and across the track of the appellants' tram line, was run into and killed by a tram-car. The action was brought against the appellant company by the present respondent Loach, the administrator of the deceased man's estate, on behalf of his widow and children, claiming damages under the Families' Compensation Act, R.S.B.C., 1911, c. 82, for Sands' death, caused by the alleged negligence of the company. The trial judge dismissed the action, but the Court of Appeal by a majority reversed the decision and entered judgment for the plaintiff in accordance with the amount awarded by the jury. The company appealed.

Dickens, K.C., and *Tyrrell T. Paine* for the appellants.

D. G. Macdonell, of the Canadian Bar, for the respondent, was not called on.

July 26, 1915. The considered judgment of their Lordships was delivered by

LORD SUMNER.—This is an appeal from a judgment of the Court of Appeal of British Columbia in favour of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light, and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negligence in not looking to see that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went "right on to the track," when he heard Sands, who was sitting on his left, say "Oh," and looking up saw the car about 50 yards off. He says he could then do nothing, and with a loaded waggon and horses going two to three miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the cart and clear the rails. The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from thirty-five to forty-five miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be 10 ft. or 12 ft. from the nearest rail, and he at once applied his brake. He was then 400 ft. from the crossing. If the brake had been in good order it should have stopped the car in 300 ft. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of vehicles being on the road, there can be

no mistake in the matter, and their finding stands. It cannot be restricted, as the trial judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly-braked car, or to a finding that there was no negligence except the "original" negligence of sending the car out ill-equipped in the morning.

Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered. It was for the jury to decide which portions of the evidence were true, and, under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing-up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and there was then nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective, he could, as the jury found, have pulled up in time. Indeed, he would have had 100 ft. to spare. If the car was 150 ft. off when Sands looked up and said "Oh," then each had the other in view for 50 ft. before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the judges in the courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. "You cannot charge up the same negligence under different heads," said MURPHY, J., at the trial; "you cannot charge it up twice." That learned judge observes on the question of ultimate negligence

> "that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the company has any opportunity between the time that this rig appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect I think it was original negligence and not what may possibly be termed 'ultimate negligence.'"

In the Court of Appeal MACDONALD, C.J.A., delivering a dissentient judgment in favour of the present appellants, says:

> "Where one party negligently approaches a point of danger, and the other party, with like obligation to take care, negligently approaches the same point of danger, if there arises a situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate

negligence, in the sense of being the proximate cause of the injury. In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence, and to assign to it the whole blame of the occurrence, although by no effort of the defendants or their servants could the situation at that stage have been saved."

So, too, McPHILLIPS, J.A., also dissenting, says:

"Upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendant, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff . . . The motorman after he saw the vehicle could not have stopped the car . . . therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death."

These considerations were again urged at their Lordships' Bar under somewhat different forms. It was said (i) that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said (ii) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the facts. The consequences of the deceased's contributory negligence continued, it is true, but after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman* (2), his contributory negligence will not disentitle him to recover "if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called "primary" or "original" negligence. The defendant may answer that by proving against the plaintiff "contributory negligence." If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called "ultimate" or "resultant" negligence. The opinion has been several times expressed, in various forms, that "original" negligence and "ultimate" negligence are mutually exclusive, and that conduct which has once been relied on to prove the first cannot in any shape constitute proof of the second. Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

This matter was much discussed in *Brenner* v. *Toronto Rail. Co.* (1), when ANGLIN, J., delivered a very valuable judgment in the Divisional Court. The decision of the Divisional Court was reversed on appeal, but on other grounds, and in their comments on the decision of the Divisional Court, DUFF, J., in the Supreme Court, and also CHANCELLOR BOYD, in *Rice* v. *Toronto Rail.* (3) (22

O.L.R., at p. 450), and HUNTER, C.J., in *Snow* v. *Crow's Nest Pass Coal Co.* (4) (13 B.C.R., at p. 155) seem to have missed the point to which ANGLIN, J., had specially addressed himself. The facts of that case were closely similar to those in the present appeal, and it was much relied on in argument in the court below. ANGLIN, J., following the decision in *Scott* v. *Dublin and Wicklow Rail. Co.* (5) observes as follows (13 O.L.R. at pp. 437, 439, 440):

"Again, the duty of the defendants to the plaintiff, breach of which would constitute ultimate negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with sufficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff, to avoid the consequences of her negligence by the exercise of ordinary care . . . Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred in the sense of becoming operative immediately after the duty in the breach of which it consisted arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty.

But there is a class of cases, when a situation of imminent peril has been created either by the joint negligence of both the plaintiff and the defendant, or it may be that of the plaintiff alone, in which, after the danger is, or should be, apparent, there is a period of time of some perceptible duration during which both, or either, may endeavour to avert the impending catastrophe. . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful but for some self-created incapacity, which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a causa sine qua non—it is in very truth the efficient, the proximate, the decisive cause of the incapacity, and, therefore, of the mischief. . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may in some cases, though anterior in point of time to the plaintiff's negligence, constitute ultimate negligence rendering the defendant liable, notwithstanding a finding of contributory negligence of the plaintiff. . . ."

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt, but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method, and begin at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility

for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of acts of responsible human beings, between the damage done and the conduct, which is tortious and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all. "Efficient or effective cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate cause," "causa causans," on the one hand, as against, on the other, "causa sine qua non," "occasional cause," "remote cause," "contributory cause," "inducing cause," "condition," and so on. No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification. In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: *Linklater, Addison & Brown*; *Blake and Redden.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

NELSON *v.* JAMES NELSON & SONS, LTD.

[Court of Appeal (Lord Reading, C.J., Kennedy, and Swinfen Eady, L.JJ.), March 3, 4, 1914]

[Reported [1914] 2 K.B. 770; 83 L.J.K.B. 823; 110 L.T. 888; 30 T.L.R. 368]

Company—Director—Managing director—Termination of appointment—Breach of agreement—Power to revoke appointment in articles—Power subject to agreement.

By one of a company's articles of association the board of directors was given power to appoint one or more of their number to be a managing director or managing directors "with such powers and authorities and for such period as they may deem fit and may revoke such appointment."

N. was appointed joint managing director of the company under an agreement by which he was to hold office as long as he should remain a director of the company, retained his due qualifications, and efficiently performed the duties of his office. The board of directors passed a resolution dismissing N. from his position as managing director without notice. In an action by N. against the company for damages for breach of the agreement,

Held: the article did not give the board of directors power to revoke the appointment of a managing director notwithstanding any engagement which they might have made and notwithstanding the terms of any agreement into which they had entered to engage any person as managing director of the company for a term of years; the power conferred by the article was subject to the terms of the agreement; and, therefore, the plaintiff was entitled to succeed.

Notes. Considered: *Re Golomb and Porter & Co.'s Arbitration* (1931), 144 L.T. 583; *Southern Foundries* (1926) *Ltd.*, v. *Shirlaw*, [1940] 2 All E.R. 445; *Read* v. *Astoria Garage* (*Streatham*), *Ltd.*, [1952] 2 All E.R. 292. Referred: *Shuttleworth* v. *Cox Bros. & Co.* (*Maidenhead*), *Ltd.*, [1926] All E.R.Rep. 498; *Shindler* v. *Northern Raincoat Co., Ltd.*, [1960] 2 All E.R. 239.

As to managing directors, see 6 Halsbury's Laws (3rd Edn.) 297–298; and for cases see 9 Digest (Repl) 556 et seq.

Cases referred to:

(1) *Thomas Logan, Ltd.* v. *Davis* (1911), 104 L.T. 914; 55 Sol. Jo. 498; affirmed 105 L.T. 419, C.A.; 9 Digest (Repl.) 556, *3679*.

(2) *Boschoek Proprietary Co., Ltd.* v. *Fuke*, [1906] 1 Ch. 148; 75 L.J.Ch. 261; 94 L.T. 398; 54 W.R. 359; 22 T.L.R. 196; 50 Sol. Jo. 170; 13 Mans. 100; 9 Digest (Repl.) 616, *4100*.

Also referred to in argument:

Bluett v. *Stutchbury's, Ltd.* (1908), 24 T.L.R. 469, C.A.; 9 Digest (Repl.) 557, *3686*.

Horn v. *Henry Faulder & Co., Ltd.* (1908), 99 L.T. 524; 9 Digest (Repl.) 578, *3824*.

Quin and Axtens, Ltd. v. *Salmon*, [1909] A.C. 442; 78 L.J.Ch. 506; 100 L.T. 820; 25 T.L.R. 590; 53 Sol. Jo. 575; 16 Mans. 230, H.L.; 9 Digest (Repl.) 498, *3283*.

Eley v. *Positive Government Security Life Assurance Co.* (1876), 1 Ex.D. 20; 45 L.J.Ex. 58; 33 L.T. 743; 24 W.R. 252; affirmed 1 Ex.D. 88; 45 L.J.Ex. 451; 34 L.T. 190; 24 W.R. 338, C.A.; 9 Digest (Repl.) 580, *3832*.

Appeal from a judgment of Scrutton, J., [1913] 2 K.B. 471, with a jury in an action brought by the plaintiff claiming damages for breach of contract. The plaintiff was awarded £15,000 damages by the verdict of the jury and the defendants now appealed.

The defendant company's articles of association included the following:

"84. The business of the company shall be managed by the board, who may pay all expenses of or incident to the formation, registration, and advertising of the company, and the issue of its capital, including brokerage and commissions for obtaining applications for or placing shares. The board may exercise all the powers of the company, subject nevertheless to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions of these articles) as may be prescribed by the company in general meeting, but no regulations made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulation had not been made.

"85. Without restricting the generality of the foregoing powers the board may do all the following things: . . . (b) appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration (including the payment of a commission varying with the amount of the company's profits), and with such powers and authorities and for such period as they deem fit, and may revoke such appointment.

"94. The office of director shall be vacated . . . (b) if he become of unsound mind, bankrupt, or compound with his creditors . . . (c) if he be absent from the board meetings continuously for six months without the consent of the board.

"96. At the ordinary general meeting in the year next but one after the year in which the company is incorporated, and at the ordinary general meeting in every subsequent year, one-third of the directors for the time being, or if their number be not a multiple of three, then the number nearest to one-third shall retire from office. A managing director holding that office for an unexpired term shall not be subject to retirement under this clause or be taken into account in ascertaining the number of directors to retire.

"100. The company in general meeting may by an extraordinary resolution remove any director (other than a managing director holding that office for an unexpired term) before the expiration of his period of office, and may by an ordinary resolution appoint another qualified person in his stead."

Younger, K.C., Shearman, K.C., and *Bremner* for the defendants.
Leslie Scott, K.C., Austen-Cartmell and *L. F. C. Darby* for the plaintiff.

LORD READING, C.J.—This is an appeal by the defendant company from a judgment of SCRUTTON, J., for £15,000 awarded to the plaintiff by the verdict of the jury; and the defendants ask now that the judgment should be reversed and judgment entered for them, or, in the alternative, that there should be a new trial as to the amount of damages, which was the only question left to the jury. The main argument upon which the appellants have based their objection and criticism with regard to the learned judge's judgment is entirely dependent upon the view taken by the court of certain words in art. 85 (b) of the articles of association of the company. In my opinion the whole question turns upon the meaning which we give to the words at the end of art. 85 (b), "and may revoke such appointment." On the one hand, if we take the view which counsel for the defendants argued strenuously before us yesterday, then the result would be that judgment should be entered for the defendants. On the other hand, if we differ from that view, and accept the view adopted by the learned judge, then the only question is one of the damages. So that in substance really the question here is, I will not say simple, but it is short as to the meaning of those particular words.

In order to make the point quite clear it is necessary to state the facts, which I shall attempt to do very briefly. Mr. T. C. Nelson, the plaintiff in this action, was on Jan. 16, 1908, appointed managing director of the defendant company under an agreement in writing. That company had been formed in 1892 to amalgamate certain businesses connected with the meat trade. Originally in

1893 two managing directors were appointed, Mr. William and Mr. Edward Nelson. It is unnecessary for me to refer in detail to that agreement, but substantially it was one which appointed them at high salaries on undoubtedly very excellent terms for themselves and, as was thought by the directors of the company, on very excellent terms for the company. On Sept. 13, 1904, Mr. T. C. Nelson was for the first time appointed managing director jointly with Mr. Edward Nelson of this company, Mr. William Nelson having resigned. At this time Mr. Thomas Nelson carried on business in Glasgow also in connection with the meat trade. He entered into an agreement in 1904, which is an agreement in writing, and is dated Dec. 6, 1904. I do not propose to read that agreement, or to refer to it, because it seems to me unnecessary for the point which we have to decide.

In 1908 Mr. Thomas Nelson left Glasgow, apparently at the desire of the directors, and took up his residence in Liverpool; and then the new agreement of Jan. 16, 1908, which is the agreement now sued upon, was entered into between him and the company. That agreement is undoubtedly one to which reference should be made having regard both to the point of law raised and the summing up of the learned judge as to damages. It first of all recites the facts, to which I have already called attention, in the earlier part of the history of the company leading up to the making of this agreement. Then, by cl. 1, Mr. Thomas Nelson is appointed joint manager of the company with Mr. Edward Nelson to carry on the practical part of the company's business under the general control of the board of directors of the company. By cl. 2 he was to hold office as long as he should remain a director of the company, and retained his due qualification, and should efficiently perform the duties of the office. By cl. 3 he was to devote his time to the company's service, and well and faithfully serve them. Clause 4 provided that he was to receive a salary of £3,000 a year. Clause 5 gave him the right to determine the agreement by six months' notice. Clause 6 was to the effect that if the tenure of his office was determined in consequence of the winding-up of the company he was not entitled to claim any damages against the company. Clause 7 dealt with the businesses which were then being carried on, and provided that he was not to carry on any other business, or be directly or indirectly concerned in any other business, always subject to the businesses described; that is to say, firms in which he was then interested as principal could be supervised by him, and, subject to that right which was reserved to him, he agreed to devote his time entirely to the company. In August, 1912, the plaintiff returned from the Argentine, which he had visited on the business of the company. On Aug. 9 the minute was passed of that date which has been read, the subject of which was Mr. Edward Nelson had said that he would not work any longer with Mr. Thomas Nelson, and the view taken by the board then was that it would be necessary for Mr. Thomas Nelson to retire. Some letters passed, but the effect of those letters was that Mr. Thomas Nelson declined to retire, and then the board, by letter of Sept. 10, 1912, gave him notice, and I will read the exact words because they may be of some importance. The company sent him this letter containing this resolution of the company:

> "Resolved that the appointment of Mr. Edward Nelson and Mr. Thomas Cormac Nelson as managing directors of the company be and the same are hereby revoked."

Then follows a resolution appointing Mr. Edward Nelson managing director of the company, and directing the entering into of an agreement with him. In consequence of that notice to the plaintiff, because the company undoubtedly treated that as a revocation of the agreement with him, and gave him notice to that effect by the letter of the secretary, a writ was issued by the plaintiff, and it is that action which was tried before SCRUTTON, J., and a special jury.

It appears from those facts, to which I have called attention, that the company, unless they were justified in revoking the appointment, had no ground whatever in law for putting an end to the agreement with the plaintiff. In fact, it is not

contended that they had any such right. What is said, and what was said before SCRUTTON, J., is that under art. 85 (b) the directors of the company to whom the plaintiff company had delegated its powers in this respect were, it is true, entitled to appoint managing directors, but were also entitled to revoke such appointment, and it is contended that the effect of that article is that the directors could not make an appointment without reserving to themselves the right also to revoke the appointment. It is said, as I understand the argument, that if the directors purported to make an agreement for a period of years without reserving to themselves such a power of revocation, they were acting ultra vires. It is put in another way, that is, that the directors in any agreement that they made must be taken to have inserted in that agreement a clause entitling them to revoke the agreement. Those are the alternative ways of putting the proposition which has been argued before us.

The material words of the article under the heading "powers of directors" are as follows: Article 84 says that "the business of the company shall be managed by the board." Article 85 says, "without restricting the generality of the foregoing powers," the board may do the following things:

> "Establish local boards, local managing committees, or local agencies in the United Kingdom or abroad, and appoint any person to be members thereof, with such powers and authorities, under such regulations, for such period, and at such remuneration as they may deem fit, and may from time to time revoke any such appointment."

Then comes the material article, art. 85 (b):

> "Appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration (including the payment of a commission, varying with the amount of the company's profits), and with such powers and authorities and for such period as they may deem fit, and may revoke such appointment."

Here the directors on behalf of the company had entered into an agreement, which may be described, subject to certain contingencies for which provision is made in the agreement, as one which provided for the efficient business life of Mr. Thomas Nelson—that is to say, subject to the contingencies in the agreement there was no power on the face of that agreement to determine the appointment at any time. There are certain conditions which are laid down, on the happening of which the agreement would come to an end; but, except for those conditions, the right was reserved to the plaintiff to determine the agreement by six calendar months' notice, but there is no such corresponding right reserved to the directors of the company. As long as the plaintiff remained a director and retained his due qualification, and efficiently performed the duties of his office, and well and faithfully served the company and attended to its business affairs, and as long as the company was not wound-up, and as long again as Mr. Nelson did not infringe cl. 7 as to his interest in other businesses, Mr. Nelson was entitled to continue to serve the company and be paid his salary at the rate of £3,000 a year.

The company does not allege that any one of those conditions to which I have referred had been broken. They do not allege that any one of the events had happened; they do not say that anything had taken place which is mentioned in that agreement entitling them to put an end to the agreement. They rest their defence upon the contention that to make such an agreement without providing for the power of revocation by the directors of the company at will was ultra vires of the board and of the company, and consequently does not bind the company. I myself am quite unable to accept that contention. It seemed to me that the words in art. 85 (b) are very clear, and although we have heard a very ingenious and capable argument to the contrary, yet they can be construed by the application of the ordinary principles of this court so as to give them a fair and reasonable businesslike meaning. In my view art. 85 (b) was for the purpose of giving certain specific powers to the directors of the company. Apart alto-

gether from the general powers which might be given under art. 84, it was intended that the company should delegate the specific powers enumerated in art. 85 to the board. One of those powers undoubtedly was to appoint a managing director (I draw particular attention to these words) "for such period and at such remuneration as they [the board] may deem fit," which would imply that the board had, under this article, power to appoint for a period of years, and when the words which immediately succeed those I have just read occur, "and may from time to time revoke any such appointment," that is really only giving the directors power to take away that which they had given, provided that they had not bound themselves to give it for any period of time. It meant that they had both powers: not only the power of appointment, but also the power of revoking the appointment. But it did not mean, in my view, and cannot be held to mean, that it gave them the power of revocation, notwithstanding any engagement which they might have made, and notwithstanding the terms of any agreement into which they had entered to employ any person, or to engage any person as managing director of the company for a term of years. I am quite unable to give those words that construction. It seems to me if those words had not been inserted at the end of the article the result would have been that the power of appointment of the managing director would have vested in the directors of the company, and the power of revocation would have been vested not in the directors, but in the company to be exercised in the ordinary way, and what was intended was that to the directors should be delegated both the power of appointment and the power of revocation. But it only created powers, it did not make that power of revocation a condition of any appointment which might be made for any period of years. For these reasons I am unable to accept the argument of counsel for the defendants, and I agree with the view taken by SCRUTTON, J.

Our attention was called to a number of authorities. In my judgment those authorities do not assist in arriving at the true construction of these words. They are not decisions upon those words or similar words. For myself, I do not think that we derive assistance from referring to other cases dealing with other words and other articles in order to construe the articles of this company. I agree that they are of value, and it was no doubt for that purpose that they were cited by counsel for the defendants, to show what the law is with reference to the position of the directors and of the company when somewhat similar articles are prepared to govern the proceedings of the company. But they do not, in my judgment, assist upon the construction, and therefore I do not propose to refer to them further in detail. For these reasons I am of opinion that this appeal fails, and must be dismissed with costs.

KENNEDY, L.J.—I am of the same opinion. As to the construction of art. 85 of the articles of association in relation to the meaning of the word "revoke," I have come to the same conclusion as the learned judge, that the argument is impossible that "revoke" in this case can be read in the article in question as creating such a state of things that, if the article is obeyed, the directors must retain the power to put an end at will to any appointment they make under art. 85 (a) or art 85 (b), or to any contract into which they enter, although by the terms of the contract itself they have stipulated for its continuance. And I think it is impossible to adopt the view which the appellants ask us to adopt. We have had the IMPERIAL DICTIONARY quoted as an authority, or at any rate, as affording some help to us in saying that "revoke" means to "put an end to summarily"; "to put an end to without notice." I think in the absence of its being really a term of art or having some special trade meaning or sense, one must construe a word like "revoke" as we are entitled to construe any initial word, according to its context. "Revoke" or "recall," which ever you like, means no doubt to put an end to an authority or an appointment, as the case may be, but not necessarily to put an end to it without giving any notice which by the terms, for instance, of the agreement, where a notice is stipulated for you ought to give. According to the

defendants' argument if it is a life appointment, it would entitle the directors to say, "although we have entered into a contract with you for the term of your natural life or for any less period, we are told under 85 (b), that it is our duty, if we can intra vires with the article, to revoke it, and 'revoke' entitles us, and indeed binds us, if we think it is in the interests of the company, and as members of the board of directors, to summarily cut short the appointment contrary to the terms of the contract." Read, as I think the words must be reasonably read, "revoke" is the co-relative in 85 (a), (b), according to the ordinary rules of the construction of English, of "appoint." You may appoint, and you may revoke. That is what is said to the board of directors. If I wanted to use a verb to say I wish to put an end to an appointment, the natural word, I should go as far as to say, is "revoke." You cannot say "dismiss the appointment," you cannot say "discharge the appointment." You could say "put an end to the appointment" no doubt, but it would be to my mind a clumsy, and certainly a not very natural, form of expression. You are to "revoke"; you may make an appointment and you may revoke that appointment. I see no authority either in sense or in grammar to make me read the word "revoke" as anything different to this: "You may put an end to the appointment, and of course, as I have told you, to make that appointment under such regulations and for such period and for such remuneration as I think fit, I, representing the board, say it means, 'put an end to the appointment in accordance with the terms of the contract, the making of which has been intrusted to you by the article.' "

With regard to the cases that were cited to us, I do not think they help us. Take, for example, the case before WARRINGTON, J., of *Thomas Logan, Ltd.* v. *Davis* (1). As I have tried to understand it (I hope not unsuccessfully) I think the question there was whether or not under the terms of certain articles the appointment of a sole managing director was vested by the terms of the articles in the directors, or whether the matter was governed by art. 113 which authorised, so to speak, the revision in certain cases of the acts of the directors by the company in general meeting. It was a pure question of construction of those articles that had to be decided. There is no question, as it seems to me, here that, excepting the meaning of the word "revoke," the power to appoint and the power or revocation or putting an end to the appointment are vested by these articles in the directors. To my mind the words "may appoint" and "may revoke" mean "we have intrusted to you the appointment subject to such regulations for such period and at such remuneration as you may think fit." So with regard to the managing directors in art. 85 (b) it means: "You may appoint such directors upon such remuneration and with such powers and authorities and for such period as you deem fit. We give you, the directors, the power and the duty to be exercised in accordance with the interests of the company. You are not to break your contract that we have empowered you to make; it is a power which we give to you, and we do not retain as a company the right to put an end to the appointment made in accordance with the contract which we have authorised you to make, and which we have divested ourselves of the power of making or of revoking." I think, therefore, in this case the appeal must be disallowed, and the judgment of the court below affirmed.

SWINFEN EADY, L.J.—I am of the same opinion. The defendants, by resolution of their board of Dec. 10, 1912, purported to revoke the appointment of the plaintiff as managing director of the company. There was no power of revocation contained in the agreement of Jan. 16, 1908, under which the plaintiff was engaged. The plaintiff had changed his position in Glasgow. He had parted with a quarter of his interest in his Glasgow business. He had agreed only to supervise that business, and, subject to that, to give all his time and attention to the business of the company, and he had entered into the agreement of Jan. 16, 1908, which provided that he should hold the office to which he was thereby appointed as long as he should remain a director of the company, and retained his

due qualification, and should effectually perform the duties of his office. The defendants did not claim to terminate the appointment or revoke it by virtue of any provision in the agreement, or by virtue of any contract whatever as between the plaintiff and the defendants; but their short point was that according to the true construction of the articles of association the directors had only power to appoint the plaintiff to be managing director subject to their right to revoke the appointment at any time. That was the only power they had, and, if by entering into the agreement of 1908 they have purported to grant to the plaintiff a longer term, it is immaterial, because, whatever they have purported to do, they had not power to do it. It is no question really, they say, of the construction of the agreement, because it is conceded that according to the true construction of that agreement the appointment is not a revocable one. There is nothing within the four corners of the agreement to point to revocation, but they say: "Our real point is that we had no power to appoint him except as a revocable appointment, and if you properly construe the articles of association of the company it is apparent that any appointment of managing director is one that may be revoked, and may be revoked at any time."

I apprehend, unless there is power in the articles to appoint a managing director it is not competent to the board to make such an appointment. That was determined in the case of *Boschoek Proprietary Co., Ltd.* v. *Fuke* (2). Therefore you have to look to the articles to see what the power is. The articles may give a power to the board to appoint one of their number to be a managing director, but with it no power to revoke or cancel or remove the appointment. That power may be a power which the company in general meeting or otherwise may keep and retain in its own hands. That would be the law if the company were registered under the statutory Table A. Table A, under the Companies (Consolidation) Act, 1908, art. 72, provides:

> "The directors may from time to time appoint one or more of their body to the office of managing director . . . at such remuneration . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation . . . but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

With an article in such a form it is quite manifest that where a managing director is appointed by the board, the board can only make the appointment subject to the company in general meeting being entitled to resolve at any time that his tenure of office of managing director is to be determined. In other words, he can with such articles as are in Table A only be appointed managing director with a right to the company in general meeting to determine the appointment at any time by passing a resolution to that effect. That would be the case if this company had been registered or had an article in the form of that article in Table A; but that is not the article we have to construe.

We have to construe the articles in the present case, and in particular art. 85 (a) (b). There are two other articles to which I wish to draw attention, because I think they do very much assist in arriving at the true construction of art. 85 (b), which is the article which gives to the board power to appoint one or more of their number to be managing director for such period as they deem fit, and it says that they may "revoke such appointment." The Lord Chief Justice has already drawn special attention to the words "they may appoint for such period as they deem fit." That contemplates a definite period of appointment, and not merely an appointment to hold his office at the will and pleasure of the board. "A period" there means a definite period. That is emphasised when you refer to the other two articles, 96 and 101. The former is the article which provides for the retirement of directors at the ordinary general meeting. Then it provides:

"A managing director holding that office for an unexpired term shall not be subject to retirement under this clause, or be taken into account in ascertaining the number of directors to retire."

That is to say, it contemplates there shall be a managing director holding that office for an unexpired term. It contemplates that he shall be appointed for a term. So again art. 101 says:

"The company in general meeting may by an extraordinary resolution remove any director (other than a managing director holding that office for an unexpired term),"

using the same phrase. To my mind, it is clear that these articles contemplate that the board may make an appointment of managing director for a definite term. In my judgment that is absolutely inconsistent with the power in the board to revoke the appointment at any time. Of course I assume that the board would act reasonably, and do what they considered to be in the best interests of the company, but in effect it would be that the board would have no power to appoint for a term; they would have no power to appoint except on the conditions that the managing director should hold his office at the will and pleasure of the board. If whenever they liked to pass a resolution it would determine ipso facto that is not an appointment for a term at all. You may put in for a term of ten or twenty or any term of years; it is purely nominal and fictitious if at any moment the board have power to say this: "Although we have put it in for a term, you merely hold your office at our will and pleasure, and we think it better in the interests of the company that your appointment should be determined and we resolve to determine it." True it is that the language of this article, "may revoke the appointment," is not quite in common form I will not say, but it is not in the more general form; the more general form is that given in PALMER'S COMPANY PRECEDENTS (11th Edn.), p. 738:

"The directors may, from time to time, appoint one or more of their body to be managing director or managing directors of the company either for a fixed term or without any limitations as to the period for which he or they is or are to hold such office, and may from time to time remove or dismiss him or them from office and appoint another or others in his place."

It is obvious that an article in that form, where there is power to appoint for a fixed term with power to remove or dismiss, means power to remove subject to the terms of the existing contract between the company and the directors. So in the present case in my opinion this power to revoke an appointment means that the power is in the board to appoint and the power to dismiss or to revoke. But again revocation must be subject to the terms of the contracts subsisting for the time being between the managing director and the company. For these reasons I am of opinion that the defendants have not the power, which they claim, to revoke the appointment during the currency of the term for which the appointment was made merely by passing a resolution. In my opinion the appeal fails.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Lightbound, Owen & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

STOKE-ON-TRENT BOROUGH COUNCIL *v.* CHESHIRE COUNTY COUNCIL

[KING'S BENCH DIVISION (Lord Reading, C.J., Ridley and Avory, JJ.), June 11, 1915]

[Reported [1915] 3 K.B. 699; 85 L.J.K.B. 36; 113 L.T. 750; 79 J.P. 452; 13 L.G.R. 1077]

Child—Young person—Youthful offender—Reform school order—Residence of offender—"Where he has his bed and dwells"—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 74.

A person **held** to be deemed to reside where he lives, i.e., has his bed and dwells, for the purposes of s. 74 of the Children Act, 1908 [see now s. 70 (2) of the Children and Young Persons Act, 1933] which provided for the reception in a reformatory school of a youthful offender by the local authority within whose district "he resides."

Notes. Section 74 of the Children Act, 1908, has been repealed. Section 70 (2) of the Children and Young Persons Act, 1933, which deals with approved school orders, is in similar terms to the repealed s. 74, and provides: "Every approved school order . . . shall name the local authority within whose district the child or young person was resident, or if that is not known, the local authority or one of the local authorities within whose district the offence was committed or the circumstances arose (as the case may be) rendering him liable to be sent to an approved school."

Distinguished: *Yorkshire West Riding Council* v. *Colne Corpn.* (1917), 87 L.J.K.B. 120. Applied: *Berkshire County Council* v. *Reading Borough Council*, [1921] 2 K.B. 787. Referred to: *Sawyer* v. *Kropp* (1916), 14 L.G.R. 989; *L.C.C.* v. *Wiltshire County Council* (1927), 137 L.T. 526; *Isle of Wight County Council* v. *Warwickshire County Council*, [1953] 1 All E.R. 525.

As to approved school orders, see 21 HALSBURY'S LAWS (3rd Edn.) 266–269. For the Children and Young Persons Act, 1933, see 12 HALSBURY'S STATUTES (2nd Edn.) 974.

Cases referred to:

(1) *R.* v. *Inhabitants of North Curry* (1825), 4 B. & C. 953; 7 Dow. & Ry. K.B. 424; 3 Dow. & Ry. M.C. 451; 4 L.J.O.S.K.B. 65; 107 E.R. 1313; 38 Digest (Repl.) 590, *695*.

(2) *Blackwell* v. *England* (1857), 8 E. & B. 541; 27 L.J.Q.B. 124; 3 Jur.N.S. 1302; 120 E.R. 202; sub nom. *England* v. *Blackwell*, 30 L.T.O.S. 148; 6 W.R. 59; 7 Digest (Repl.) 97, *556*.

(3) *Lamb* v. *Smythe* (1846), 15 M. & W. 433.

Case Stated by justices for the county of Chester, sitting at Sandbach.

By s. 74 of the Children Act, 1908:

"(1) Where a youthful offender is ordered to be sent to a certified reformatory school, it shall be the duty of the council of the county or county borough in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified reformatory school suitable to the case, having regard to this part of the Act. . . . (3) For the purposes of the foregoing provisions of this section, a youthful offender or child shall be presumed to reside in the place where the offence was committed, or the circumstances which rendered him liable to be sent to a certified school occurred, unless it is proved that he resided in some other place. . . ."

Mackenzie, *K.C.*, and *Horace Fenton* for the appellants.

Montgomery, *K.C.*, and *Hugo Marshall* for the respondents.

LORD READING, C.J.—The question which arises for our decision in the present case is whether the youthful offender, Fryer, who was convicted of larceny

and sent to a reformatory resided at the time when the offence was committed within the county borough of Stoke-on-Trent, or whether he was residing within the area of the Cheshire County Council. The justices before whom the question came decided that the place of residence was within the county borough of Stoke-on-Trent, and it is against this decision that the Stoke-on-Trent Corporation are now appealing, since they maintain that upon the facts the place of residence was within the county of Chester.

Under s. 74 (3) of the Children Act, 1908, when an offence is found to have been committed by a youthful offender it is presumed that such youthful offender resides at the place where the offence was committed, unless it is proved that the actual place of residence is elsewhere. Under sub-s. (7) of the same section power is given to a local authority, where an order has been made declaring that a youthful offender is resident in their district, and consequently he is to be sent to a reformatory school under their jurisdiction, to apply to a petty sessional court, and that court, on proof that the youthful offender was resident in the area of another local authority, and, after giving such other local authority an opportunity of being heard, may (which is to be construed as "must") transfer the liability to maintain the youthful offender to that other local authority. In the present case the facts proved before the justices on the application under s. 74 (7) were that the youthful offender had been in the employment of a farmer named Kennerley, in Cheshire, in the month of October, 1914, and that on Nov. 2, 1914, he left the employment of Kennerley and took up a new employment with a farmer named Broad, at a place called Arclid, which is also in Cheshire. He worked there from Nov. 2 to Nov. 5, when he was arrested by the police, and was eventually convicted and sent to a reformatory. When the youthful offender was taken into the employment of Broad no time was fixed as to the duration of his employment. He slept at Broad's house, and he was supplied with food by Broad.

Taking all these facts into consideration, the question that arises is whether the justices were right in coming to the conclusion that the youthful offender was not resident at Arclid, in Cheshire, because his residence there was only of a temporary nature, and that, being under the age of sixteen years, he was constructively resident with his parents at their place of abode at Stoke-on-Trent. The justices came to the conclusion that the residence was primâ facie Stoke-on-Trent, and that the Stoke-on-Trent Corporation had failed to rebut the presumption that Stoke-on-Trent was the residence of the youthful offender. If there was evidence upon which the justices could arrive at that conclusion upon the facts proved before them, then even though we might have come to a different conclusion, we ought not to interfere with it. But if we come to the conclusion that upon the facts as proved it was not possible, as a matter of law, to hold that the youthful offender was constructively resident with his parents we should interfere. Upon the facts as set out in the Special Case I do not think that it can be said that there was evidence that at the time in question the youthful offender was resident with his parents. The justices did not come to the conclusion that he was actually resident with his parents, but only that he was constructively resident with them, and this is, to my mind, a most important consideration. The youthful offender was in fact living at Broad's farm, and the justices looked upon this as a residence of a temporary character only. I do not think that this is a proper way of construing the word "residence" in the section. Indeed, I do not see any reason why it should not be construed in the ordinary way, and with the ordinary meaning attached to the word. It is not a term of art, and under different statutes there are many decisions as to its meaning. In the present case we must, however, look at this Act and come to our conclusion upon this Act alone. The Act provides that it is to be presumed that the youthful offender resides where the offence was committed, unless it is proved that he resides elsewhere. A person resides where he lives—that is, where he has his bed, and where he dwells. Applying, then, that test, I cannot see any distinction between this case and that of a domestic servant, who may, between the age of twelve and sixteen years, enter

into employment. If a servant sleeps in the employer's house and is boarded there, and if the engagement is not of a merely casual nature, the place of residence of the servant is the same as that of the employer. There is nothing to indicate that the youthful offender's residence with Broad was of a temporary or casual nature. If it was of a temporary nature, every case of residence with an employer must be temporary. In one sense, of course, no employment is permanent. Though this employment only lasted two or three days, the boy was employed in the ordinary way. There is no statement in the case that his employment was merely casual. So far as I can see, the intention was that it should continue. For these reasons the justices' decision cannot stand, and the appeal must be allowed.

RIDLEY, J.—I am of the same opinion. By s. 74 (3) of the Act of 1908 it is provided that the youthful offender shall be presumed to reside in the place where the offence was committed. The offence was committed in Cheshire, and, therefore, he must be presumed to have resided in Cheshire, unless it is proved that he resided elsewhere. The justices have found that the residence was temporary, and that the boy had no definite settled employment, that he visited his father's home for the purpose of changing his clothes, and that, being under sixteen years of age, he was under the control of his parents, and constructively resided with them. The parents lived in the county borough of Stoke-on-Trent. Therefore the justices, having found what they did, decided that the residence of the youthful offender was also at Stoke-on-Trent. To my mind the justices were wrong in their reasoning. The residence of a person has been defined as the place where he eats, drinks, and sleeps. The authority for it is the ancient case of *R.* v. *Inhabitants of North Curry* (1), which was decided in 1825, in which BAYLEY, J., said:

> "Personal property cannot be rated unless the proprietor resides in the parish. Then the question is, what is the meaning of the word 'resides'? I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep."

This meaning of the word "residence" has been accepted as the one to be generally adopted, and although there are cases in which it can be shown that this definition is not always applicable, it is the presence of special circumstances which has caused a different meaning being given to the word. I need only refer to two cases by way of illustration, one is *Blackwell* v. *England* (2), which was cited before the justices, and the other is *Lamb* v. *Smythe* (3). In the present case the youthful offender ate, drank, and slept at Broad's house, and he was not there temporarily or as a casual visitor. He was in employment with the farmer Broad, and the mere fact that he had his clothes at his father's house and went to change them there did not constitute the parental home as his place of residence. And as the youthful offender was in employment on his own account, I do not think that the fact of his being under the age of sixteen makes any difference. In my opinion his place of residence was that of his employer and not that of his father, and for this reason I think that the justices came to an incorrect decision and that their order cannot be upheld.

AVORY, J.—I also agree that this appeal should be allowed, and I should not add anything to what has been already said, but for the contention on the part of the respondents' counsel that the question in the present case was one of fact. I do not concur in that contention. I think that it is a question of law. It is quite clear that the word "residence" is capable of various meanings, and that its particular meaning is to be gathered from the particular statute in which it appears. However, in the present statute I am satisfied that the meaning to be given to the word is the place where a person actually resides, as distinguished from the place where he may be said constructively to reside. If that is the

proper interpretation of the word the justices were wrong in law, for they have in effect decided that the statute is satisfied by holding that the youthful offender had a constructive residence with his father.

I think that they were also wrong in law in holding that there was any evidence from which they could arrive at the conclusion that the boy was residing with his father. As far as I can see from the Case Stated there was no evidence, either actual or constructive, of residence with the father. On both points I am quite satisfied that the justices came to a wrong conclusion and the appeal must be allowed.

Appeal allowed.

Solicitors: *Gibson & Weldon*, for *E. B. Sharpley, Town Clerk*, Stoke-on-Trent; *Philpot & Co.*, for *Reginald Potts*, Chester.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL OF SOUTHERN NIGERIA *v.* JOHN HOLT & CO. (LIVERPOOL), LTD., AND OTHERS, ET E CONTRA SAME *v.* W. B. MACIVER & CO., LTD., AND OTHERS, ET E CONTRA

[Privy Council (Lord Shaw, Lord Parker of Waddington and Lord Sumner), November 9, 12, 13, 16, 1914, February 9, 1915]

[Reported [1915] A.C. 599; 84 L.J.P.C. 98; 112 L.T. 955]

Foreshore—Accretion of dry land—Artificial reclamation of foreshore—Property in foreshore unaltered.

Sea—Encroachment on land—Land lost becoming property of owner of foreshore.

Easement—Land—Storage of chattels thereon.

Where the sea recedes naturally, gradually and imperceptibly (i.e., that the recession is imperceptible in its course and progress, not imperceptible after a long lapse of time) from the land, and, as a result, part of the foreshore becomes situate above high-water mark, the resulting accretion of land is added to the dry land which it adjoins and becomes the property of the owner of that dry land. In the case of artificial reclamation, as distinct from natural accretion, the property of the foreshore as altered by the reclamatory work done on it remains as before. On the other hand, where the sea gradually encroaches on the land the owner of the land loses that part of his property, and it becomes the property of the owner of the foreshore. Properties described as abutting on the seashore and specifically measured or described in their conveyances or delineated on a plan are not excluded from the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea.

The respondents had for many years occupied land on the shore of the island of Lagos, and for their business as African merchants had built stores, wharves, and jetties by the water side, but this use and possession could not be established for a period of sixty years. To prevent incursion by the sea and erosion of the land they had erected a retaining wall on the soil of the foreshore and driven posts with the result that part of the foreshore was reclaimed from the sea and was used by the respondents as part of their land. In 1907

the government of the island began the construction of a road along the water-side which road passed through the accrued land and interfered with the respondents' use of it. Proceedings were commenced to determine the rights of the respondents as against the Crown so as to settle the basis upon which compensation should be paid them.

Held: the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore, but, in view of the length of the user by the respondents of the accrued land and the absence of objection by the Crown, that user could not be subverted and the respondents were entitled to compensation on the principle laid down in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1) (1872), L.R. 5 H.L. 418.

Held, further: an easement to use the reclaimed land for the storage thereon of casks, foods and produce was a good and valid easement.

Notes. Considered: *Copeland* v. *Greenhalf*, [1952] 1 All E.R. 809. Referred to: *Secretary of State for India in Council* v. *Fourcar & Co.* (1934), 50 T.L.R. 241; *Symes and Jaywick Associated Properties, Ltd.* v. *Essex Rivers Catchment Board*, [1936] 3 All E.R. 908; *Re Ellenborough Park, Re Davies, Power* v. *Maddison*, [1955] 2 All E.R. 38.

As to accretion by recession of the sea, see 33 HALSBURY'S LAWS (2nd Edn.) 522–525; and for cases see 44 DIGEST 67–70. As to the nature of easements and miscellaneous easements, see 12 HALSBURY'S LAWS (3rd Edn.) 519, 611; and for cases see 19 DIGEST 7, 174.

Cases referred to:

(1) *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724, H.L.; 11 Digest (Repl.) 143, *228*.

(2) *City of London Land Tax Comrs.* v. *Central London Rail. Co.*, [1913] A.C. 364; 82 L.J.Ch. 274; 108 L.T. 690; 77 J.P. 289; 29 T.L.R. 395; 57 Sol. Jo. 403; 11 L.G.R. 693, H.L.; 30 Digest (Repl.) 349, *109*.

(3) *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55; 33 L.T.O.S. 189; 23 J.P. 308; 5 Jur.N.S. 745; 7 W.R. 404; 45 E.R. 22, L.C.; 7 Digest (Repl.) 282, *100*.

(4) *Re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327; 8 L.J.Ex. 260; 44 Digest 68, *492*.

(5) *R.* v. *Lord Yarborough* (1824), 3 B. & C. 91; 2 L.J.O.S.K.B. 196; on appeal sub nom. *Gifford* v. *Lord Yarborough* (1828), 5 Bing. 163; 130 E.R. 1023; sub nom. *R.* v. *Lord Yarborough*, 2 Bli. N.S. 147; 1 Dow. & Cl. 178, H.L.; 44 Digest 67, *485*.

(6) *Dyce* v. *Lady Hay* (1852), 1 Macq. 305, H.L.; 19 Digest 16, *42*.

(7) *A.-G. for Ireland* v. *Vandeleur*, [1907] A.C. 369; 76 L.J.P.C. 89; 97 L.T. 221, H.L.; 44 Digest 75, *562*.

(8) *Phillips* v. *Halliday*, [1891] A.C. 228; 61 L.J.Q.B. 210; 64 L.T. 745; 55 J.P. 741, H.L.; 19 Digest 469, *3215*.

(9) *Rogers* v. *Brooks* (1783), 1 Term Rep. 431, n.; 99 E.R. 1179, n.; 19 Digest 473, *3274*.

(10) *A.-G.* v. *Tomline* (1879), 12 Ch.D. 214; 48 L.J.Ch. 593; 40 L.T. 775; 28 W.R. 76; affirmed (1880), 14 Ch.D. 58; 49 L.J.Ch. 377; 42 L.T. 880; 44 J.P. 617; 28 W.R. 870, C.A.; 44 Digest 79, *606*.

(11) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; 46 L.J.Ch. 68; 35 L.T. 569; 42 J.P. 163; 25 W.R. 165, H.L.; 44 Digest 107, *856*.

(12) *Marshall* v. *Ulleswater Steam Navigation Co.* (1871), L.R. 7 Q.B. 166; 41 L.J.Q.B. 41; 25 L.T. 793; 36 J.P. 583; 20 W.R. 144; 44 Digest 108, *867*.

Also referred to in argument:

A.-G. v. *Portsmouth Corpn.* (1870), unreported, cited in Stuart Moore on The Foreshore (3rd Edn.), p. 555.

A.-G. v. *Portsmouth Corpn.* (1877), 25 W.R. 559; 44 Digest 76, *571*.

Lyell v. *Lord Hothfield*, [1914] 3 K.B. 911; 84 L.J.K.B. 251; 30 T.L.R. 630; 19 Digest 62, *353*.

Richardson v. *Pond* (1860), 81 Mass. (15 Gray) 387.

A.-G. of Straits Settlement v. *Wemyss* (1888), 13 App. Cas. 192; 57 L.J.P. 62; 58 L.T. 358, P.C.; 44 Digest 76, *572*.

Doe d. Seebkristo v. *East India Co.* (1856), 10 Moo.P.C.C. 140; 6 Moo. Ind. App. 267; 14 E.R. 445, P.C.; 44 Digest 69, *499*.

Emmerson v. *Maddison*, [1906] A.C. 569; 75 L.J.P.C. 109; 95 L.T. 568; 22 T.L.R. 748, P.C.; 16 Digest 219, *77*.

R. v. *Pagham Sussex Sewers Comrs.* (1828), 8 B. & C. 355; 2 Man. & Ry.K.B. 468; 108 E.R. 1075; sub nom. *R.* v. *Bognor Sewers Comrs.*, 6 L.J.O.S.K.B. 338; 44 Digest 81, *625*.

Duke of Beaufort v. *Swansea Corpn.* (1849), 3 Exch. 413; 12 L.T.O.S. 453; 154 E.R. 905; 44 Digest 74, *544*.

Re Belfast Dock Act, 1854, *Ex parte Earl of Ranfurly* (1867), 1 I.R.Eq. 128; 44 Digest 73, *541i*.

Van Diemen's Land Co. v. *Table Cape Marine Board*, [1906] A.C. 92; 75 L.J.P.C. 28; 93 L.T. 709; 54 W.R. 498; 22 T.L.R. 114, P.C.; 44 Digest 73, *535*.

R. v. *Keyn* (1876), 2 Ex.D. 63; 2 Q.B.D. 90; 13 Cox, C.C. 403; sub nom. *R.* v. *Keyn*, *The Franconia*, 46 L.J.M.C. 17; 41 J.P. 517, C.C.R.; 16 Digest 103, *38*.

Plimmer v. *Wellington Corpn.* (1884), 9 App. Cas. 699; 53 L.J.P.C. 105; 51 L.T. 475; 11 Digest (Repl.) 126, **72*.

North Shaw Rail. Co. v. *Pion* (1889), 14 App. Cas. 612; 59 L.J.P.C. 25; 61 L.T. 525, P.C.; 44 Digest 86, *673*.

Foster v. *Wright* (1878), 4 C.P.D. 438; 49 L.J.Q.B. 97; 44 J.P. 7; 25 Digest 14, *109*.

Hindson v. *Ashby*, [1896] 2 Ch. 1; 65 L.J.Ch. 515; 74 L.T. 327; 60 J.P. 484; 45 W.R. 252; 12 T.L.R. 314; 40 Sol. Jo. 417, C.A.; 44 Digest 93, *745*.

A.-G. v. *Hammond* (1575), unreported, cited in Stuart Moore on The Foreshore (3rd Edn.), pp. 219–224.

Ontario Mining Co. v. *Seybold*, [1903] A.C. 73; 72 L.J.P.C. 5; 87 L.T. 449; 19 T.L.R. 48, P.C.; 8 Digest (Repl.) 780, *439*.

Willmott v. *Barber* (1880), 15 Ch.D. 96; 49 L.J.Ch. 792; 43 L.T. 95; 28 W.R. 911; on appeal (1881), 17 Ch.D. 772; 45 L.T. 229, C.A.; 31 Digest (Repl.) 431, *5579*.

Russell v. *Watts* (1883), 25 Ch.D. 559; 50 L.T. 673; 32 W.R. 621, C.A.; reversed (1885), 10 Ch. App. 590; 55 L.J.Ch. 158; 53 L.T. 876; 50 J.P. 68; 34 W.R. 277, H.L.; 19 Digest 40, *215*.

Lord Advocate v. *Wemyss*, [1900] A.C. 48; 34 Digest 619, *174*.

Consolidated Cross-Appeals from a decision of the full court of the Supreme Court of the colony of Southern Nigeria varying orders made by OSBORNE, C.J.

P. O. Lawrence, *K.C.*, *A. R. Pennington*, *K.C.*, and *F. Whinney* for the Attorney-General.

Cave, *K.C.*, *Tomlin*, *K.C.*, and *A. T. Miller* for the respondents (appellants upon the cross-appeals).

Feb. 9, 1915. **LORD SHAW.**—These are two appeals and two cross-appeals, all consolidated, against two judgments pronounced by the full court of the Supreme Court of Northern Nigeria on April 22, 1911, varying the judgment of OSBORNE, C.J., pronounced on Mar. 14, 1910. For the sake of convenience the Attorney-General for Southern Nigeria is hereinafter referred to as "the Crown" and the opposite parties as "the respondents."

The proceedings relate to certain lands in the district of Olowogbowo, in the island of Lagos, which is now a part of the colony of Southern Nigeria. The lands consist of five plots, all of which are situated on the shore of the lagoon. As com-

merce has developed, these lands, and especially the frontage thereof to the sea, have become of considerable value. They adjoin each other; and in the view which is to be taken of these appeals the facts as to the different plots may be sufficiently stated as follows. The respondent firm of Holt & Co. were in occupation claiming as freeholders of (i) William's land and (ii) Dunkley's land, and as tenants of the executors of the Rev. James White, who claimed to be the freeholders of (iii) White's land. The respondents MacIver & Co. were in the occupation of (iv) George's land and (v) Johannsen's land as tenants of the freeholders of these respective plots. The whole premises were occupied for the purpose of the respondents' respective businesses as African merchants.

In regard to the possession and occupancy of the properties, the admitted facts are these: A wharf was built from George's land in or before the year 1859, a pier was built from Johannsen's land prior to the year 1861, and a pier was also built from Dunkley's land soon after that year. The respondents, it is further admitted, built stores, sheds, and other works at different dates upon the land adjoining the waterside, and in particular upon not inconsiderable portions of the solum of the land in question in the case, namely, that which had been foreshore, i.e., land between high and low water marks at ordinary spring tides. The respondents and their predecessors used the foreshore and land for storage and for the purposes of their business; and the wharf and piers already mentioned were also used by them in connection with their trade. While, upon the one hand, there seems little doubt that for about half a century continuous use and possession were had —of the kind and nature just described—and that, as trade developed, additional buildings and erections were put upon the ground, yet, upon the other hand, it is admitted that this use and possession cannot be established for a period of sixty years. To complete the general statement of the facts, it may be mentioned that a retaining wall was built to protect Dunkley's land prior to 1879, and that this retaining wall was continued in front of William's land in the years 1886–8. Further, as was stated on the appeal to the full court, there was no public right of way over the foreshore. In the years 1907 or 1908 the government of the island began the construction of a public road along the waterside of the lagoon. The road was continued over the lands in dispute in the present case. By this means the five plots belonging to the respondents have been cut off from the waters of the lagoon, and from their wharves and piers. By the construction of the road so made some of the stores, buildings and sheds erected by the respondents or their predecessors have been destroyed, and the use and possession of the respondents' lands have been in an important degree subverted. It became, accordingly, necessary to determine the nature of the rights of the parties so as to settle the basis upon which compensation shall be made.

The form of the proceedings is by way of information. It only requires to look at the prayer of these to observe the startling consequences which would result to all the respondents' properties should that prayer be granted as it stands. For it is prayed that a declaration be made of the absolute right of the Crown in the land in dispute, and for an injunction and peaceable possession. The result of this would be the complete extrusion of the respondents from land, foreshore, wharves, and piers. The properties themselves, instead of being properties abutting on the sea, would be separated therefrom by the road to be constructed, and be converted into hinterland. Their Lordships are not surprised that the advisers of the Crown shrank from the consequences of this sweeping demand. The only substantial concession made, however, was that as to Dunkley's land and Johannsen's land, no appeal was presented against that portion of the judgment of the court below which declared that the respondents have acquired an easement for a jetty and a right of way thereto from these respective lands. Subject to this, the demand of the Crown is maintained in all its breadth. This is the first time that process by way of information has been used in Southern Nigeria, and it is remarked by OSBORNE, C.J., that:

"It has proved exceedingly difficult to adapt to the Supreme Court Ordinance and the procedure rules thereunder, which are framed to meet the requirements of a community wherein illiterate suitors not uncommonly conduct their own litigation."

Strict English procedure was accordingly departed from, and the courts went further in considering themselves not limited by the actual wording of the informations and pleadings. This occurred with the consent of both parties. OSBORNE, C.J., said:

"What we are really asked to do is to ascertain and declare what have been the rights of the respective parties from the time of first occupation of their lands by their predecessors in title, not only with regard to foreshore, but with regard also to a strip of land which lies between the limits specified in the various grants relating to the defendants' lands and the low-water mark of the lagoon."

While it is true that this state of the record may import certain difficulties into the case, their Lordships pass no adverse comment upon the course taken by the parties and the courts below. And they desire to express their sense of the thoroughness and care with which the perplexing problems which emerge in the case, both upon the law and in fact, have been treated by all of the learned judges.

It appears from the historical narrative in the judgment of OSBORNE, C.J., that, about 1850, Lagos, then under powerful chiefs, was one of the principal centres of the slave trade. It was bombarded in 1851 by a British force, and on Jan. 1, 1852, the slave trade was finally abolished. A British consulate was established, and there was an influx of many liberated slaves from Sierra Leone and elsewhere. There seems no reason to doubt the opinion of the learned Chief Justice that the land had originally belonged to tribal communities, but that "during the decade between 1852 and 1862 the practice of alienation sprang into vogue, and another new feature, totally foreign to native law, which knew not writing, was introduced in the shape of written grants by the King of Lagos. The land in Lagos was originally attached to the stools of the White Cap chiefs, who were in no way subordinate to the early kings." In the course of time, however, the royal power increased and the tribal and chieftain power diminished. This was the state of matters when King Docemo and his chiefs, on Mar. 6, 1861, entered into a treaty of cession of the port and island of Lagos to Her Majesty the Queen of Great Britain. The treaty is printed at length in the record in this case. The only question which has been mooted upon it is whether by its terms it granted sovereignty and jurisdiction alone to the exclusion of property. The words are complete and absolute, they

"grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island and premises, with all the royalties thereof, freely, fully, entirely, and absolutely."

Their Lordships do not refer to the treaty further than to say that, in their opinion, property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors were to be respected. It may be that these required confirmation by subsequent procedure, prescribed by way of ordinance or otherwise, but no question on that head arises in the present case. On Mar. 13, 1862, the ceded territories, under the title of Settlement of Lagos, were erected into a separate government. On Feb. 19, 1866, Lagos became part of the West African Settlements. On July 24, 1874, the Gold Coast Colony, including Lagos, was formed. On Jan. 13, 1886, Lagos again became a separate colony, and finally, on May 1, 1906, it became the colony of

Southern Nigeria. This is briefly the political history of the island, but none of these changes, recorded in the judgments of the court below, effected any alteration in the status of occupants of land, or in the nature of the tenure thereof.

With regard to the plots of land in question in the present case, the one point which has a really important bearing upon the questions to be determined in the appeals is as to the boundary seaward of those plots. On Jan. 21, 1864, a Crown grant was executed in favour of Williams, who had been in possession for twelve years before, and the boundary on the south-west side of the property was stated to be the river Lagos. In 1861 there had been a grant of the next plot by King Docemo to a native called Captain Harry Johnson; Johnson sold to Dunkley, and in 1869 Dunkley obtained a Crown grant. There is a peculiarity as to the southern boundary, which is stated to be the "Marina," but it appears to be a fact that there was no "Marina" or public thoroughfare in that island, and, as the Chief Justice states, there is evidence that Dunkley himself had previously reclaimed some land and built a sea wall thereon as early as 1868, and that at the time he acquired the Crown grant he had a jetty or pier opposite his land. As to the third plot, the original grant was to the Rev. James White, in 1861, and in his Crown grant the western boundary is stated to be the lagoon. The fourth plot—viz., George's land—was the subject of a grant from King Docemo, and the boundary is described as "facing the lagoon." The fifth plot—viz., Johannsen's land—is described as having a water frontage, and in an earlier agreement the property is said to include the ground on the beach. Their Lordships do not investigate these titles in further detail. For, in their opinion, they are substantially at one in this, that the properties were each and all treated in description as being bounded in fact by the sea. The expression may be in one case the river Lagos, in another the lagoon, and so on, but a sea frontage was that which was meant, and in their Lordships' opinion was sufficiently expressed. They were riparian properties. In the next place, in their Lordships' view, there was no express grant of foreshore made in any one of these titles, nor can any grant of foreshore be implied, looking to the language of description which is employed. Their Lordships are not moved by the fact that in some cases measurements are given; these would have to yield to the description. But the description itself is a water lagoon or sea boundary, and, as stated, this, in the opinion of the Board, does not embrace foreshore within the scope of the grant.

Before adverting to the state of possession of these properties, their Lordships think it right to allude to one fact with regard to the sea frontage. A swift current sweeps along the shore. The effect in the past has been to erode the coast, and it has been the practice in time past memory to erect upon the shore stakes or "cabbage posts" to prevent the serious inroad and ravages of this tidal erosion. The practice was not only known to the British government, but so early as 1864 it was recognised, and, indeed, enforced, by an ordinance confirmed upon Mar. 28 of that year. A road had been made along a part of the riverside, and the owners of land abutting on the road were ordained, among other things, to drive in stakes in the bank of the river in such a manner as should be required by the government surveyor, the narrative of the ordinance being that the road was liable to be put out of repair and the soil carried away by inter alia "the action of the tide at the base thereof." The reason of the ordinance is stated to be the convenience and comfort of Her Majesty's subjects. There can, in the opinion of the Board, be little doubt that the erosive action of the sea was such along the coast of Lagos that a protection against it was considered not only to be for private but for public advantage.

Before stating the nature of the operations conducted by the respondents, their Lordships, in view of the argument presented to them, think it necessary to consider the possession of the properties, the descriptions whereof have been already alluded to, in reference to the doctrine of the accretion from the sea. In the first place their Lordships are of opinion that when de facto the boundary was the sea under the different names already alluded to, there is nothing in the law or the

nature of the case to prevent the application of the ordinary doctrine of accretion or dereliction to such a condition of things. On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had de facto been transferred to the Crown as owners of the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained. The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were de facto fronted and bounded by the sea, were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a stretch of land, it might be yards, feet, or inches, between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into hinterland, would be followed by grotesque and wellnigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage.

The whole of this question as applicable to lands de facto fronting a river but described by measurements which excluded its bed, was anxiously discussed in *City of London Land Tax Comrs.* v. *Central London Rail. Co.* (2). The law with reference to river and street boundaries of property was there gathered together, and it need no longer be a matter of doubt that the operation of adding to the ownership of riparian lands the property of the soil ad medium filum is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring do not in fact include any part of the bed of the river or of the street. Similarly, in their Lordships' opinion properties scheduled or specifically measured, but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea. In the present case, accordingly, the conveyances of the properties which are in question in this appeal were in the opinion of the Board habile to cover the land formed by slow, gradual, and natural accretion.

Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt its general applicability to lands like those of the respondents' abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs. There has been much written and decided law upon this subject, and notwithstanding the very full argument, it need not be entered upon at large. But in spite of the wealth of authority, including the dicta of HALE'S DE JURE MARIS and of many eminent judges, it is not clear that the general proposition has been advanced beyond that laid down by JUSTINIAN in his INSTITUTES, bk. 2, tit. 1, s. 20:

> "Præterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intellegere non possis, quantum quoquo momento temporis adjiciatur."

BLACKSTONE COMMENTARIES (vol. 2, chap. 16, p. 261), says:

> "As to lands gained from the sea, either by alluvion, by the washing up of

sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little by little, by small and imperceptible degrees, it shall go to the owner of the land adjoining."

BLACKSTONE then introduces by way of explanation a reference to a doubtful brocard de minimis non curat lex, which LORD CHELMSFORD in *A.-G.* v. *Chambers* (3) (4 De G. & J. at p. 66) properly disclaims. The true reason for the principle of law in regard to foreshores is the same reason as the principle in regard to river banks, i.e., that it is founded upon security and general convenience.

In *Re Hull and Selby Rail. Co.* (4) LORD ABINGER, C.B., referring to *Lord Yarborough's Case* (5), said:

"The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

Re Hull and Selby Rail. Co. (4) is important not only for the opinions of LORD ABINGER and ALDERSON, B., but for the fact of its acceptance of this principle of the law (settled as between subject and subject) to the relations between the subject and the Crown. LORD ABINGER said (5 M. & W. at p. 332):

"In all cases of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and vice versa."

He repeats in different words his main proposition:

"No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property."

ALDERSON, B., dwelt specially upon the double-sided operation of the rule. He said (ibid., at pp. 332, 333):

"I think the question is precisely the same, whether the claim is made against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water-mark—grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by LORD HALE, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."

In *A.-G.* v. *Chambers* (3), LORD CHELMSFORD refers to the double-sided operation of the rule in this way (4 De G. & J. at p. 68):

"It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore."

As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress. In *R.* v. *Lord Yarborough* (5), ABBOTT, C.J., said (3 B. & C. at p. 107):

"Considering the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."

This statement of the principle—namely, that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress—goes no further than the words of JUSTINIAN already quoted.

It was strongly contended before the Board that the facts of this case showed it to be substantially one of natural accretion. The argument was this. In accordance with the policy generally approved, stakes were set out between high and low-water mark, and the silting up took place within those stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the court below. More than one reference is made to "the question of the reclaimed or silted-up land," and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore, thus suddenly altered by reclamatory work upon it, remains as before—i.e., in cases like the present, with the Crown. The history of the foreshore adjoining these lands, and of the operations thereon, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the courts below upon this question of fact. Upon the appeals, GRIFFITH, C.J., after referring to the finding of the trial judge, said:

> "I have no reasonable doubt that the great bulk of the land between the Crown grant land and the lagoon is the result of artificial reclamation on the part of the defendants and their predecessors."

OSBORNE, C.J., who had been the trial judge, put his judgment upon this point thus:

> "The evidence seems clearly to show that actual reclamation contributed more than alluvion to the extension of the lands in the occupation of the defendants and their predecessors in title, and as to actual gain by alluvion, uninfluenced by the defendants' and their predecessors' reclaiming operations, there is no direct evidence."

The finding is thus not very specific, although WINKFIELD, J., goes the length of saying:

> "It is not established that any part of the land neutral tint on the plan was the result of natural accretion or alluvion."

In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding. Nor do they say that they would have come to a different conclusion. The case, accordingly, must be dealt with as substantially one of an addition to adjoining lands being caused artificially by the execution of reclamatory work.

The natural situation of the land was that, consequent upon the erosion mentioned, a relatively steep and inconvenient shore had been created. The reclamation mentioned undertaken by the respondents and their predecessors was not of the simple character of the erection of stakes, as alluded to, but was the building of a solid wall; and the evidence appears to point to the foundations of that wall having been sunk to the extent of at least a few feet in the soil between ordinary high and low-water mark—i.e., in the foreshore itself. Nothing more natural could have been expected, and probably nothing more in the interest of all parties, including the Crown. The fact, however, being accepted as stated, the legal consequences follows—viz., that the doctrine of natural accretion cannot be held to apply. The wall, having been founded as stated, was built up; the land within it and the old high line of foreshore was levelled; and the respondents and their predecessors have possessed the same ever since, that is, during a very long course of time, and they built thereupon from time to time the warehouses and sheds which appear upon the plans. The ground upon which these are erected protrudes

largely over the disputed territory. Upon the new wall frontage itself wharfage accommodation was constructed; and the whole—viz., piers, wharves, disputed land and property within the old boundaries have been possessed together and used, roughly speaking, in this way for a period of between thirty and fifty years.

The judgment of the full court has affirmed various easements over reclaimed land (i) in the case of Williams's land for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and (ii) and (iii) in the case of Johannsen's and Dunkley's lands easements for jetties. Against these last the Crown has not insisted at their Lordships' Board, but with regard to the first point it is maintained that such an easement is unknown to the law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof.

Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce* v. *Hay* (6), by LORD ST. LEONARDS, L.C., who observed (1 Macq. at p. 312):

> "The category of servitude and easements must alter and expand with the changes that take place in the circumstances of mankind."

But in their Lordships' opinion the second contention of the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly beneficial to the general interests, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

There remains for consideration the judgment of OSBORNE, C.J., which was inter alia defended in argument by the respondents, and to which it was part of their case that this Board should revert. The respondents are not in a position to plead the benefit of prescription as, although their buildings and erections have been used and occupied for a time unquestionably long, it has, as already mentioned, not reached the requisite period of sixty years. Their Lordships have been referred, on the other hand, to cases like the *A.-G. for Ireland* v. *Vandeleur* (7). But the facts of the present case cannot be subsumed under the category of lost grant. Although their Lordships are accordingly impressed with the long-continued possession, they are unable to discover in the law of England any acknowledged ground for holding that the property of the solum of the artificially reclaimed land has thereby become vested in the respondents.

A reference also was made to *Phillips* v. *Halliday* (8). But the circumstances of that case were remote from the present. What was decided was that a pew may be annexed to a dwelling house within a parish "either by a faculty or by prescription, which supposes a faculty," and that a faculty may be presumed upon evidence of exclusive possession and repair for a long period. A passage in the judgment from the opinion of HERSCHELL, L.C., is much relied upon. It is to the following effect ([1891] A.C. at p. 234):

"In the case of *Rogers* v. *Brooks* (9), WILLES, J., a very learned judge, said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the plaintiff. No doubt that is a strong expression, and possibly there may be presumptions that ought not to be made even under such circumstances as those, but I think it points out how emphatically the view has been entertained by learned judges that where there has been long continued possession which is consistent with a legal title, every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right."

In the opinion of the Board this passage does not support the proposition that a transfer of the dominium of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership. The effect of this upon the present case will be immediately seen.

As to the facts, the dates of reclamation have already been given and the nature of the erections, operations, and occupation stated. To all intents and purposes the reclaimed ground was used along with and as part and portion of the respondents' properties as a whole; and the piers, wharves, and whole land have been for the protracted period alluded to, used for the purpose of the shipping and mercantile business. Their Lordships are further of opinion that the circumstances in which the reclamation itself was made negative all ideas of intentional trespass or of surreptitious acquisition of land. As stated, the respondents' and their predecessors' acts of reclamation were good for all concerned, and were a public benefit. Their Lordships find themselves in agreement with OSBORNE, C.J., who tried the cause, and has submitted both facts and law to a thorough consideration, that "it is quite impossible to believe that all the reclamation and subsequent building can have gone on without the knowledge and against the wish of the government . . . as the government must have been aware of the reclamation and subsequent building, it is more probable that those acts were done with permission from the governor for the time being than that they were acts of trespass done in defiance of the government."

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation and to obtain an injunction which would extrude the respondents from the reclaimed land. One result of no inconsiderable consequence would, of course, follow. The plots of land, all of which were bounded by the foreshore and the sea, would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation as above described, not objected to, and followed by occupation ever since, would be the loss of all kinds of navigation, groundage, and other foreshore rights, and the destruction of probably the most serious elements of value in the whole of the respondents' properties. Their Lordships are of opinion that this result is not in accordance with law. It may be that in building the foundation of the wall a stricter care should have been taken to keep on the landward side of the foreshore; but the foreshore, it should not be forgotten, was exceptionally troublesome; the erosion was going on, and the current was so dangerous that in native opinion there was a devil in the water. In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it should not be forgotten that it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown. This principle is in accord with the law laid down in *A.-G.* v. *Tomline* (10), and prin-

cipally with the opinions of FRY, J., at the trial, and COTTON, L.J., in the Court of Appeal. With regard to the use and enjoyment of the made-up land by the respondents as merchants, their Lordships are, as already indicated, of opinion that the same cannot, in the circumstances, be subverted. As to what may be called foreshore rights, as such, the point of the case seems to be: What is the effect of a frontage owner reclaiming part of a foreshore which is vested in another. It appears from *Lyon* v. *Fishmongers' Co.* (11) that the frontage owner has foreshore rights annexed to his land, beyond such rights as he possesses as one of the public. And the real question, therefore, is whether the reclamation made in the circumstances before described operates as an abandonment of these rights over the land reclaimed. The abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case intended to convert their holdings into what has been described as "hinterland." Further, it appears from *Marshall* v. *Ulleswater Steam Navigation Co.* (12) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow and re-flow of the tide.

The case has been brought in order to determine the principles upon which compensation shall be awarded to the respondents in consequence of the construction by the Crown of a road over the disputed land. Their Lordships desire to make it clear that it follows from their decision that the foreshore rights originally attaching to the respondents' lands before reclamation have, accordingly, not been destroyed thereby. The lands further will fall, upon the case of compensation, to be treated upon the principle laid down in the *Duke of Buccleuch* v. *Metropolitan Board of Works* (1), as possessing not only rights of navigation and otherwise in and enjoyable by the public at large, but those special rights which are attached and add value to specific riparian lands. Their Lordships will humbly advise His Majesty that the judgment of the full court should be set aside and the judgment of the Chief Justice in the court of first instance on Mar. 14, 1910, restored, except upon the point of costs. The Crown will pay to the respondents the costs of the appeals and of the causes in the courts below.

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[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

WHITTAKER *v.* LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (A. T. Lawrence, and Bailhache, JJ.), May 4, 1915]

[Reported [1915] 2 K.B. 676; 84 L.J.K.B. 1446; 113 L.T. 544; 79 J.P. 437; 31 T.L.R. 412; 13 L.G.R. 950]

Tramway—Offence—Passenger travelling beyond distance to which ticket entitled him to travel—Right of conductor to eject him from tramcar—Wrongful ejection—Liability of tramway owners—Tramways Act, 1870 (33 & 34 *Vict.*, *c.* 78), *s.* 51, *s.* 52.

The plaintiff, who had paid his fare, was ejected from one of the defendants' tramcars by the conductor who mistakenly believed that he was attempting to travel beyond the distance to which his ticket entitled him to travel. He claimed damages from the defendants in respect of injuries which he had sustained through being ejected.

Held: the remedies possessed by tramway authorities, such as the defendants, against a person who entered a tramcar and refused to pay the proper fare were not limited to those provided by s. 52 of the Tramways Act, 1870, but included the common law right of ejection, provided that no more force than might be necessary was used; here, the conductor had committed a wrongful act in the course of his employment as a servant of the defendants who were, accordingly, liable.

Notes. As to the liabilities of tramway authorities, see 32 HALSBURY'S LAWS (2nd Edn.) 728–730; and for cases see 43 DIGEST 351–353. For the Tramways Act, 1870, s. 51 and s. 52, see 25 HALSBURY'S STATUTES (2nd Edn.) 1318.

Cases referred to:

(1) *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C.B.N.S. 336; 28 L.J.C.P. 242; 33 L.T.O.S. 366; 5 Jur.N.S. 1104; 7 W.R. 464; 141 E.R. 486; 10 Digest (Repl.) 1207, *8436*.

(2) *Hutchins* v. *L.C.C.*, July 30, 1914, unreported, C.A.; reversed (1915) 85 L.J.K.B. 1177; 114 L.T. 377; 80 J.P. 193; 32 T.L.R. 179; 60 Sol. Jo. 156; 14 L.G.R. 313, H.L.; 8 Digest (Repl.) 125, *805*.

(3) *Poulton* v. *London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; 8 B. & S. 616; 36 L.J.Q.B. 294; 17 L.T. 11; 31 J.P. 677; 16 W.R. 309; 8 Digest (Repl.) 127, *812*.

Also referred to in argument:

Barwick v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 34 Digest 129, *987*.

Bayley v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1872), L.R. 7 C.P. 415; 41 L.J.C.P. 278; 28 L.T. 366; affirmed (1873), L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 366, Ex. Ch.; 8 Digest (Repl.) 124, *801*.

Farry v. *Great Northern Rail. Co.*, [1898] 2 I.R. 352; 34 Digest 135, *a*.

Dyer v. *Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306, C.A.; 34 Digest 130, *996*.

Lloyd v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 34 Digest 129, *991*.

Charleston v. *London Tramways Co.* (1888), 4 T.L.R. 629; 32 Sol. Jo. 557, C.A.; 8 Digest (Repl.) 127, *816*.

Myers v. *Bradford Corpn.*, [1915] 1 K.B. 417; 84 L.J.K.B. 306; 112 L.T. 206; 79 J.P. 130; 31 T.L.R. 44; 59 Sol. Jo. 57; 13 L.G.R. 1; affirmed sub nom. *Bradford Corpn.* v. *Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 32 T.L.R. 113; 60 Sol. Jo. 74; 14 L.G.R. 130, H.L.; 38 Digest (Repl.) 120, *829*.

Lyles v. *Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 74 L.J.K.B. 484; 92 L.T. 586; 69 J.P. 193; 21 T.L.R. 389; 3 L.G.R. 691, C.A.; 38 Digest (Repl.) 108, 759.

Appeal from Wandsworth County Court.

The plaintiff, F. Whittaker, a bricklayer's foreman, had been working at Barnes on Sept. 4, 1914, and was returning home. At Wandsworth High Street he boarded a tramcar belonging to the defendants, the tramway authority for the district, and duly paid his fare. Before he had reached his destination, the conductor, mistakenly believing that he was attempting to travel beyond the distance to which his ticket entitled him to travel, ejected him from the tramcar with such force that he fell into the road and sustained injuries to his ankle. He brought an action against the defendants for damages for assault by their servant, the conductor. At the trial in the county court the jury, in answer to certain questions found that the plaintiff was ejected from the car on the ground that the conductor thought that he was endeavouring to travel to a point beyond which his ticket allowed him to travel but that he was not ejected through the malice or spite of the conductor; that the conductor did not think that the plaintiff was intoxicated; and that the injuries he suffered were the result of his being ejected. They assessed the damages at £30. The county court judge entered judgment for the defendants on the ground that the conductor was not acting within the scope of his authority in assaulting the plaintiff and ejecting him from the car. The plaintiff appealed.

The Tramways Act, 1870, provides:

"51. If any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects on arriving at the point to which he has paid his fare to quit such carriage, every such person shall, for every such offence, be liable to a penalty not exceeding forty shillings."

"52. It shall be lawful for any officer or servant of the promoters or lessees of any tramway, and all persons called by him to his assistance, to seize and detain any person discovered either in or after committing or attempting to commit any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or until he is otherwise discharged by due course of law."

McCall, K.C., and *Martin O'Connor* for the plaintiff.

Craig Henderson for the defendants.

A. T. LAWRENCE, J., stated the facts, and continued: It seems to me, under these circumstances, that this is not a case in which it is correct to say, as was contended for the defendants, that the defendants, as the tramway authority, had no power themselves to eject the plaintiff from the tramcar, and, therefore, could not delegate such power to their servant the conductor. In my opinion, although the conductor acted in a manner that was contrary to what the defendants intended, it was not legally impossible for the defendants to eject a passenger or for them to have delegated to their servant, the conductor, the authority to do it. The case comes within the first of the three classes of cases mentioned by WILLES, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1) where he says (6 C.B.N.S. at p. 356):

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue that or the statutory remedy."

The defendants, as the tramway authority, have a right of property in their cars, and, in my opinion, a right to protect them against trespassers; consequently they can eject from their cars as a trespasser any person who attempts to remain therein without paying, or intending to pay, his fare. The fact that a person has entered a tramcar does not protect him from the common law liability to be treated as a trespasser if he is one as a matter of fact. I agree that the defendants have other remedies given to them by the Tramways Act, 1870, and their by-laws, but these remedies are not exclusive of their common law right to protect their property.

In my opinion, therefore, the question left open by KENNEDY, L.J., in *Hutchins* v. *L.C.C.* (2) in the Court of Appeal must be answered by saying that a tramway authority can eject a trespasser in a case such as this from one of their cars. To decide the question otherwise would place the tramway authorities in a ridiculous position, as they would be unable to protect their own property. In this case, the conductor committed a wrongful act in the course of his employment as a servant of the defendants; the plaintiff was consequently entitled to sue the defendants, and judgment ought to have been entered in his favour in accordance with the findings of the jury. The appeal must, therefore, be allowed.

BAILHACHE, J.—I am of the same opinion, and I only desire to say a few words. It appears that the conductor ejected the plaintiff from the tramcar, causing him some injury, because he mistakenly thought that the plaintiff was attempting to travel beyond the point to which his ticket entitled him to travel. There can be no doubt that, if the defendants were not a statutory body with powers limited by statute, such an action on the part of such a servant would be an action within the scope of his authority for which the master would be liable.

It is contended for the defendants, however, that they are not liable because a tramway authority is a statutory body with limited powers, and cannot delegate to its servants powers which it does not itself possess. *Poulton* v. *London and South Western Rail. Co.* (3) was referred to as supporting that proposition. I have no doubt that that is the law with regard to statutory bodies, including building societies and limited companies whose powers are limited and defined by their memorandum and articles of association; it certainly has been laid down as the law with regard to tramway companies. So far I agree with the argument of counsel on behalf of the defendants. He then referred us to s. 51 and s. 52 of the Tramways Act, 1870, and contended that the powers possessed by a tramway authority in a case of this sort were confined to the powers given by those sections. I do not think that that is so. Section 51 makes the act which the plaintiff was mistakenly suspected of committing an offence punishable by a penalty not exceeding 40s., and s. 52 provides that, when a tramway authority wishes to treat such an act as an offence, any officer or servant of the tramway authority may seize and detain any person discovered committing or attempting to commit the act, whose name or residence is unknown, until such person can conveniently be taken before a justice, or until he be otherwise discharged by due course of law. In my opinion, however, the detention provided for by that section is not the only remedy possessed by a tramway authority; it is, I think, in addition to the other remedies which an authority would have if this section was not included in the Act. One of the most obvious remedies which an authority must ex necessitate have is the common law right to treat as a trespasser any person who insists on remaining on a tramcar without paying his fare, and a trespasser may be ejected provided no more force than may be necessary is used. The defendants, as the tramway authority, have a perfect right to do that, and I do not think that s. 52 deprives them of that right, or that they are bound to take the trespasser's name and address. In my opinion, therefore, the learned county court judge was wrong, and this appeal must be allowed.

Solicitors: *Yardley, Tilley & Co.*; *Edward Tanner.* *Appeal allowed.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

Re BRITISH RED CROSS BALKAN FUND. BRITISH RED CROSS SOCIETY *v.* JOHNSON

[CHANCERY DIVISION (Astbury, J.), July 16, 1914]

[Reported [1914] 2 Ch. 419; 84 L.J.Ch. 79; 111 L.T. 1069; 30 T.L.R. 662; 58 Sol. Jo. 755]

Trust—Resulting trust—Subscriptions for special object—Unapplied surplus of fund subscribed—Resulting trust for subscribers—Distribution of surplus.

A special fund was raised by subscription to aid the wounded in the Balkan war of 1912. At the end of the war, the fund having been duly applied during the war, an unapplied surplus remained which became distributable to some or all of the subscribers by way of resulting trust.

Held: the rule in *Clayton's Case* (1) had no application, and the balance belonged to the subscribers in the proportion which the total amount unexpended bore to the total fund subscribed.

Notes. Explained and Distinguished: *Re Welsh Hospital (Netley) Fund, Thomas* v. *A.-G.*, [1921] All E.R.Rep. 170. Applied: *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest*, [1945] 2 All E.R. 711. Distinguished: *Re Hillier, Hillier* v. *A.-G.*, [1953] 2 All E.R. 1547.

As to resulting trusts, see 33 HALSBURY'S LAWS (2nd Edn.) 141 et seq.; and for cases see 43 DIGEST 642 et seq.

Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest (Repl.) 192, *370*.

(2) *Cory Bros. & Co.* v. *Mecca, Turkish Steamship (Owners), The Mecca*, [1897] A.C. 286; 66 L.J.P. 86; 76 L.T. 579; 45 W.R. 667; 13 T.L.R. 339; 8 Asp.M.L.C. 266, H.L.; 12 Digest (Repl.) 540, *4098*.

Also referred to in argument:

Deeley v. *Lloyds Bank, Ltd.*, [1912] A.C. 756; 81 L.J.Ch. 697; 107 L.T. 465; 29 T.L.R. 1; 56 Sol. Jo. 734, H.L.; 12 Digest (Repl.) 552, *4191*.

Re Abbott Fund Trusts, Smith v. *Abbott* [1900] 2 Ch. 326; 69 L.J.Ch. 539; 48 W.R. 541; 8 Digest (Repl.) 447, *1414*.

Originating Summons.

As a result of appeals made by the plaintiffs to the public in October, 1912, inviting subscriptions for a special fund, to be called the British Red Cross Balkan Fund, to enable the plaintiffs to dispatch expeditions to aid the wounded in the war in the Balkans between the Balkan Allies and Turkey, large sums amounting to £28,682 were subscribed from time to time during the war. This war ended sooner than was expected, with the result that, in July, 1913, the plaintiffs were in possession of an unexpended balance of £12,655 19s. 6d., which admittedly belonged to some or all of the subscribers by way of resulting trust. The plaintiffs sent out a circular letter, dated July 5, 1913, to all subscribers stating that the war was concluded and that an unexpended balance of the funds subscribed was in their possession, and asking them to consent to such balance being applied for the general purposes of the plaintiffs. To this letter, 923 subscribers of £5,108 sent no reply, 21 subscribers of £295 intimated that they wished their money returned, and the remainder, 2,310 subscribers of £23,279, consented to such an application of their subscriptions. The accounts of the expenditure on the war showed that the amount actually subscribed up to Nov. 8, 1912, was the exact amount actually expended in aiding the wounded in the war.

The question arose whether the rule in *Clayton's Case* (1) was applicable under these circumstances; if so, the balance in hand must be treated as derived from subscriptions coming in on or after Nov. 8, 1912, and would belong to the sub-

scribers who had subscribed on or after that date, so that they would be entitled to receive their subscriptions back in full. If, on the other hand, the rule in *Clayton's Case* (1) was not applicable, the expenditure would be treated as made rateably out of all the subscriptions irrespective of their date, and the unexpended balance would belong to all the subscribers rateably in proportion to their subscriptions.

The plaintiffs issued this summons to ascertain how the unexpended balance of the funds should be applied by them.

Howard Wright for the plaintiffs.

Roger Turnbull for subscribers who had subscribed before Nov. 8, 1912.

H. O. Danckwerts for those of the subscribers who had subscribed on or after Nov. 8, 1912.

ASTBURY, J.—The question which arises here is whether, there being a balance in the hands of the trustees of the plaintiffs, the portion of such balance of unexpended subscriptions must be returned to subscribers according to the analogy of the rule in *Clayton's Case* (1), or whether it must be returned to them after arriving at the proportion the unexpended balance bears to the total subscriptions.

The rule in *Clayton's Case* (1) as re-stated by LORD HALSBURY, L.C., in *The Mecca* (2) ([1897] A.C. at p. 290) is that

> "where an account current is kept between parties as a banking account, 'there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other.' "

This is not a rule of law, but merely a rule of evidence, and the circumstances of any particular case may or may not afford ground for inferring that the transactions of the parties were not intended to come under the general rule.

In my judgment, the rule in *Clayton's Case* (1) is obviously inapplicable to the present case. After the Balkan War broke out, application was made by the plaintiffs to the public for subscriptions for a special fund for assisting the sick and wounded. Subscriptions were obtained and duly applied, and, at the close of the war, there was an unexpended balance of £12,655 19s. 6d. That balance, or so much of it as is returnable to subscribers who are unwilling to allow it to be used for the general purposes of the fund, must be returned to subscribers in the proportion which the total amount unexpended on the purposes for which subscriptions were made bear to the total fund subscribed.

Solicitors: *Freshfields.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

BROWN *v.* JOHN WATSON, LTD.

[House of Lords (Lord Kinnear, Lord Dunedin, Lord Atkinson, Lord Shaw and Lord Parmoor), March 30, 31, April 28, 1914]

[Reported [1915] A.C. 1; 83 L.J.P.C. 307; 111 L.T. 347; 30 T.L.R. 501; 58 Sol. Jo. 533; 7 B.W.C.C. 259]

B

Workmen's Compensation—"Arising out of and in course of employment"—"Accident"—Miner—Chill while waiting to ascend mine—Death from pneumonia—Need to prove physical impact—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1 (1).

C In consequence of an accident to one of the shafts, the men in a pit where the workman was employed were ordered to ascend to the surface by another shaft, at the bottom of which they waited for about an hour and a half. During this period a strong current of cold air blew on the men. On reaching the surface B. complained of feeling cold and died soon after from pneumonia due to the chill incurred while waiting.

D **Held:** physical impact was not a necessary element to found a claim for compensation under the Workmen's Compensation Act, 1906, and the workman's death was caused by an accident arising out of and in the course of his employment, and his dependants were entitled to compensation.

Decision of the Second Division of the Court of Session in Scotland, 1913 S.C. 593, reversed.

E **Notes.** The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, s. 89, Sched. 9. The principle of "arising out of and in the course of employment," is now contained in s. 7 (4) of the National Insurance (Industrial Injuries) Act, 1946 (16 Halsbury's Statutes (2nd Edn.) 814) with the variation that an accident arising in the course of an insured person's employment must be deemed, in the absence of evidence to the contrary, also to F have arisen out of that employment.

Considered: *Barbeary* v. *Chugg* (1914), 84 L.J.K.B. 504; *Glasgow Coal Co.* v. *Welsh*, [1916] 2 A.C. 1; *Innes (or Grant)* v. *Kynoch*, [1919] A.C. 765; *Walker* v. *Bairds and Dalmellington, Ltd.* (1935), 153 L.T. 322; *Smith* v. *Cornhill Insurance Co.*, [1938] 3 All E.R. 145. Referred to *Aitken* v. *Finlayson, Bousfield & Co.* (1914), 7 B.W.C.C. 918; *Thom (or Simpson)* v. *Sinclair*, [1916–17] All E.R. G Rep. 415; *Raeburn* v. *Lochgelly Iron and Coal Co.* (1926), 20 B.W.C.C. 637.

As to industrial accidents and the burden of proof, see 27 Halsbury's Laws (3rd Edn.) 802–810; and for cases see 34 Digest 266 et seq., 463 et seq.

Cases referred to:

(1) *Drylie* v. *Alloa Coal Co.*, 1913 S.C. 549; sub nom. *Alloa Coal Co., Ltd.* v. H *Drylie* (1913), 6 B.W.C.C. 398; 34 Digest 268, *2282iii.*

(2) *M'Luckie* v. *John Watson, Ltd.*, 1913 S.C. 975; 50 Sc.L.R. 770; [1913] 2 S.L.T. 61; 6 B.W.C.C. 850; 34 Digest 268, *2282iv.*

(3) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230; 74 L.J.K.B. 474; 92 L.T. 578; 53 W.R. 641; 21 T.L.R. 444; 49 Sol. Jo. 445; 7 W.C.C. 1, H.L.; 34 Digest 464, *3799.*

(4) *Victorian Railways Comrs.* v. *Coultas* (1888), 13 App. Cas. 222; 57 L.J.P.C. I 69; 58 L.T. 390; 52 J.P. 500; 37 W.R. 129; 4 T.L.R. 286, P.C.; 17 Digest (Repl.) 122, *333.*

(5) *Dalico* v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76; 17 T.L.R. 555; 45 Sol. Jo. 578, D.C.; 17 Digest (Repl.) 122, *335.*

(6) *Pugh* v. *London, Brighton, and South Coast Rail. Co.*, [1896] 2 Q.B. 248; 65 L.J.Q.B. 521; 74 L.T. 724; 44 W.R. 627; 12 T.L.R. 448; 40 Sol. Jo. 565, C.A.; 29 Digest 401, *3178.*

(7) *Cooper* v. *Caledonian Rail. Co.* (1902), 4 F. (Ct of Sess.) 880; 39 Sc.L.R. 666; 36 Digest (Repl.) 197, **1853.*

(8) *Bell* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L.R.Ir. 428; 36 Digest (Repl.) 197, **1852.*

Also referred to in argument:

Dunham v. *Clare*, [1902] 2 K.B. 292; 71 L.J.K.B. 683; 86 L.T. 751; 66 J.P. 612; 50 W.R. 596; 18 T.L.R. 645; 4 W.C.C. 102, C.A.; 34 Digest 341, *2759.*

Ystradowen Colliery Co., Ltd. v. *Griffiths*, [1909] 2 K.B. 533; 78 L.J.K.B. 1044; 100 L.T. 869; 25 T.L.R. 622; 2 B.W.C.C. 357, C.A.; 34 Digest 342, *2760.*

Clover, Clayton & Co., Ltd. v. *Hughes*, [1910] A.C. 242; 79 L.J.K.B. 470; 102 L.T. 340; 26 T.L.R. 359; 3 B.W.C.C. 275; sub nom. *Hughes* v. *Clover, Clayton & Co.*, 54 Sol. Jo. 374, H.L.; 34 Digest 273, *2316.*

Blakey v. *Robson, Eckford & Co., Ltd.*, 1912 S.C. 334; 34 Digest 325, *2656i.*

Eke v. *Hart-Dyke*, [1910] 2 K.B. 677; 80 L.J.K.B. 90; 103 L.T. 174; 26 T.L.R. 613; 3 B.W.C.C. 482, C.A.; 34 Digest 271, *2304.*

M'Millan v. *Singer Sewing Machine Co., Ltd.*, 1913 S.C. 346; 50 Sc.L.R. 220; 1912 S.L.T. 484; 6 B.W.C.C. 345; 34 Digest *267b.*

Wicks v. *Dowell & Co., Ltd.*, [1905] 2 K.B. 225; sub nom. *Wilkes* v. *Dowell & Co.*, 74 L.J.K.B. 572; 92 L.T. 677; 53 W.R. 515; 21 T.L.R. 487; 49 Sol. Jo. 480; 7 W.C.C. 14, C.A.; 34 Digest 266, *2265.*

Fenton v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, *2264.*

Kelly v. *Auchenlea Coal Co., Ltd.*, 1911 S.C. 864; 34 Digest 275, *l.*

Appeal from a decision of the Second Division of the Court of Session in Scotland (KINGSBURGH, DUNDAS, SALVESEN and GUTHRIE, L.JJ.).

On June 26, 1911, at about 7 a.m., Brown, who seemed to be in his usual good health, started work in No. 2 Pit, Gilbertfield Colliery.

Between 8 and 9 o'clock a.m., in consequence of a wreck in the shaft, all the men in the pit were ordered to ascend to the surface. They proceeded towards the shaft of No. 2 Pit, by which they were usually raised, but on this day they were met by an official who told them to proceed by the communication road to the shaft of No. 1 Pit. Here they had to wait at a mid-landing for about an hour and a half until the men from the lower seam, who usually ascended by this shaft, had been raised.

Whilst waiting a very strong, cold, down draught blew in on B. and his fellow miners. On reaching the surface B. complained of feeling cold and ran part of the way home to try to recover warmth. The next morning Brown went down the pit, but he was unable to start work on account of illness which the arbitrator found was due to the chill incurred on the previous day. He returned home and went to bed, pneumonia supervened, and he died therefrom on July 3, 1911, having been removed that day to the Royal Infirmary, Glasgow. The deceased left a widow and four pupil children, and a posthumous child has been born of the marriage. The arbitrator found that Brown died from the effects of injuries by accident received by him on June 26, while in the course of his employment with the respondents, and awarded compensation to the claimants. On appeal the Second Division of the Court of Session held that there was no evidence on which it could be competently found that Brown sustained an accident arising out of and in the course of his employment, and recalled the award of the arbitrator. The widow appealed.

Moncrieff, K.C., and *J. Keith* (both of the Scottish Bar) for the appellant.

The Lord Advocate (*R. Munro*, K.C.) and *H. W. Beveridge* for the respondents.

Their Lordships took time for consideration.

April 28, 1914. The following opinions were read.

LORD DUNEDIN.—On the assumption that *Drylie* v. *Alloa Coal Co.* (1) was well decided, I am of opinion that this case is ruled by that. I cannot help thinking on perusing the opinion of LORD SALVESEN that he really took the same view, although he did not express a formal dissent from the views of the other members of the Second Division. Here, as there, you have an accident interfering with the normal working of the mine, a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident, and a finding of fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance, depending on some cause other than the accident, which occurs to break that chain of causation. I would refer to *M'Luckie* v. *John Watson, Ltd.* (2), where the wetting which brought on the chill was not a necessary cause of the accident, but was due to the workman's determination not to wait his turn for the cage, but to stand in water in order to get in front of his fellows. As regards *Drylie* v. *Alloa Coal Co.* (1) I was a party to that judgment, and I have no reason to alter the opinion I then formed. I think that the appeal should be allowed and the award of the arbitrator restored, and I move accordingly. **LORD KINNEAR** requests me to say he concurs in this judgment.

LORD ATKINSON.—The difficulties raised by the contention of the learned Lord Advocate on behalf of the respondents arise from his effort to disintegrate, as it were, the compound but injurious effect upon a workman of the forces or agents into contact with which he may by an accident be brought, separating the immediate and primary effect from the ultimate effect and endeavouring to establish a sequence of causation between them. He contended that the accident must, to entitle the injured workman or his dependants to compensation, be the proximate cause of the personal injury, and insisted that the chill sustained by John Brown, the deceased workman, was the proximate cause of his death by pneumonia, and that the accidental breakdown or wreckage of the machinery of the mine in No. 2 shaft, so far from being the proximate cause of this chill, was either a mere historical event unconnected with it or, at least, if a cause of it at all, a very remote cause. I put to him during his argument the following question: Suppose an employer is during the very cold weather in mid-winter driving in his motor car with two servants in front—his chauffeur and another—and suppose that when crossing a bridge over a river a tyre bursts, his car skids and comes into collision with one of the battlements of the bridge with such force and violence that both servants are precipitated into the river below, the one being drowned and the other rescued, yet so tardily as to be thoroughly chilled; that an attack of pneumonia is thereby induced, of which he dies: Would the dependants of the first man be entitled to compensation? The learned Lord Advocate answered in the affirmative. I then asked him, Would the dependants of the second servant be similarly entitled? and he answered in the negative. But can there be any real distinction between these two supposititious cases? The primary accident, the bursting of the tyre, the consequential accidents, the skidding of the car, the collision with the battlement of the bridge, the precipitation into the river are common to both cases. The element into contact with which the deceased servants were brought, the cold water, the same. The injurious effect of this element upon them was different. It smothered the one. It chilled the other so badly that disease supervened. According to the contention of the Lord Advocate, the bursting of the tyre, though it was a primary accident which, through the agency of other accidents consequent on it, brought about the prolonged exposure of the deceased to the action of the cold water, was not the proximate cause of death.

The principle upon which cases should be dealt with under the statute where death or incapacity is caused to a workman by a disease induced by an "injury by accident" is clearly laid down in the well-known "anthrax" case, *Brintons, Ltd.* v. *Turvey* (3). LORD HALSBURY expressed himself thus ([1905] A.C. at p. 233):

"When some affection of our physical frame is in any way induced by an accident we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease. . . . It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequence or results of the injury that has been inflicted."

LORD MACNAGHTEN said (ibid. at p. 234):

"Speaking for myself I cannot doubt that the man's death was attributable to personal injury by accident arising out of and in the course of his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease which was immediately the cause of death, and would, no doubt, be certified as such in the usual death certificate."

LORD LINDLEY said (ibid. at p. 238):

"In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental."

In the present case there were two shafts to the respondent's mine, the Down Cast Shaft No. 1 and the Up Cast Shaft No. 2. The current of air which ventilated the mine passed down the former shaft. The deceased workman, John Brown, started to work in the mine at 7 a.m. on the morning of June 26, 1911, at a place which was dry, with a good current of air passing through it. Brown and his mates were sweating as they worked; their clothes were somewhat wet from this, not from any other cause. Some breakdown of the machinery connected with shaft No. 2 took place. Brown and his companions were ordered, owing to this, to ascend to the surface, and while proceeding to No. 2 shaft to ascend in the ordinary and accustomed way, they were directed to ascend by No. 1 shaft instead of No. 2. They attempted to do so, but were checked at the mid-landing for one and a half hours, during which the down current of cold air was playing upon them. Brown, the deceased, was badly chilled by this exposure. Pneumonia was thereby induced and he died. Thus, Brown and his companions were, owing to the accidental breakdown of the machinery in No. 2 shaft, placed by the orders of their master in a position where they were, through the accident of the prolonged and abnormal delay, exposed to the action of the current of air during the period while he waited—that exposure was not expected, intended, or designed either by the employer or the workman. It was one of the consequential accidental effects arising from the primary accident, the breakdown of the machinery, just as the prolonged immersion in the river of the servant who was rescued was in the supposititious case I have mentioned one of the consequential accidents of the bursting of the tyre of the motor car. This accidental but prolonged exposure was the cause of "the injury," the chill. The pneumonia was only the disease brought on by that injury.

This case cannot be distinguished from *Drylie* v. *Alloa Coal Co.* (1). There owing to the breakdown of a pump the water in a mine accumulated so that the workmen had to stop work. They went to the shaft to ascend and were kept waiting for twenty minutes up to their knees in cold water, the cold air descending upon them. This abnormal exposure caused to the deceased a chill from which disease was set up. The abnormal exposure to the action of the cold air and cold water in that case was on all fours with the abnormal exposure to the current of cold air in this case, and that the exposure in the latter case was quite as much an accident as in the former, and the chill quite as much an injury by accident in the latter case as in the former.

Therefore, the question of law stated by the learned sheriff-substitute for the opinion of the court should be answered in the affirmative, and this appeal allowed with costs.

LORD SHAW.—This appeal arises out of an arbitration under the Workmen's Compensation Act, 1906. Sheriff-Substitute Shennan, an experienced arbitrator, sets forth the facts in the stated case and says:

> "In these circumstances I found that the deceased, John Brown, died from the effects of injuries by accident received by him on June 26, while in the course of his employment with the appellants, and awarded compensation."

There is no ground for holding that the learned sheriff misdirected himself in law; and that his finding was contrary to or in no reasonable sense in accordance with the facts proved is equally unfounded. One pit shaft in this mine was blocked by an accident; a dislocation of the working arrangements ensued; the men had to be sent by another shaft under circumstances which exposed them to severe chill; this chill in one workman's case brought on pneumonia, and of that the workman died. It appears to me both legally and philosophically incorrect to say that this should not be treated as a chain of causation—with the accident at the one end as cause, and death at the other end as effect. Wherever a chain of causation is alleged to exist it is possible to say that it is broken at a certain point, and to attribute the effect to a fresh and intervening factor. The sheriff-substitute as the judge of the facts did not find that the chain of causation was broken in this way. And I see no ground for saying that he erred. The judgment of the Second Division which recalled the arbitrator's finding and award should therefore be reversed.

It would be unnecessary to say more but for certain considerations, to which out of respect for the learned judges of the Second Division it appears to me proper to allude. In the first place, the judgments distinguish the present case from a decision by seven judges of the Court of Session in Scotland (LORD SALVESEN dissenting) in *Drylie* v. *Alloa Coal Co.* (1). In that case by an accumulation of water in a mine (caused by a breakdown in the pumps) the workmen were forced to stand knee-deep in water; one of the men was in consequence seized with pneumonia, and he died. The Act was held to apply and an award of compensation was made. I should have said that the principle of the present case was concluded by that applied in *Drylie* v. *Alloa Coal Co.* (1). The cold element in the one case was water and in the other air. But, as LORD SALVESEN indicates, there does not appear to be any other real ground of distinction between the two cases. In this I agree. Indeed, I do not entirely understand why that learned judge, accepting the *Drylie* decision and not distinguishing the two cases, did not tender his dissent from the present judgment. But the learned counsel for the respondents were within their rights in maintaining that the present judgment is unanimous. Before passing from *Drylie* v. *Alloa Coal Co.* (1) I desire to remark upon a passage in the judgment of LORD DUNDAS, who said:

> "The circumstance of Drylie finding himself immersed to the knees in icy cold water was abnormal; it, in its turn, was due to an abnormal cause—the stoppage of the pump while men were at work in the pit; and if the pneumonia of which he died was, in fact, caused by his immersion, I think the elements of an 'accident' are here present."

I am aware that, in the present case, the views of LORD DUNDAS do not exactly equate with those just cited from that report. But these sentences do give such a clear statement of a chain of causation, connecting the whole with the statutory provision, that I should have adopted them if *Drylie* v. *Alloa Coal Co.* (1) had directly reached this House.

I think that the present case was ruled by the judgment in that case and the departure in the present case from its principles makes the present appeal of importance, and that particularly in regard to one point. The point appears most clearly from the opinions of LORD SALVESEN, and it is this: that countenance appears to be given to the view that the compensatory provisions of the statute cannot be invoked unless injury be caused by "physical impact." This is a

most serious and a most disturbing and erroneous proposition. I think counsel for the appellant in his able address and citation of authority was right so to treat it. LORD SALVESEN elaborately argues and illustrates the point in *Drylie* v. *Alloa Coal Co.* (1). In his view the pneumonia which supervened to the workman may have not been causally attributable to the accidental exposure, but to neglect. But while this is so, the learned judge does give some countenance to the idea that physical impact, or, indeed, direct lesion, is required in order to enable compensation to be given. He observes, for instance:

> "The only case decided in the House of Lords, so far as I am aware, where a death from disease not preceded by some direct lesion, was held to be a death resulting from injury by accident in the well-known anthrax case."

And in another passage he says:

> "In all such cases, if we are to affirm the judgment of the sheriff-substitute, it will be open for the arbitrator to find, if he were bold enough to attribute the disease to a particular exposure resulting from some accidental occurrence, that it was the result of accident within the meaning of the Act."

I pass by the form of the expression, "if he were bold enough to find," and take the learned judge to mean "if he found as a fact that" the disease arose from exposure, etc.

The statute itself in no way limits the causal connection between accident and disease to cases of physical impact, nor does it treat the connection itself as anything extraordinary. In the section dealing with industrial diseases it provides that:

> "Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply if the disease is a personal injury by accident, within the meaning of this Act."

In the second place, such a restriction, excluding all cases, however serious—say of shock and the like—unless physical impact or lesion had occurred, has, in my opinion, no justification in the state of the authorities. The one case cited in its favour is *Victorian Railways Comrs.* v. *Coultas* (4). The case was decided by the Privy Council, and the judgment was in form merely on remoteness of damage.

> "They [their Lordships] are of opinion that the first question, whether the damages are too remote should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

But there undoubtedly are observations by SIR RICHARD COUCH of a more definite character. For instance, the learned judge, deprecating the extension of liability, does say (13 App. Cas. at pp. 225, 226):

> "In every case where an accident caused by negligence had given a person a serious nervous shock there might be a claim for damages on account of mental injury,"

and he observes on the chance of a wide field for imaginary claims. In the present case and in *Drylie* v. *Alloa Coal Co.* (1) one may discern traces of similar views. But in England, in Scotland, and in Ireland alike, the authority of *Victorian Railways Comrs.* v. *Coultas* (4) has been questioned, and has been denied. I am of opinion that the case can no longer be treated as a decision of guiding authority. The subject was, if I may say so, examined with much erudition and care by the lords justices in *Dulieu* v. *White & Sons* (5), and *Victorian Railways Comrs.* v. *Coultas* (4) was held not binding. I agree with the judgment of KENNEDY, L.J., in his observations thereon. It may be added that these were in line with certain dicta of LORD ESHER on the same topic in *Pugh* v. *London, Brighton, and South Coast Rail. Co.* (6). In Scotland, LORD STORMONTH DARLING, in *Cooper* v. *Caledonian Rail. Co.* (7), stated broadly and emphatically that the *Victorian*

Railways Comrs. v. *Coultas* (4) was no part of the law of Scotland. Probably, however, no better analysis of it has been made than by PALLES, C.B., in the Irish case of *Bell* v. *Great Northern Rail. Co. of Ireland* (8), and I adhere to and approve of that judgment. I should add that other cases were cited showing it to be fully established by authority that physical impact or lesion is not a necessary element in the case of recovery of damage in ordinary cases of tort.

On principle, the distinction between cases of physical impact or lesion being necessary as a ground of liability for damage caused seems to have nothing in its favour—always on the footing that the causal connection between the injury and the occurrence is established. If compensation is to be recovered under the statute or at common law in respect of an occurrence which has caused the dislocation of a limb, on what principle can it be denied if the same occurrence has caused an unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail—in the incidence of justice or the principle of law—is it to say that there is a distinction between things physical and mental? This is the broadest difference of all, and it carries with it no principle of legal distinction.

The other case, of which the present is an example, is much narrower—a case of injury to the body, a physical injury not caused by physical impact. On the point of the principle of liability, what is there to distinguish the case of a man who is drowned in a scuttled boat from that of another who is immersed and sustains a chill resulting in his death? Make the difference still narrower—as narrow, for instance, as between this case and *Drylie* v. *Alloa Coal Co.* (1). The fatal pneumonia of one man is produced by his standing in cold water, and of a second by his standing in cold air. How the particular element which was the medium through which the producing cause operated towards the fatal effect should have any legal effect in altering either the range or the canon of liability does not appear to my mind. The truth is that the difference between all such cases is not one of principle, but is one of the things which becomes more notable as a point of difficulty, or in the practice of the law on the matter of proof. But wherever the causal connection between occurrence and result be established, the principle to be applied is the same. The difficulty of establishing the causal connection may be much greater in the one case than in the other, and courts of law are justified in demanding in all cases, and especially where external signs are wanting, that the relation of cause and effect be sufficiently established. If it be, the liability follows. I am of opinion that the appeal should be allowed with costs.

LORD PARMOOR.—This is an appeal against the decision of the Second Division of the Court of Session in Scotland upon a case stated in an arbitration under the Workmen's Compensation Act, 1906. The arbitrator found that John Brown died from the effects of injuries by accident received by him on June 26, 1911, while in the employ of the respondents, and awarded compensation to the appellant.

[HIS LORDSHIP stated the facts and continued:] It was not denied by counsel for the appellant that in order successfully to maintain a claim for compensation under the Workmen's Compensation Act, 1906, there must be an accident in the ordinary popular meaning of that term, and an injury attributable to such accident. The accident relied upon is the wreckage of the shaft, and the injury the chill from which Brown took pneumonia and died. The answer of the respondents is that the wreckage of the shaft should be considered merely as an historical incident in the narrative of the case, and as too remote a factor to which to attribute the injury, and that in any case the injury cannot fairly be attributed to the wreckage of the shaft. I cannot assent to this argument on behalf of the respondents. The delay in the landing where the chill was caught appears to me to be clearly attributable to the wreckage of the shaft, and but for such wreckage would not have occurred. The incidents are closely

connected, and cannot be treated as independent and detached factors. On the other hand, it is not questioned that the delay on the landing in a draught did cause the injury which resulted in Brown's death. There are both the necessary elements to maintain a claim, a definite accident and injury fairly attributable thereto. It is not material that the wreckage of the shaft did not result in physical impact causing physical injury, or that no one could have foreseen the delay on the landing, and the subsequent chill, as a probable or natural result of the wreckage of the shaft. Such considerations do not arise in a claim under the Workmen's Compensation Act. The workman under the Act is as much entitled to compensation if death results from exposure consequent on and attributable to an accident as he would be if death had resulted from immediate physical injury. A number of authorities were quoted by the counsel for the appellant. It is only necessary to refer to two of them. *Victorian Railways Comrs.* v. *Coultas* (4) was quoted as an authority for the doctrine that in ordinary accident cases some form of physical impact is a necessary element to found a claim for damage. The case does not appear to support this contention. The following passage occurs in the judgment (13 App. Cas. at p. 226):

> "They [their Lordships] are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

The second case is *Drylie* v. *Alloa Coal Co.* (1). I am unable to distinguish this case from the present case. It cannot be material, for a claim under the Workmen's Compensation Act, whether the chill resulted from exposure to a current of air or to cold water, so long as the exposure is attributable to the accident, and has caused the injury on which the claim to compensation is founded. In my opinion, the appeal should be allowed, and the question of law stated by the arbitrator for the opinion of the court should be answered in the affirmative.

Solicitors: *Deacon & Co.*, for *Simpson & Markwick*, Edinburgh, and *Hay, Cassels & Frame*, Hamilton; *Beveridge, Greig & Co.*, for *W. & J. Burness*, Edinburgh, and *W. T. Craig*, Glasgow.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

LARKIN AND OTHERS *v.* LONG

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), March 5, 8, April 29, 1915]

[Reported [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455]

Trade Union—"Trade dispute"—Dispute between employer and employers' association—Employees' trade union officers acting in support of association—No dispute between employer and employees—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3, *s.* 5 (3).

Conspiracy—Contract—Inducement to break—Contract of service.

A dispute only between an individual employer and an employers' association is not a "dispute between employers and workmen, or between workmen and workmen," and so cannot be a "trade dispute" within the meaning of the Trades Disputes Act, 1906.

An employer of labourers, who were members of a trade union, refused to join an employers' association, promoted by the labourers' trade union. The labourers did not insist on their employer joining the association, but the defendants, officers of the union, acting in concert with members of the employers' association, induced the employer's labourers to break their contracts with him and cease working for him, thus causing the employer pecuniary loss. In an action by the employer against the defendants for damages for conspiracy to induce breaches of contract by the workmen, the defendants pleaded that the acts complained of were done by them "in contemplation or furtherance of a trade dispute," and so, by virtue of the Trades Disputes Act, 1906, s. 3, were not actionable.

Held: this defence failed, because a dispute between an employer and employers was not a "trade dispute" within the section.

Decision of the Irish Court of Appeal, [1914] 2 I.R. 285, affirmed.

Quinn v. *Leathem* (1) [1901] A.C. 495, followed.

Notes. Considered: *Valentine* v. *Hyde*, [1919] 2 Ch. 129. Distinguished: *Sorrell* v. *Smith*, [1925] All E.R.Rep. 1. Referred to: *Pratt* v. *British Medical Association*, [1918–1919] All E.R.Rep. 104; *Ware and De Freville, Ltd.* v. *Motor Trade Association*, [1920] All E.R.Rep. 387.

As to torts arising out of the operations of trade unions, see 32 Halsbury's Laws (2nd Edn.) 516–524; as to meaning of "trade dispute," see ibid., 526–529; for cases see 43 Digest 120–122; and for the Trades Disputes Act, 1906, see 25 Halsbury's Statutes (2nd Edn.) *1267*.

Cases referred to:

(1) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 285; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179*.

(2) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*.

(3) *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51*.

(4) *R.* v. *Druitt, Lawrence and Adamson* (1867), 16 L.T. 855; 10 Cox, C.C. 592; 43 Digest 112, *1175*.

(5) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 732; 71 L.J.K.B. 994; 87 L.T. 493; 51 W.R. 115; 19 T.L.R. 20; 47 Sol. Jo. 29, C.A.; 43 Digest 116, *1204*.

(6) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 43 Digest 114, *1186*.

(7) *Conway* v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, *1237*.

Also referred to in argument:

Ward, Lock & Co., Ltd. v. *Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327, C.A.; 15 Digest (Repl.) 919, *8827*.

Bulcock v. *St. Anne's Master Builders Federation* (1902), 19 T.L.R. 27; 47 Sol. Jo. 32; 43 Digest 115, *1192*.

Dallimore v. *Williams and Jesson* (1912), 29 T.L.R. 67; 57 Sol. Jo. 77, C.A.; subsequent proceedings (1914), 30 T.L.R. 432, C.A.; 43 Digest 121, *1238*.

Appeal by the defendants from an order of the Court of Appeal in Ireland, which affirmed the judgment of the King's Bench awarding the plaintiff £200 damages for conspiracy inducing his workmen to break their contracts with him, and decided that the acts of which the plaintiff complained were not done by the defendants in contemplation or furtherance of a trade dispute within the meaning of the Trades Disputes Act, 1906. The proceedings in the Irish Courts are reported sub nom. *Long* v. *Larkin*, [1914] 2 I.R. 285. The facts, which are summarised in the headnote, are stated in full in the opinions of LORD ATKINSON and LORD PARMOOR.

The action was tried before PALLES, C.B., and a special jury, who found that the defendants had induced the dock labourers in the plaintiff's employment to break their contracts with him, and that there was at that time no dispute between the plaintiff and his dock labourers within the meaning of the Trades Disputes Act, 1906, and they assessed the damages at £200, and judgment was entered in accordance with the verdict. The defendants applied to the Divisional Court (GIBSON and KENNY, JJ.) for judgment or new trial, but the application was refused and their appeal to the Court of Appeal (O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.) was dismissed.

The material sections of the Trades Disputes Act, 1906, are:

Section 3. "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Section 5 (3). "In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment on the terms of the employment or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . ."

Serjeant Sullivan and *H. R. Poole* (both of the Irish Bar) for the appellants. *J. H. Campbell, K.C.*, *Timothy Healy, K.C.*, *Hanna, K.C.*, and *K. B. Dockrell* (the two former of the Irish and also of the English Bar, and the two latter of the Irish Bar only) for the plaintiff, were not called on to argue.

The House took time for consideration.

April 29, 1915. The following opinions were read:

LORD ATKINSON.—This is an appeal against an order of the Court of Appeal in Ireland, dated Dec. 19, 1913, affirming an order of the King's Bench Division of the High Court of Justice in Ireland dated June 7, 1913. By this latter order the application of the six defendants in the action to have the judgment entered for the plaintiff, the present respondent, dated Dec. 6, 1912, set aside, and judgment entered for the defendants, or in the alternative for a new trial, was refused with costs. Three of the defendants—namely, William Long, Newman and Donohoe—are members and officials of a certain trade union or association of stevedores styled the Stevedores' Association. Stevedores are

employers of labour. Their business is to load and discharge ships for reward paid by the owners of the ships, and the staff which they hire for this work are dock labourers. In Dublin these dock labourers are all members of a trade union styled the Transport Workers General Union, of which the appellant Larkin is the secretary and the appellants Redmond and Hopkins are also officials. Larkin desired to get more favourable terms for the members of his association from the stevedores of the port. The stevedores represented to him that the remuneration they received from the shipowners for their work was not sufficient to enable them to comply with this demand, and at Larkin's suggestion the great body of the stevedores entered into this trades union association, the policy and object of which was to secure for themselves increased remuneration from shipowners by refusing to work at any scale less than that which they themselves had adopted. The plaintiff, Mathew Long, never had any dispute with his dock labourers. He refused to join the association. Severe and illegitimate pressure was put upon him to force him to do so, and on Aug. 19, 1912, he instituted the action against the six defendants out of which this appeal has arisen, claiming damages and an injunction. His cause or causes of action are succinctly set forth in the third paragraph of the original statement of claim. It runs thus:

> "In or about the months of August and September, 1912, the defendants wrongfully and maliciously conspired and agreed to combine amongst themselves and did so combine to procure, cause, and induce the aforesaid workmen of the plaintiff to leave his employment and abstain from continuing therein, and did further procure, cause, and induce dock labourers and others to refuse to work for the plaintiff. In furtherance and pursuance of the said conspiracy the defendants did in fact procure, cause, and induce workmen of the plaintiff to leave his employment and abstain from continuing therein, and did further in fact procure, cause, and induce dock labourers and others to refuse to work for the plaintiff."

It will be observed that the object of the conspiracy is alleged to have been, first, to induce the plaintiff's workmen to leave his employment, and, second, to induce dock labourers and others not to work for him, the overt acts being that they in fact induced his workmen to leave his employment, and in fact procure dock labourers and others not to work for him. I think it is rather unfortunate that the trial did not proceed upon the pleadings as they stood. Having regard to the evidence given, questions might, I think, have been framed for the jury upon it somewhat similar to questions 2 and 3 framed in *Quinn* v. *Leathem* (1). However, at the instance of the counsel for the plaintiff, an amendment to the statement of claim was by the leave of the judge made at the trial, which, while by no means improving the pleading, accounts for the form in which the questions ultimately left to the jury were in fact framed. The amendments run thus:

> "The defendants wrongfully and maliciously conspired and agreed amongst themselves wrongfully and without legal authority to force the plaintiff to join the Stevedores' Association, which the plaintiff had a legal right to refuse to join. And the defendants in pursuance of the said agreement did, by threats and menaces and other unlawful means, endeavour to force the plaintiff to join the Stevedores' Association. And in further pursuance of the said conspiracy in agreement, did procure certain dock labourers who were willing to work for the plaintiff not to work for him, and in further pursuance did induce and produce labourers who had engaged to work for the plaintiff to break their contracts of employment and leave the plaintiff's employment, whereby actual money loss was sustained by the plaintiff."

The first and second questions were left by the Chief Baron, who tried the case, to the jury to deal with the first and second paragraphs of this amendment, the third with the last portion of it.

I do not think that it is at all necessary to embark on a critical examination of the authorities dealing with the law touching actions for conspiracy, for the simple reason that the quantum of the damages not being objected to, the inducing of a servant or workman to break his contract with his master is an actionable wrong against the master, whether committed by one or many persons, and whether committed in pursuance of a malicious conspiracy to injure the master, or deliberately and maliciously but with no more concert or agreement than is usually involved in almost all joint wrong-doing. In *Lumley* v. *Gye* (2) the wrong sued for was committed by the defendant acting alone. He, unaided, succeeded in persuading Miss Wagner not to sing at the Queen's Theatre. I think there was ample evidence to sustain the findings of the jury on questions 1 and 2. In answer to the third question, taken in connection with the answer to question 1, the jury found that the six defendants, in pursuance of an agreement to force the plaintiff, Mathew Long, to join the Stevedores' Association, induced and procured certain dock labourers, who had engaged to work for him, and were actually working for him in discharging a ship called the *Sieben Jarl*, to break their contracts and leave his employment. I did not understand that it was seriously contested—it could not, I think, be successfully contested—that there was not ample evidence to sustain this finding. Of course, it must be confined to what took place before the writ was issued. Much of the argument devoted to this question was directed rather to show that, owing to the terms of the contract of hiring entered into between the plaintiff and his dock labourers, the amount of damage found could not have accrued from this tortious act. I do not think it is at all clear, however, upon the evidence, what has to be the precise duration of the employment of these labourers, or when their hiring was at an end, or what the precise nature of the contract the respondent had entered into with the owner of the *Sieben Jarl* for her discharge, but however that may be, your Lordships are not concerned on this appeal with the question of the quantum of the damages.

An objection has been made, however, to this finding on the strangest ground —namely, this, that owing to an alleged misdirection by the Chief Baron, three members of the Stevedores' Association—namely, William Long, Newman, and Donohoe—have been found guilty equally with the three appellants of the tort mentioned in the third question. Yet these three—additional tortfeasors—are apparently satisfied with their position. They are not parties to this appeal. The appellants, however, though they have nothing to complain of in the way of misdirection against themselves, ask to have the verdict set aside, because they have, through the alleged misdirection, got companions in misfortune to whom they object. The alleged misdirection consists in this. The jury came into court with an answer to the third question implicating the three appellants alone. The Chief Baron pointed out to the jury that they had only answered the question as to three of the six defendants charged, and sent them back to answer the question as to the three remaining defendants. That was a perfectly proper course. If the jury thought the three omitted defendants were not guilty of the tort charge, it was the right of these latter to have a finding in their favour to that effect. One of the jurors then asked the Chief Baron whether they had any evidence against the three defendants in reference to whom they had been silent, and he replied, "That if there was an agreement among six, and three of them do acts in pursuance of the agreement, the acts are the acts of the six." It is quite obvious, however, that the Chief Baron in these observations was not applying to all agreements, or to any act done in pursuance of them, or to any agreement other than the agreement mentioned in question 3, about which the jury were in a difficulty, or to any acts done in pursuance of that agreement other than the acts mentioned in the question. It is, I think, quite impossible to suppose that the jury understood his observation in any other sense, and so confined, the so-called misdirection was, in my view, perfectly right in point of law. But even if it were not so, I do not think the appellants would have any right what-

ever to object to the verdict for this misdirection, as it does not affect them. The jury have found that the Acts mentioned in question 1, 2, and 3 caused actual money loss to the plaintiff.

The next ground relied on by the appellants in support of the appeal was that set forth in the fifth paragraph of their defence, to the effect that at the time the things complained of were done by them a trade dispute was pending between the plaintiff, the dock labourers of the Port of Dublin, and the Transport General Workers' Union acting on their behalf, relative to the wages and rate of remuneration to be paid by the plaintiff to dock labourers for their work in discharging cargo, and that in refusing to allow any of such labourers to work for the plaintiff, and in withdrawing them from his employment, they were acting as they lawfully might in contemplation and furtherance of such trade disputes within the meaning of the Trades Disputes Act, 1906. The jury have found on the issues raised on this plea that there was no dispute between the plaintiff and the dock labourers. And they have also found that the dispute was a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought the appellants to assist. And further, that the labourers did not insist that the plaintiff should become a member of the Stevedores' Association.

There was, in my opinion, ample evidence to sustain all these findings. The evidence of the two defendants, William Long and Newman, would be quite sufficient for that purpose in itself. It was plain upon the evidence that the only dispute which existed was a dispute between the members of the Stevedores' Association and the plaintiff. The association sought to force the plaintiff to enter its ranks in order that he might thereby be compelled to adopt the scale of remuneration for any dock labourers he might employ which this association had adopted. The appellants, at the request of the association, came to their aid, and sought to bring pressure to bear upon the plaintiff to force him to enter it, by refusing to permit the dock labourers who were members of the Transport Union to work for him. But these officers of the union of employees by so aiding the association of employers in its contest with the plaintiff, another employer, did not change the character of the original dispute. It was from the first a dispute between an individual stevedore and an association of stevedores. The Trades Dispute Act, 1906, has no application to such disputes. It only deals with disputes between employers and workmen and workmen and workmen. This dispute has neither of these. This defence, therefore, wholly fails.

Counsel on behalf of the appellants insisted that the fact that the members of the Transport Union thought it for their own interest to pass a rule that they should not work for a stevedore who was not a member of the Stevedores' Union was quite legitimate, that they were not bound to work for him or for any other person for whom they did not choose to work—and were, in the legitimate promotion of their own interest, entitled, within the decision in *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (3) to observe that rule, though it might incidentally cause injury to those who desired to employ these workmen, but for whom they themselves did not desire to work. It is undoubtedly true that the members of a trade union need not work for those for whom they do not desire to work. That is the right to personal freedom of action referred to in the following well-known passages from the judgment of LORD BRAMWELL in *R.* v. *Druitt, Lawrence and Adamson* (4) (10 Cox, C.C. at p. 600) and from the essay of SIR W. ERLE ON TRADES UNIONS (p. 12). They have been many times approved of in your Lordships' House. They respectively run thus:

> "The liberty of a man's mind and will to say how he should bestow himself, his means, his talents, and his industry was as much a subject of the law's protection as was that of his body."

And,

> "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour, or his capital, accord-

ing to his will. It follows that every person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."

But it is equally true that the members of trades unions are bound to respect the right of other workmen to work for whom they please so long as they do nothing illegal, and are also bound to respect the right of an employer to undertake any work he pleases to undertake, and to employ what workmen he chooses, on whatever terms they both agree to unless there is something unlawful in his action. If, therefore, any two or more members of a trade union, whatever its rules may be, wilfully and knowingly combine to injure an employer by inducing his workmen to break their contracts with him, or not to enter into contracts with him, resulting in damage to him, that is an entirely different matter. That is an invasion of the liberty of action of others, and has no analogy to the action of the defendant in the *Mogul Case* (3), for there, as LORD HALSBURY pointed out in *Quinn* v. *Leathem* (1), no legal right had been interfered with, no coercion of mind or will had been effected, all were left free to trade on what terms they willed, and nothing was done except in rival trading which could be supposed to interfere with the appellant's interest.

The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defence to an action for the breach of any contracts they have entered into: *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (5), and still less is it a defence to the wilful and malicious infringement in combination of that legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are. I am clearly of opinion that the decision appealed from was right, and should be upheld, and the appeal should be dismissed with costs. The **LORD CHANCELLOR** desires me to say that he concurs in this judgment.

LORD PARKER OF WADDINGTON.—Notwithstanding the arguments addressed to your Lordships by counsel for the appellants, this case seems to me to be reasonably plain. The jury have found: (i) That there existed an agreement or combination between the defendants to force the plaintiff to join the Stevedores' Association; (ii) that, pursuant to this combination or agreement, the defendants induced or procured dock labourers who had engaged to work for the plaintiff and who were then actually working for the plaintiff to break their contracts and leave the plaintiff's employment; and (iii) that the said acts caused actual money loss to the plaintiff. These findings bring the case within the principle of *Lumley* v. *Gye* (2), approved by this House in *Quinn* v. *Leathem* (1).

The appellants endeavour to displace their primâ facie liability on the principle of *Lumley* v. *Gye* (2) in the following way: First, they contend that there was no evidence before the jury on which they could reasonably find pecuniary loss to the plaintiff; secondly, they say that all that they did was done in contemplation or furtherance of a trade dispute within the Trades Disputes Act, 1906, and rely on that Act as a defence to any civil proceedings.

[HIS LORDSHIP considered the question of pecuniary loss, and the appellants' contention that the plaintiff had not shown that the loss he suffered due to failure to perform his contract was due to the breaches of contract induced by the appellants' acts, and concluded thereon:] Even, however, if the job was an entire one, payment being conditional on completion, and even if the non-completion was not consequent on the breaches of contract alleged, I do not think it clear that the plaintiff could have suffered no damage by reason of the breach. In my opinion the jury might legitimately take into account the necessary dislocation of the plaintiff's business and the injury to his reputation among shipowners. Under these circumstances it cannot be contended that there was no

evidence of damage to go to the jury, and the amount awarded by them is not in question on this appeal.

I am also of opinion that the second contention of the appellants, to the effect that all that they did was in furtherance or contemplation of a trade dispute within the meaning of the Act of 1906 is completely untenable. A "trade dispute" within the meaning of the Act must be a dispute between employers and workmen or between workmen and workmen. The jury have found that there was not at the time of the acts complained of any dispute between the plaintiff and the dock labourers, but that the dispute then existing was between the plaintiff and the Stevedores' Association, a union of employers, and that this union brought in the officials of the dock labourers' union to assist. There was, in my opinion, ample evidence to justify these findings. Unless, therefore, as a matter of law, there must be a trade dispute within the meaning of the Act whenever the officials of a workmen's union are called in to assist one party to a dispute between employers or, indeed, between any other persons, the plaintiff's contention must necessarily fail. The Act of 1906 confers immunity from civil liability in respect of certain acts, if done in furtherance or contemplation of a trade dispute, and to this extent abrogates or curtails the rights of His Majesty's subjects at common law. An Act of this sort ought, according to principles which have hitherto prevailed in construing Acts of the legislature, to be construed with reasonable strictness and not to be given a meaning wider than the words used will justify. There is nothing, in my opinion, in the Act which would justify the court in holding that a dispute, not in its origin a trade dispute, will become a trade dispute merely because the officials of a workmen's union chose to assist one side or the other. I do not say that no dispute, not originally a trade dispute, can become a trade dispute by the interference of a workmen's union. I can imagine circumstances where it might, but to hold that every dispute in which the officials of a union chose to interfere must be a trade dispute would, in my opinion, unduly extend the immunity from liability conferred by the Act, and, therefore, unduly curtail the common law rights of other persons. In my opinion the appeal fails.

LORD SUMNER.—The appellants' grounds of objection to the verdict and judgment against them are (i) misdirection; (ii) that the verdict was against the weight and, indeed, directly contrary to the evidence; (iii) that the plaintiff's evidence showed no cause of action; (iv) alternatively, that, if it did, the defendants were protected from liability by reason of the Trades Disputes Act, 1906, s. 3. Of the directions actually given to the jury by PALLES, C.B., your Lordships have no admissible record beyond what may be collected from the learned judge's report. It shows nothing exceptional in this regard. Counsel for the defendants submitted careful requisitions and objections after verdict as well as before, but there is no note of any objection of submission directed to the terms of the summing up. In any case misdirection would not avail unless it appeared to be such as might reasonably be supposed to have affected the verdict. I can find no materials on which the appellants can found an argument on the first head. Complaint was also made that the plaintiff was allowed to amend his statement of claim at a very late stage, and that the questions for the jury were directed rather to the amended case than to that originally pleaded. The question of amending the pleadings was in the learned judge's discretion, and, except as to costs, immaterial, unless it was such as to bias or mislead the jury or to place the defendants at some disadvantage in respect of the evidence called. The latter is not suggested, the former would be prevented or corrected by a proper summing-up, and there is nothing to show that the summing-up was defective in this regard.

Heads (ii) and (iii) may be dealt with together. Whatever else was alleged and found, the plaintiff alleged and the jury found that the defendant Hopkins, acting with the concurrence of his co-defendants Larkin and Redmond (for such is clearly the sense of the finding), induced the plaintiff's employees to break their contracts of service with him during their first spell of work in discharging the

Sieben Jarl, and thereby caused him pecuniary damage. It is not, and cannot be denied that this gives a good cause of action, though the Trades Disputes Act may be an answer to it. If there was evidence to support it, so far the verdict must stand. Damage is of the essence of this cause of action, and it is said that there is no evidence that any was occasioned. There was no appeal from the quantum of damages given by the jury. Large as they are, they must be taken to be correct, if any damage was proved. Even if the terms of the plaintiff's contract with the shipowner were such that he was entitled to no remuneration unless and until he had completely discharged the ship, I do not think it can be said that the admitted act of calling off his labourers in breach of their contracts did not evidence such pecuniary injury to him in his business as to found the action. Presumably he came under liability to the shipowner for his failure to complete the discharge. In any case, he was to be remunerated on the basis of a money rate for a quantity standard of work done, and he was not cross-examined or contradicted as to this. Presumably he would be entitled to payment pro rata, which would be sufficient to provide a profit, though only a small one. If so, that profit was lost. It is said that the ordinary stevedore's contract is entire, and that he would be entitled to nothing till the ship was discharged. Hence he lost no profit by the breach of the workmen's contracts, for the performance of those particular contracts alone would have brought him none, and he lost nothing out of pocket, for he paid them nothing. However probable it may be that his contract was entire, this was not formally admitted, and cannot be assumed merely because, as is stated, the contention of the defendant's counsel to that effect has passed sub silentio. The jury's findings, Nos. (i), (ii), and (iii), amount to an express finding that what the defendant Hopkins did was done in pursuance of an agreement between himself and his co-defendants to force the plaintiff to join the Stevedores' Association, which is sufficient to make all the appellants primâ facie liable, if there was evidence to support it. I do not understand the objection made to the course taken by the learned judge when the jury first returned their answers to the issue paper. He drew attention to their omission to deal with question 3 as affecting three of the defendants. I think he was quite right. The jury had not meant to acquit them under this head; they had evidently failed to observe the full scope of the question.

I cannot doubt that there was evidence upon which the jury could find against the appellants, as they did in this regard. Under the circumstances it is obvious that part of the agreement to form a Stevedores' Association was to force any stevedore to join who might wish to stand out. The fact, if it be one, that the plaintiff was at first supposed to be willing to join, or to have joined already, is immaterial. There was a continuing agreement, and, when he declined to join, it clearly was part of the agreed plan to compel him to do so. To take any other view of the matter would do complete injustice to the business acumen and tactical skill of the appellants under the circumstances. I think, therefore, that it becomes unnecessary to consider whether the plaintiff did not equally succeed in establishing his cause of action upon the principle of *Quinn* v. *Leathem* (1), or to discuss the form in which this matter was left to the jury, but I do not wish to be supposed to dissent from the decisions upon this head which were given in the courts below.

The remaining, and I think the only real question, is whether the Trades Disputes Act, 1906, affords a defence. Here the burden of proof was on the defendants to show that what Hopkins did, with the concurrence of his co-appellants, was done in furtherance of a trade dispute as defined by the Act. The jury found the contrary. They were the judges of the credibility of the witnesses, who swore that between the plaintiff and his employees there was no dispute at all. This they accepted. The appellants' case is that the admitted facts constituted a statutory trade dispute nevertheless. Those facts are that the officials of the Transport Workers' Union, the present appellants, acting in purported furtherance of the interests of the members of the Union in their trade,

and confident (I daresay rightly confident) that the members of the Union would act on their orders even though neither previously consulted nor subsequently asked to ratify and adopt their acts, first of all promoted the formation of a trades union of employers, among whose objects (inter alia) was the compulsory inclusion in its membership of all the Dublin stevedores; secondly, promised that trades union the assistance of the Transport Workers' Union; and, lastly, in performance of that promise procured the plaintiff's employees to break their contracts of service. I think there is an initial difficulty in the appellants' way of which they had been scarcely conscious. Even if the actual dealings with the labourers were done in furtherance of some trade dispute within the meaning of the statute, arising there and then when the men were called off the *Sieben Jarl*, it is quite indisputable that they were also done in furtherance of another dispute, namely, that arising between the plaintiff and the Stevedores' Association, upon the question whether or not he should become a member of it. This latter dispute was not a trade dispute within the Trades Disputes Act, 1906, s. 5 (3). Is the only ground for calling the acts in question actionable that they induced certain labourers to break their contract, or is there an additional ground, that they were done to further a conspiracy to coerce one employer at the instance of other employers, and in furtherance of a dispute which was not a trade dispute? Even if the acts in question are excusable because done in furtherance of the trades dispute, which the appellants allege to have existed, and so far are protected by s. 3 of that Act, still, in so far as they were done in furtherance of a dispute to which that Act does not apply, they may stand outside the protection of that Act, and so being actionable at common law, be indefensible. As this point was not argued I reserve the expression of any opinion upon it.

It seems to me, however, impossible upon the facts proved and admitted, and in face of the jury's finding, to say that there was at any time any dispute between employers and workmen at all. The plaintiff complied, and intended to continue to comply, with all the requirements of the Transport Workers' Union, both as to wages and hours and conditions of employment. With him his employees were quite content; they had no quarrel with him and wished for none. They did as the Transport Workers' Union delegate told them, but the dispute which he was engaged in furthering had nothing to do with their "employment or non-employment or the terms of the employment or the conditions of labour." It was solely a dispute between one employer, the plaintiff, and sundry others, the other stevedores and the present appellants, which in its turn had as its object the prosecution of an ulterior dispute between one group of employers, the stevedores, and another—namely, the shipowners of Dublin severally or collectively. I think that the observations of LORD MACNAGHTEN on the very similar position in *Quinn* v. *Leathem* (1) are much in point. He said ([1901] A.C. at p. 511):

> "So far as I can see there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. . . . There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce, in order to compel him to do harm to Leathem and so enable them to wreak their vengeance on Leathem's servants, who were not members of the union."

It was contended that, as the appellant Larkin promoted the Stevedores' Association in purported furtherance of the interests of the Transport Workers' Union, any dispute which arose between the association of employers and another employer comes to be a statutory trades dispute by reason of its supposed effect on the interests of the employees. The contention is unfounded. There is no more a statutory trades dispute here than there was between Quinn's union and Munce in *Quinn* v. *Leathem* (1). If B. and C. quarrel about the interests of A., that is not A.'s quarrel; still less is it A.'s quarrel when neither A. nor B. has any wish to dispute at all, and the whole object of the dispute which C. forces

upon B. is to bring about the coercion of D., a state of things from which it is supposed that benefit may ultimately reach the passive and placable A.

One point remains, the form of the judgment for damages. The now appellants say that, even though they were rightly adjudged to be liable, they can require the judgment to be set aside if they can show that their co-defendants, who were also adjudged to be liable, but who do not appeal, had a good defence to the action. They are entitled, it is said, though liable by themselves, to refuse to stand for ever on record as liable in such company; in other words, that a judgment debtor, who has no grounds for appealing himself, may be relieved from the judgment because a co-defendant might have appealed successfully if he had cared to do so. No authority is cited for this proposition, and I am not minded to make one, but having failed to apprehend on what legal basis the argument is supposed to rest, I must confess my inability to answer it further. I think that the appeal should be dismissed.

LORD PARMOOR.—The plaintiff has for many years carried on the business of a stevedore in the port of Dublin. The appellant Larkin is secretary, and the other appellants are members of the Irish Transport Workers' Union, founded in Dublin in 1904. The appeal is from an order of the Court of Appeal in Ireland refusing to set aside an order of the Divisional Court of the King's Bench Division, which confirmed a judgment entered for the respondent on Dec. 6, 1912, in an action tried by PALLES, C.B.

There was no Stevedores' Union in Dublin prior to 1912. In 1912 Larkin issued a circular to all the stevedores in Dublin—about twelve in number—asking them to meet him at Liberty Hall. The meeting took place in June and the respondent was present. At this meeting Larkin explained a scheme for alteration in the conditions of labour in the discharge of vessels in the port of Dublin, stating that his object was not directly to increase the wages of each individual, but that more workmen should be employed. The scheme, if adopted, would increase the cost incurred by the stevedores in the discharge of vessels, and at their instance the consideration was adjourned. Shortly after this conference, a meeting of the stevedores took place in Shaw Street, and the new proposal for the employment of labour in the discharge of vessels in the port of Dublin, which had been printed, was considered. The plaintiff's evidence is that he found both the rate of wages and the terms of employment those in operation in his own business, and that as the proposal did not affect him he had no further interest in it. According to his own evidence the plaintiff was not present at any subsequent meeting. On June 20th the stevedores assembled at Liberty Hall to further discuss the suggested proposal. The stevedores were willing to agree to the alteration in the conditions of labour if they could get additional payment from shipowners to cover the additional cost. Larkin then proposed that the stevedores should form an association to fix a scale of payment from the shipowners, and said that he would give his help in seeing that no union man would work for any stevedore who was not a member of the Stevedores' Association. It is clear that the Stevedores' Association was formed some time in July, and that the main object of the association was to obtain additional payment from the shipowners to meet the additional cost of labour which would be incurred under the scheme put forward by Larkin. On July 24 the plaintiff was shown a proposed scale of charges between the Association of Stevedores and the shipowners, but he refused to join the association on the ground that the high rates would exclude stevedores and that shipowners would not employ them. The plaintiff was told at this interview that Larkin would not allow any man to work for a stevedore who was not a member of the association. On July 27 there was a further meeting between the plaintiff and representatives of the stevedores, when the plaintiff was told that he would get no more men to work for him, as Larkin had promised to assist the association in every way to get their prices, and that, if he did not join, Larkin would withdraw the men from him. On the same evening

the plaintiff was told that Larkin wanted him, and he went to Liberty Hall, but he did not see Larkin. On Aug. 2, 1912, the plaintiff discharged a ship without interference, and he had no difficulty in obtaining men to work for him. On Aug. 7 a ship, the *Sieben Jarl*, arrived at the port of Dublin. The appellant Redmond called on the plaintiff, asking him to see Larkin. At this interview Larkin told the plaintiff that unless he joined the Stevedores' Association and charged the same rates he would withdraw the men. The plaintiff made a contract with the shipping agent to discharge the *Sieben Jarl*, and employed for this purpose a gang of men. The men began to work in the ordinary way and had worked about an hour when Redmond and Hopkins, at 7.15, called the men off during the first half-day's employment. Hopkins told the plaintiff that he would be further stopped until he joined the Stevedores' Association. Thirty-three men were working at the discharge of the *Sieben Jarl* when they were called off. It is clear that at this time these men were under contract for employment with the plaintiff, although the period of such employment is not clearly defined. On Aug. 22 the *Schoona* was in port and the plaintiff obtained the contract to discharge her. The men were halfway down to the ship when Hopkins held up his hand to the men and stopped them and told them they were not to work for the plaintiff. From Aug. 22 until Sept. 23 the plaintiff did not try to discharge a ship. On Sept. 23 plaintiff tried to discharge the *Thelma*, and he engaged for this purpose forty men. They started to discharge at twelve o'clock, but Hopkins took all the men off and they left. This was the last effort the plaintiff made, and since then he has been prevented from discharging any ship.

On Aug. 19 the plaintiff issued a writ of summons, and the statement of claim was delivered on Oct. 21. Upon motion made by Serjeant Moriarty, on Dec. 5, to the Chief Baron, the plaintiff was granted liberty to amend his statement of claim by adding two additional paragraphs. Counsel for the appellants argued that this amendment should not have been allowed, but it was a matter within the discretion of the Chief Baron. There is nothing to show that this amendment placed the appellants under any disadvantage, or that there was any confusion in the summing-up of the case to the jury by the Chief Baron. It is unnecessary to refer further to this point.

At the close of the plaintiff's case it was submitted on behalf of the appellants, and also on behalf of the other defendants—Long, Newman, and Donohoe—that there was no evidence proper to be submitted to the jury to sustain the plaintiff's claim, and that there was a trade dispute existing at the port of Dublin on the occasions complained of by the plaintiff. These objections were overruled, and the Chief Baron left certain questions to the jury. I agree in the opinion expressed in the words of the Chief Baron, that there was ample evidence of acts of each of the defendants which would have been actionable prior to the passing of the Trades Disputes Act, 1906; that consequently it lay on the defendants to show that such acts were done by them in contemplation or furtherance of a trade dispute as defined by the Act; and that it was competent for the jury to hold that the only dispute was a refusal to allow the dock labourers to work for the plaintiff unless he became a member of the Stevedores' Association.

The findings of the jury are set out in the certificate of the registrar. The jury found that the appellants with the other defendants, who are not appealing, did agree to force the plaintiff to join the Stevedores' Association, and that in pursuance of the said agreement they did induce or procure dock labourers who were engaged to work for plaintiff, and were then actually working for plaintiff, to break their contracts and leave plaintiff's employment on the *Sieben Jarl* on Aug. 8, and that the said acts did cause actual money loss to the plaintiff. There was a further finding that the appellants and the other defendants used threats to force the plaintiff to join the Stevedores' Association. In reference to this finding it was contended that the Chief Baron gave a wrong direction when asked by one of the jury, "Have we any evidence as regards the defendants other than the appellants?" The answer of the Chief Baron appears to have been perfectly

explicit, and without doubt correct, "If there was an agreement amongst six, and three do act in pursuance of the agreement, the acts are the acts of the six." Seeing, however, that the defendants other than the appellants are not appealing, it is impossible to say that the present appellants can in any way have been prejudiced by the direction of the Chief Baron. The jury assessed the plaintiff's damages up to the date at which the writ was issued at £200.

The facts as found by the jury are amply sufficient to establish that the appellants did commit wrongful acts in derogation of the rights of the plaintiff, and to his pecuniary loss, and that unless the Trades Disputes Act, 1906, applies, they are liable in the action. For this proposition *Quinn* v. *Leathem* (1), which explicitly approves *Lumley* v. *Gye* (2), is a sufficient authority. To quote the words of LORD MACNAGHTEN:

> "It is a violation of legal rights to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

I understood the main argument of counsel for the appellants, under this part of his address, to be directed to establish that there was under the circumstances of the present case a sufficient justification for interference. There was some confusion in his reference to the *Mogul Case* (3), and cases of a similar character. These cases have no application when there is a wrongful act which requires justification. They are decided on the different ground, that there was no wrongful act and no infringement of the rights of other persons. Assuming then that there has been a wrongful act, what is the justification?

There was no duty of any kind on the appellants to commit the acts charged against them, and in this absence of duty of some kind it is difficult to see how justification is possible. The highest point to which the argument can be carried in favour of the appellants is that the appellants acted without sinister motive in the supposed interests of the men and without ill-will to the plaintiff, but these are considerations which do not alter the wrongful nature of the acts charged against the appellants, and cannot be successfully urged as an excuse or justification, *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (6).

The second point taken on behalf of the appellants is that there was no evidence that the acts charged against the appellants resulted in any damage to the plaintiff. It is necessary to put the argument on the ground of no evidence of damage, since if there is any evidence of damage the amount found by the jury stands, and it is not claimed that it can be questioned. In a case of this character the jury are not limited to an assessment of a specific sum for damages founded on the actual loss proved, but may take into consideration all the circumstances of the wrong. The actual direction of the Chief Baron to the jury on the amount of damages was not before your Lordships, but if it is desired to question this direction the onus is upon the appellants. Their counsel based his argument that there was no evidence of damage on an assumption which was not established at the hearing of the action. The assumption was that the contract made by the plaintiff to unload the *Sieben Jarl* was one entire contract, and that the plaintiff was not entitled to any payment under the contract, until the whole cargo had been discharged, and that, apart from the workmen being induced to break their employment by the appellants, the plaintiff could not have performed his contract if the workmen had refused to return after the period for which they were under contract with the plaintiff, whether this period was for a half-day or for the first full day. I can find no adequate evidence to support this assumption, or that the plaintiff might not have recovered in respect of work actually done under the contract, but making the assumption in favour of the appellants there is still ample evidence of some damage, and this is sufficient to support the verdict. The real complaint is that the damages are far in excess of any figure of any possible loss in connection with the discharge of the cargo of the *Sieben Jarl*, but the jury were not limited to this figure, and the appellants cannot claim to reopen the question of amount.

The remaining point argued by counsel for the appellants is that the appellants, even if liable on general principles of law, are protected from liability by the Trades Disputes Act, 1906. Section 3 of this Act provides that an act done by a person in furtherance or contemplation of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills. The governing words of this section are "in furtherance or contemplation of a trade dispute." The question is whether acts of the appellants came within the protection of these words. Before referring to this contention I desire to draw attention to the word "only," and to express my concurrence with the views of LORD SUMNER as to the difficulty which these words place in the way of the argument for the appellants. This point was not, however, directly argued, and I agree with LORD SUMNER that it is desirable in the absence of argument to reserve any expression of opinion upon it. In order to determine whether acts have been done in furtherance or contemplation of a trade dispute, it is necessary to determine what is a trade dispute within the Act of 1906. There is a definition of the expression in s. 5 (3).

> "The expression trade dispute means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment and non-employment or the terms of employment or with the conditions of labour."

The definition is not limited to workmen in the employment of the employer with whom a trade dispute arises, but no question arises under this part of the subsection in the present case. Counsel for the appellants argued that there was a trade dispute within the meaning of the Act of 1906 at the time when the men working for the plaintiff were called away from their work in the discharge of the *Sieben Jarl*. The burden of proving that there was such a dispute, and that, consequently, the acts of the appellants come within the protection of the Act of 1906, is upon the appellants.

In answer to questions left to them, the jury found, first, that at the time of the acts complained of there was no dispute between the plaintiff and the dock labourers. It cannot be said that there was not sufficient evidence to support this finding. At the time of the acts complained of none of the workmen employed by the plaintiff was complaining either of the wages received or of the conditions of labour. It is admitted that the plaintiff had, in the course of his previous employment of workmen, given the wages and terms demanded by the workmen's union. The jury found in the second place that the dispute was one between the plaintiff and the Stevedores' Association, into which the stevedores brought the appellants Larkin, Hopkins, and Redmond to assist. There is ample evidence to support this finding. The evidence is practically all in one direction. Unless it can be said that the stevedores are "workmen," these two findings are conclusive against the appellants as to the conditions which existed when the acts complained of took place. The stevedores were clearly not workmen but in the position of employers. There was a further finding of the jury, that it was not the workmen who insisted that the plaintiff should become a member of the Stevedores' Association, but this finding is less important.

In order to meet the case made against him counsel for the appellants urged that the appellants, by taking sides in a dispute between the plaintiff and the Stevedores' Association and calling out the workmen employed by the plaintiff, altered the character of the dispute, so that a dispute which, up to the time of the acts complained of was not a trade dispute within the Act of 1906, became such a dispute, and that the appellants were accordingly protected from all liability. I am unable to accept this argument. No doubt a dispute may change its character so as to become a trade dispute in its later stages although it was not a trade dispute in its origin. But in the present instance there is nothing

more than a choice by the appellants to assist one side in the dispute between the plaintiff and the Stevedores' Association, a dispute which was not in its origin, and which never became in its later stages, a dispute within the Act of 1906. To hold that the acts in this case bring the dispute within the Act of 1906 would be in effect to disregard the definition of the Act of 1906, and to bring within the protection of the Act every dispute of whatever character in which the workmen and their representatives determined to take part with one side or the other.

The construction of the expression "trade dispute" in the Act of 1906 has been considered in this House and it is unnecessary to do more than refer to *Conway* v. *Wade* (7). In my opinion the appeal should be dismissed.

LORD DUNEDIN.—I concur.

Appeal dismissed.

Solicitors: *Herbert Z. Deane*, for *W. Smyth & Son*, Dublin; *Barlow, Barlow & Lyde*, for *M. Good*, Dublin.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

R. *v.* KETTERIDGE

[Court of Criminal Appeal (Darling, Lush and Atkin, JJ.), December 14, 1914]

[Reported [1915] 1 K.B. 467; 84 L.J.K.B. 352; 112 L.T. 783; 79 J.P. 216; 31 T.L.R. 115; 59 Sol. Jo. 163; 24 Cox, C.C. 678; 11 Cr. App. Rep. 54]

Criminal Law—Trial—Jury—Retirement—Absence of juror from court and separation from colleagues after summing-up—Discovery of irregularity after verdict—Effect on trial.

At the trial of a prisoner on a charge of felony, after the judge had summed-up, the jury expressed a wish to retire and consider their verdict. While they were leaving the jury box in charge of the court bailiff, one of the jurymen left the building and was absent for about fifteen minutes. He then returned, joined the other members of the jury in the retiring room, and assisted in returning a verdict.

Held: (i) if a juror, after the summing-up by the judge in a criminal trial, leaves his colleagues and, without being under the control of the court, converses or is in a position to converse with other persons, the irregularity makes the whole trial abortive; (ii) the only course then open to the judge is to discharge the jury and proceed to a fresh trial.

Notes. The second part of the holding in this case has been commented on by Lord Goddard, C.J., in *R.* v. *Neal* [1949] 2 All E.R. 438. He said, "We think that we are entitled to treat what the court said in *R.* v. *Ketteridge* as merely obiter. It will be observed that the court there did not order a venire de novo, and . . . they expressed an opinion on a matter which had never been argued." On the facts of *R.* v. *Neal* Lord Goddard held that the C.C.A. had no power to order a new trial and could only quash the conviction.

Considered: *Fanshaw* v. *Knowles*, [1916] 2 K.B. 538. Distinguished: *R.* v. *Twiss*, [1918] 2 K.B. 853. Considered: *R.* v. *Neal*, [1949] 2 All E.R. 438.

As to retirement of jury, see 10 Halsbury's Laws (3rd Edn.) 431; and for cases see 14 Digest (Repl.) 846 and 661 et seq.

Cases referred to:

(1) *R.* v. *Kinnear* (1819), 2 B. & Ald. 462; 106 E.R. 434; sub nom. *R.* v. *Woolf* 1 Chit. 401; 14 Digest (Repl.) 345, *3342*.

(2) *R.* v. *O'Neill* (1843), 3 Craw. & D. 146; 30 Digest (Repl.) 267, **177.*
(3) *R.* v. *Fowler* (1821), 4 B. & Ald. 273; 106 E.R. 937; 14 Digest (Repl.) 367, *3557.*
(4) *R.* v. *Ward* (1867), 17 L.T. 220; 31 J.P. 791; 16 W.R. 281; 10 Cox, C.C. 573, C.C.R.; 14 Digest (Repl.) 346, *3357.*

Also referred to in argument:

R. v. *O'Connell* (1843), 1 Cox, C.C. 410.
R. v. *Willmont* (1914), 78 J.P. 352; 30 T.L.R. 499; 10 Cr. App. Rep. 173, C.C.A.; 14 Digest (Repl.) 367, *3561.*
R. v. *Crippen*, [1911] 1 K.B. 149; 80 L.J.K.B. 290; 103 L.T. 704; 75 J.P. 141; 27 T.L.R. 69; 22 Cox, C.C. 289; 5 Cr. App. Rep. 255, C.C.A.; 14 Digest (Repl.) 345, *3343.*

Appeal against a conviction for attempted rape before A. T. LAWRENCE, J., at Chelmsford Assizes.

At the trial the learned judge summed-up and the jury, after a few minutes' deliberation in the jury box, retired to consider their verdict. The court bailiff was duly sworn and conducted them to the retiring room. One of the jurymen, not understanding, apparently, what he had to do, separated from his colleagues, left the building, and was absent for about fifteen minutes. He then rejoined his colleagues, his absence up to that time not having been noticed, and assisted them in returning a verdict of guilty against the appellant. These facts did not come to the knowledge of the appellant until two days after trial. Nothing transpired as to what the juror did during his absence from the court.

C. E. Jones for the appellant.
Rowland Burrows for the Crown.

Dec. 14, 1914. **LUSH, J.,** read the following judgment of the court. HIS LORDSHIP stated the facts and continued: It was submitted by counsel for the appellant that the trial was, in the circumstances, abortive, and that the conviction should be quashed. The court, after argument, took this view, and ordered the conviction to be quashed and the appellant to be discharged from custody. But as the case involves matters of some importance we thought it better to state our reasons in writing.

Counsel for the Crown contended that, although the juror did what was irregular in separating from his colleagues and exposed himself to the risk of having a punishment imposed for his contempt of court, the court should not, in the absence of evidence that he had communicated with any other person or that the appellant had been prejudiced, treat the trial as abortive, jurors now being allowed to separate during the trial of a prisoner on a charge of felony such as this. He cited *R.* v. *Kinnear* (1) and *R.* v. *O'Neill* (2). In the first of these cases the offence charged was a misdemeanour and the judge had not summed up, and therefore this decision does not assist us in the present case. In *R.* v. *O'Neill* (2), which was an Irish case, and the decision merely that of a court of first instance, there are dicta which appear to show that the fact that the prisoner had been prejudiced by the juror conversing with other persons was material, but *R.* v. *Fowler* (3) does not appear to us to justify that conclusion. In our opinion it is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner. We refused to consider an explanatory statement which we were told had been made by the juror, which would clearly not be admissible in evidence.

If a juror, after the judge has summed-up, in any criminal trial separates himself from his colleagues and, not being under the control of the court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the court, renders the whole proceedings abortive, and the only course open to the court is to discharge the jury and commence the proceedings afresh. This view was adopted by the court in *R.* v. *Ward* (4). That such an

act on the part of a juror is irregular and could not be sanctioned by the court itself was recognised by the legislature in the Juries Detention Act, 1897. [Repealed by the Criminal Justice Act, 1948.] We accordingly quashed the conviction. It is, of course, open to the Crown to recommence the proceedings. It is for the Crown to consider whether to adopt that course or not.

Appeal allowed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

Re RICHARDSON. RICHARDSON *v.* RICHARDSON

[CHANCERY DIVISION (Eve, J.), December 10, 1914]

[Reported [1915] 1 Ch. 353; 84 L.J.Ch. 438; 112 L.T. 554]

Will—Legacies for life—Capital to fall into residue—Legatees treated as annuitants—Deficiency of estate—Abatement.

The testator, after giving pecuniary legacies which had priority, gave the residue of his property upon trust to set aside eight specified sums, amounting to £10,500, and to pay the income from each sum to eight legatees respectively for life. On the death of each of four legatees, each capital sum was to fall into the trust for ultimate residue, and in the case of the others the capital was to be held as settled. After payment of the pecuniary legacies in priority the estate proved insufficient to satisfy the eight legacies.

Held: the four legatees, the capital sum of whose legacies was destined to fall into the ultimate residue, must be treated as being annuitants whose annuities, equivalent in amount to the income of the appropriated sums, ought to be valued as at one year from the death of the testator and the values so ascertained be treated as pecuniary legacies, and each was liable to abate rateably with the other four legacies.

Notes. Followed: *Re Ellis, Nettleton* v. *Crimmins*, [1934] All E.R.Rep. 58.

As to abatement of annuities, see 16 HALSBURY'S LAWS (3rd Edn.) 331; and for cases see 23 DIGEST (Repl.) 426 et seq.

Cases referred to:

(1) *Arnold* v. *Arnold* (1835), 2 My. & K. 365; 4 L.J.Ch. 79, 123; 39 E.R. 987; 23 Digest (Repl.) 411, *4814*.

(2) *Re Cottrell, Buckland* v. *Bedingfield*, [1910] 1 Ch. 402; 79 L.J.Ch. 189; 102 L.T. 157; 23 Digest (Repl.) 428, *4988*.

Also referred to in argument:

Re Tootal's Estate, Hankin v. *Kilburn* (1876), 2 Ch.D. 628; 24 W.R. 1031, C.A.; 44 Digest 292, *1238*.

Croly v. *Weld* (1853), 3 De G.M. & G. 993; 1 Eq. Rep. 134; 22 L.J.Ch. 916; 43 E.R. 389, L.JJ.; 39 Digest 143, *380*.

Adjourned Summons.

The testator, Charles Nicol Richardson, by his will dated Mar. 31, 1911, appointed the plaintiffs William Hartley Richardson and Harold Sadler executors and trustees, and made a number of pecuniary and other bequests, and so far as material, proceeded as follows:

"All the rest, residue and remainder of my property of every description, both real and personal whatsoever and wheresoever, I give, devise, and bequeath unto my said trustees . . . upon trust, in the first place, to pay my

just debts, funeral, and testamentary expenses, and then upon trust as to £2,500 to pay the income thereof to my . . . brother William H. Richardson for . . . his life, and upon [his] death . . . upon trust to pay the . . . £2,500 . . . to the . . . Liverpool Merchants' Guild, . . . And as to £1,500 upon trust to pay the income to arise therefrom unto my sister Kate Richardson for . . . her life, but subject to and conditionally upon my sister assigning to my trustees all her claim and interest . . . under the will of the late Mercey Richardson . . . and on the death of Kate Richardson then upon the trust hereinafter declared concerning the residue of my trust estate, and as to £600 upon trust to pay the income to arise therefrom to my brother Walter Richardson for . . . his life and, on his death, upon the trust hereinafter declared concerning the residue of my estate. And as to £800, upon trust to pay the income to arise therefrom to my sister-in-law Sarah Ann Richardson for . . . her life, and on her death upon the trust hereinafter declared concerning the residue of my trust estate. And as to £2,000, upon trust to pay the income to arise therefrom to my nephew Percy Morgan Richardson for . . . his life, and on his death, without leaving a widow or issue him surviving, then upon the trust hereinafter declared concerning the residue of my trust estate; but if Percy M. Richardson should die leaving a widow or issue him surviving, then upon the trusts, . . . in favour of such widow and issue as in the will mentioned. And as to £2,500 upon trust to pay the income to arise therefrom to my niece Ada Mary Richardson for . . . her life, and on her death upon the trust hereinafter declared concerning the residue of my trust estate. And as to £500, upon trust to pay the income to arise therefrom to my friend Eliza Matthews for . . . her life, and upon [her] death . . . upon trust to pay the . . . £500 to the Liverpool Merchants' Guild. . . . And as to £100 to pay the income to arise therefrom to my cousin Hannah Sherborn for . . . her life, and after her death to pay the . . . £100 to her sons Percy Sherborn and Sidney Sherborn or the survivor of them. And as to all the residue of my trust estate upon trust for my nephews William Harold Richardson and Ernest Sadler Richardson and my niece Marion Mercey Roberts in equal shares absolutely."

The testator died on Mar. 5, 1915 and Eliza Matthews predeceased him and Percy M. Richardson was unmarried. On Feb. 7, 1914, the trustees issued a summons asking (inter alia: (i) Whether the absolute pecuniary legacies bequeathed by the testator's will had priority over the eight trust legacies; (ii) whether the four legacies, the capital of which was to fall into ultimate residue, were applicable towards satisfying deficiency in the other legacies; and (iii) how the testator's estate, if proved insufficient to satisfy in full the various bequests in the will, ought to be administered.

By an order made on Mar. 12, 1914, it was declared that the absolute pecuniary legacies bequeathed by the will of the testator had priority over the sums of £2,500, £1,500, £600, £800, £2,000, £2,500, £500 and £100 directed to be held upon trust to pay the income thereof to the legatees during their respective lives. It was also declared that the four legacies the capital of which was directed to fall into ultimate residue were subject to the payment of the eight legacies in full, and that the legacy of £1,500 to Kate Richardson during her life had no priority over the other seven legacies.

The originating summons was then argued on question (iii) as to the proper mode of abatement between the eight legacies not entitled to priority:

E. Ackroyd for the trustees.
Maugham, K.C., and *Whitmore Richards* for Kate Richardson.
R. W. Baxter for Sarah A. Richardson and Ada M. Richardson.
J. Rutherford for the Liverpool Merchants' Guild.
Courthope Wilson for those interested in the ultimate residue.

EVE, J.—The testator, by his will, bequeathed several pecuniary legacies, which I held on a former occasion were entitled to priority. These having all been provided for, I have now to deal with the residuary estate which is given to trustees upon trust thereout to set aside and invest certain specified sums, and to pay the income to various legatees for life, and on their respective deaths to pay the capital to other legatees, except that in four instances the testator declared that on the death of the life tenant the sum set aside for his or her benefit was to fall into residue. The ultimate residue is given to three named persons. The sums so to be set aside out of residue amount to £10,500, and unfortunately the residue falls short of that amount by a sum of from £2,000 to £3,000. The question now is, how ought the deficiency to be apportioned among the various persons interested in the sums making up the £10,500.

It has been argued on behalf of those interested in the ultimate residue, and by counsel who appears for a charity entitled to one of the appropriated sums subject to a preceding life interest, that the sums making the £10,500 are all settled legacies and ought to abate rateably, and that as the life interests in the four sums directed to fall into residue determine these four sums, amounting together to £5,400, will respectively be available to mitigate, and possibly make good, for the benefit of life tenants and remaindermen the present deficiency. I think it is inaccurate to speak of these last sums as settled legacies; they are appropriated sums, of which the income is disposed of during the lives of the legatees, but of which the capital is left to pass under the residuary bequest, and the legatees interested in these sums as life tenants protest against any course of administration calculated to give them less than the testator contemplated and intended that they should have. Accordingly, they claim that the right thing to do is to regard them as annuitants entitled to annuities equivalent in amount to the income of the respective sums directed to be appropriated for their benefit, and, the estate being insufficient to keep down the annuities, to treat each of them as a pecuniary legatee of a capital sum equal to the value of his or her annuity at the expiry of one year from the testator's death. It is admitted that if once the legatees in question can be regarded as annuitants, the result they contend for must follow.

I think *Arnold* v. *Arnold* (1) is a sufficient authority for holding that legatees whose legacies are life interests in sums directed to be appropriated for their benefit are really annuitants, and when the estate is insufficient to pay legacies and to keep down the annuities in full, the rule adopted by the court for the purpose of ascertaining the proper proportionate abatement of legacies and annuities respectively is to put all on the same level and to convert the annuities into pecuniary legacies. To effect this, each annuity is valued as at the date when it would have been payable had it taken the form of a pecuniary legacy, and the value so ascertained is treated as a pecuniary legacy liable to abate rateably with the other legacies. The rule was stated and applied by WARRINGTON, J., in *Re Cottrell, Buckland* v. *Bedingfield* (2), and in my opinion is applicable and ought to be applied here.

I think, seeing that the rate of interest which has been paid on account to some of the legatees is 4 per cent., it will not be unreasonable to treat the appropriated sums as capable of producing income at that rate, and to calculate the annuities on that footing. Each of the annuities so arrived at will then be valued according to the Government tables as at the expiry of one year from the testator's death, and the four annuitants will be treated as pecuniary legatees for the respective amounts so ascertained, and each of these amounts will bear its rateable proportion of the abatement which has to be made in common with the other legacies making up the £10,500. If, ultimately, owing to the failure of issue or from any other cause, the bequest in remainder of the £2,000 in which Mr. Percy Morgan Richardson has the first life interest fails, that £2,000

will fall to be apportioned among the legatees by way of addition to the distribution now about to be made.

Order accordingly.

Solicitors: *H. G. C. Day*, Liverpool; *Whitley & Co.*, Liverpool, *Crowders, Vizard, Oldham & Co.*, for *C. H. Garrett*, Caterham Valley.

[*Reported by* W. P. PAIN, ESQ., *Barrister-at-Law.*]

ZINC CORPORATION, LTD. *v.* ARON HIRSCH UND SOHN

[COURT OF APPEAL (Swinfen Eady, Phillimore and Pickford, L.JJ.), November 19, December 15, 16, 21, 1915]

[Reported [1916] 1 K.B. 541; 85 L.J.K.B. 565; 114 L.T. 222; 32 T.L.R. 232; 21 Com. Cas. 273]

Trading with the Enemy—Contract rendered illegal—Intercourse with enemy—Agreement to sell ore to German firm—Suspension if carrying out of agreement prevented by cause beyond control of parties—Effect of suspension clause—Provision against sale to any buyer other than German firm.

By a contract dated April 4, 1912, it was provided that the plaintiff company should sell to the defendants, a German firm carrying on business in Germany, the whole of their production of zinc concentrates during a certain period. By cl. 3 the plaintiffs undertook that so long as the agreement should be in force they would not sell zinc concentrates to any person other than the defendants. By cl. 17: "... in the event of any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement, then this agreement shall be suspended during the continuance of any and every such disability." War having been declared between Great Britain and Germany on Aug. 4, 1914, the plaintiffs brought the present action claiming a declaration that the contract between them and the defendants was dissolved by the outbreak of war.

Held: (i) on the true construction of the contract as a whole the words in cl. 17 "this agreement shall be suspended" did not bear their natural and ordinary meaning, but meant only that deliveries under the contract were to be suspended, and, consequently, the rest of the contract subsisted to be performed according to its tenor; to carry out any part of the contract during the war would involve intercourse with the enemy and so would be illegal; and, therefore, the outbreak of war had dissolved the contract so far as regards performance of it after Aug. 4, 1914, the remedy of either side for what had previously been carried out remaining in abeyance until after the war, and the plaintiffs were entitled to the declaration which they claimed; (ii) the provision in cl. 3 of the contract that so long as the agreement should be in force the plaintiffs would not sell to any person other than the defendants would result in a British subject being prevented from using important resources for the benefit of his country during war and as such was illegal and void.

Notes. Considered: *Clapham Steamship Co.* v. *Naamlooze Vennootschap Handels-en Transport Maatschappij Vulcaan of Rotterdam*, [1917] 2 K.B. 639; *Orconera Iron Ore Co.* v. *Fried. Krupp Akt.* (1917), 86 L.J.Ch. 613; *Hugh Stevenson & Co.* v. *Akt. für Cartonnagen Industrie*, [1917] 1 K.B. 842. Followed: *Veit-*

hardt and Hall v. *Rylands* (1917), 86 L.J.Ch. 604. Considered: *Ertel Bieber & Co.* v. *Rio Tinto Co., Ltd.*, [1918–19] All E.R.Rep. 127; *Naylor, Benson & Co.* v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331. Referred to: *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1916–17] All E.R.Rep. 122; *British Association of Glass Bottle Manufacturers* v. *Foster* (1917), 86 L.J.Ch. 489; *Blackburn Bobbin Co.* v. *Allen* (1918), 87 L.J.K.B. 1085; *Re Coutinho Caro*, [1918] 2 Ch. 384; *Lebeaupin* v. *Crispin*, [1920] All E.R.Rep. 353; *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331; *Schering, Ltd.* v. *Stockholms Enskilda Bank*, [1946] 1 All E.R. 36; *Nordisk Insulinlaboratorium* v. *Bencard (C.L.) (1934), Ltd.*, [1953] 1 All E.R. 986.

As to illegality of contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 125 et seq.; and for cases see 12 DIGEST (Repl.) 263 et seq.

Cases referred to:

(1) *Esposito* v. *Bowden* (1857), 7 E. & B. 763; 8 State Tr.N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur.N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex. Ch.; 12 Digest (Repl.) 440, *3352*.

(2) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 12 Digest (Repl.) 271, *2084*.

(3) *Furtado* v. *Rogers* (1802), 3 Bos. & P. 191; 127 E.R. 105; 2 Digest (Repl.) 254, *550*.

(4) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 241, *435*.

(5) *Griswold* v. *Waddington* (1819), 16 Johnson, Sup. Ct. New York, 438.

(6) *Robson* v. *Premier Oil and Pipe Line Co.*, ante, p. 419; [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 31 T.L.R. 420; 59 Sol. Jo. 475, C.A.; 2 Digest (Repl.) 258, *573*.

(7) *Kershaw* v. *Kelsey*, 100 Mass. Rep. 561.

Also referred to in argument:

Thorman v. *Dowgate Steamship Co., Ltd.*, [1910] 1 K.B. 410; 79 L.J.K.B. 287; 102 L.T. 242; 11 Asp.M.L.C. 481; 15 Com. Cas. 67; 17 Digest (Repl.) 282, *894*.

Northfield Steamship Co., Ltd. v. *Compagnie L'Union des Gaz*, [1912] 1 K.B. 434; 81 L.J.K.B. 281; 105 L.T. 853; 28 T.L.R. 148; 17 Com. Cas. 74; 12 Asp.M.L.C. 87, C.A.; 41 Digest 570, *3944*.

Matsoukis v. *Priestman & Co.*, post; [1915] 1 K.B. 681; 84 L.J.K.B. 967; 113 L.T. 48; 13 Asp.M.L.C. 68; 20 Com. Cas. 252; 7 Digest (Repl.) 357, *82*.

Larsen v. *Sylvester & Co.*, [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 24 T.L.R. 640; 11 Asp.M.L.C. 78; 13 Com. Cas. 328, H.L.; 41 Digest 306, *1682*.

France Fenwick & Co., Ltd. v. *Philip Spackman & Sons* (1912), 108 L.T. 371; 12 Asp.M.L.C. 289; 18 Com. Cas. 52; 41 Digest 452, *2836*.

W. Wolf & Sons v. *Carr, Parker & Co.* (1915), 31 T.L.R. 407; [1915] W.N. 195, C.A.; 2 Digest (Repl.) 241, *439*.

Hadley v. *Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, *3426*.

Antoine v. *Morshead* (1815), 6 Taunt. 237; 1 Marsh. 558; 128 E.R. 1025; 2 Digest (Repl.) 254, *544*.

Steamship Knutsford, Ltd. v. *Tillmanns & Co.*, [1908] 2 K.B. 385; 77 L.J.K.B. 778; 99 L.T. 399; 24 T.L.R. 454; 13 Com. Cas. 244; affirmed, [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 24 T.L.R. 786; 11 Asp.M.L.C. 105; sum nom. *Tillmanns* v. *Steamship Knutsford*, 13 Com. Cas. 334, H.L.; 41 Digest 522, *3504*.

Zinc Corpn. and Romaine, Ltd. v. *Skipworth* (1914), 31 T.L.R. 106; reversed 31 T.L.R. 107, C.A.; 2 Digest (Repl.) 270, *618*.

R. v. *Kupfer*, [1915] 2 K.B. 321; 84 L.J.K.B. 1021; 112 L.T. 1138; 79 J.P. 270;

31 T.L.R. 223; 24 Cox, C.C. 205; 11 Cr. App. Rep. 91, C.C.A.; 2 Digest (Repl.) 259, *579*.

Sunday & Co. v. *British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; 84 L.J.K.B. 1624; 113 L.T. 407; 31 T.L.R. 195; 59 Sol. Jo. 316; affirmed, [1915] 2 K.B. 789; 84 L.J.K.B. 1630; 113 L.T. 410; 31 T.L.R. 374; 59 Sol. Jo. 456; [1915] W.N. 185; 20 Com. Cas. 305; affirmed sub nom. *British and Foreign Marine Insurance Co., Ltd.* v. *S. Sanday & Co.*, [1916–17] All E.R. Rep. 134; [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; 32 T.L.R. 266; 60 Sol. Jo. 253; 13 Asp.M.L.C. 289; 21 Com. Cas. 154, H.L.; 29 Digest 276, *2236*.

The Panariellos (1915), 84 L.J.P. 140; 112 L.T. 777; 31 T.L.R. 326; 59 Sol. Jo. 399; 13 Asp.M.L.C. 52; affirmed (1916), 85 L.J.P. 112; 114 L.T. 670; 32 T.L.R. 459; 60 Sol. Jo. 427; 13 Asp.M.L.C. 484, P.C.; 2 Digest (Repl.) 251, *522*.

Miller & Co., Ltd. v. *Taylor & Co., Ltd.*, [1916] 1 K.B. 402; 85 L.J.K.B. 346; 114 L.T. 216; 32 T.L.R. 161; 60 Sol. Jo. 140, C.A.; 12 Digest (Repl.) 445, *3371*.

Appeal by the defendants from the decision of BRAY, J., in an action tried by him without a jury ([1916] 1 K.B. 541).

The plaintiffs claimed a declaration that an agreement dated April 4, 1912, was abrogated and avoided by the existence of a state of war between Great Britain and Germany on Aug. 4, 1914, and that the plaintiffs were released and absolved from any duty or obligation at any time to supply to the defendants, their servants, agents, nominees, or assigns, the plaintiffs' production of zinc concentrates or any part thereof, or otherwise to observe and perform the said agreement or two earlier agreements of Dec. 14, 1908, and June 20, 1910. By cl. 17 of the agreement:

> "In the event of any strike, lock-out, combination of workmen, interference of trade unions, suspension of labour—whether partial, local, or general, and from whatever cause arising—floods, storms, fire, stoppage of water supply, washaways of railways, accidents, acts of God, force majeure—or perils of the sea, breakdown of machinery, or inability of the Silverton Tramway Co. to provide the necessary trucks for taking away the concentrates, or in the event of any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement, then this agreement shall be suspended during the continuance of any and every such disability."

By cl. 3, so long as the agreement was in force the plaintiffs should not sell any zinc concentrates to any person, firm, or corporation other than the defendants. BRAY, J., held that the contract was dissolved on Aug. 4, 1914, and that the plaintiffs were entitled to a declaration to that effect. The defendants appealed.

Compston, K.C., and *Cohn* for the defendants.
Gore-Browne, K.C., and *F. Dodd* for the plaintiffs.

Cur. adv. vult.

Dec. 21, 1915. The following judgments were read.

SWINFEN EADY, L.J.—This is an appeal by the defendants from the judgment of BRAY, J., who upon the trial of the action made a declaration that the agreement dated April 4, 1912, between the Zinc Corporation, Ltd. (incorporated in Victoria), and Frank Charles Heley, the liquidator thereof, of the first part, the plaintiffs of the second part, and the defendants of the third part, was dissolved as from eleven o'clock p.m. Greenwich time on Aug. 4, 1914, by the existence of a state of war between Great Britain and Germany. The said agreement is one whereby an earlier agreement dated Dec. 14, 1908, as modified by an agreement dated June 20, 1910, was adopted and made binding upon the respective parties to this action, the previous company, the Zinc Corporation, Ltd. (incorporated in Victoria), and its liquidator being released. The defendants have contended on

this appeal that the judgment was erroneous, and that the effect of the war was merely to suspend the operation of the agreement until the termination of the war and not to dissolve it.

It is necessary first to determine what is the true construction of the agreement which is in dispute between the parties, and then to consider what is the effect of the war upon the contract as so construed. The plaintiff company is engaged in obtaining ore from their mines at Broken Hill, Australia, and they treat that ore and other ore and concentrate the mixed products, which they sell as concentrates. The defendants are metal merchants and smelters, and carry on their business at Halberstadt in Germany; they buy the plaintiffs' concentrates for the purpose of smelting. The defendants are alien enemies. By the contract of Dec. 14, 1908, the predecessors of the plaintiffs agreed to sell to the defendants a quantity of 355,000 to 385,000 tons of zinc concentrates already produced or to be produced at Broken Hill. By the contract of June 20, 1910, varying and extending the previous contract, the company were to sell and the defendants were to purchase, during each of the ten years, 1910 to 1919, both inclusive, the whole of the company's production of zinc concentrates, such production not to be less than 85,000 tons nor more than 95,000 tons in each year, and by the same agreement it was provided that so long as the agreement should be in force the company should not sell any zinc concentrates to any person, firm, or corporation other than the defendants. The contract of April 4, 1912 (embodying the former contracts), was acted upon and carried out between the plaintiffs and defendants respectively until on or about Aug. 1, 1914, when the defendants gave notice to the plaintiffs stopping all payments and advances for either ores or metals until further notice and stopping all shipments to Europe of ores or metals. The defendants discontinued taking deliveries of zinc concentrates, by reason whereof the plaintiffs have been placed in a position of much difficulty. They cannot safely make forward contracts for delivery of their products elsewhere until their legal position has been determined, as, if the contract with the defendants has been merely suspended during the duration of the war and they are called upon, possibly at short notice, to resume deliveries to the defendants, they may run short of material if in the meantime they sell and deliver elsewhere. Moreover, the evidence shows that the plaintiffs may have difficulty in finding a market for their products, certainly if they are only able to guarantee delivery for an uncertain and indefinite period. Indeed, the plaintiffs' difficulties have been such that they have ceased to produce ores since the commencement of the war.

The plaintiffs contend that the effect of the war is to put an end to and dissolve the contract. The defendants contend that the contract is merely suspended during the war and will again immediately become operative on the restoration of peace. The questions of construction involve the determination of the true meaning and effect of cl. 17 of the agreement of 1908. That clause provides that in certain events the agreement shall be suspended. Is the happening of war an event included and provided for? The plaintiffs dispute and the defendants assert that it is. If it is, what is the meaning of the expression "then this agreement shall be suspended?" The defendants allege that it means the whole agreement is suspended. If so, is cl. 3 of the agreement of 1910, precluding the plaintiffs from selling elsewhere, also suspended? And are they now at liberty to sell elsewhere? The plaintiffs allege that the expression means only that deliveries of ore are suspended, that the rest of the agreement remains in force, and if its provisions are observed necessitates intercourse with the enemy, and, therefore, that the agreement having become illegal and so incapable of execution is now void and at an end.

Although cl. 17 does not appear to indicate that war was an event within the contemplation of the contracting parties, yet the language of the clause may be sufficient to cover it, and I assume in favour of the defendants that such is the case. The term force majeure as used on the continent of Europe includes war: Calvo, Dictionnaire de Droit International, "Force Majeure"; Dalloz, Juris-

PRUDENCE GÉNÉRALE tome 24, p. 755, art. "Force Majeure"; GOIRAND'S FRENCH COMMERCIAL LAW (2nd Edn.), p. 854. Whether the expression has the same meaning in this contract is another matter, but war is a cause beyond the control of either party preventing or delaying the carrying out of the agreement. Then the question is: What is the meaning of the phrase "then this agreement shall be suspended"? The events mentioned in cl. 17 upon which the agreement is to be suspended are numerous and extremely diverse in character; some may be of very short duration, and others may last for a long and indefinite period; some events (such as strikes or suspension of labour) may prevent the plaintiffs from producing ore; some (such as scarcity of trucks for taking away concentrates) may prevent the defendants from taking delivery. But however trivial or important the delay occasioned by the event, upon its happening "then this agreement shall be suspended during the continuance of any and every such disability." Having regard to the numerous and intricate provisions of the agreement, it seems quite unreasonable, and indeed extravagant, to suppose that the parties could have intended that a wash-away of a railway, or a paucity of tramway trucks temporarily interfering with production or delivery, should suspend the carrying out of the very elaborate provisions of the agreement for determining by assay the percentages of silver, zinc, and lead contained in ore previously delivered, or the reference to an arbitrator assayer, where the difference between the assays made by the respective parties exceeded the limits specified, or the detailed procedure elaborated in the agreement for the purpose of calculating the ultimate price payable for ore already delivered, or the amount of the "returning charge" based upon the rise or fall in the price of spelter (ordinary brands) and upon the amount of the lead contents of the concentrates. Indeed, the argument that upon the happening of any event mentioned in cl. 17 the whole agreement was suspended led manifestly to such absurd results that the defendants then contended that the true construction was that all the agreement was suspended except the portion of it relating to ore already delivered. It was said that the reason of the thing required this construction, although not definitely so expressed. But such a benevolent construction would not obviate all difficulty, having regard to other provisions of the agreement, unconnected with ore already delivered, which it could not have been intended should be suspended. Thus by cl. 2 of the agreement of 1910 the plaintiffs are to fix the quantity in excess of 85,000 tons, but not exceeding an additional 10,000 tons, to be produced and delivered in each year, and are to give notice to the defendants of the amount so fixed on or before April 30 in each year. It cannot be that if by an accident in the last week of April and before the annual notice is given, production or delivery of ore is suspended for, say, ten days the agreement is thereby suspended, and the plaintiffs in consequence unable to give the notice until on or before April 30 in the following year. This could not have been intended, as there would be no real connection between cause and result. Again, if by the happening of an event, within the meaning of cl. 17, the plaintiffs should be prevented from producing a sufficient quantity of zinc concentrates to fulfil their contract, they were to be at liberty under cl. 19 to acquire and tender to the defendants other zinc concentrates. If the whole agreement were suspended this clause would be suspended, which is absurd, as it is only intended to come into operation when there is a suspension under cl. 17. Again, by cl. 3 of the agreement of 1910 the plaintiffs agree not to sell zinc concentrates to any persons other than the defendants while the agreement shall be in force. It could not have been intended that whenever the defendants were unable to take delivery for a few days through some temporary interruption that the agreement should be suspended, the consequence of which would be that the plaintiffs could take advantage of the occasion and sell their whole accumulated stock elsewhere. Other clauses and events pointing to the same conclusion might be referred to.

Upon these grounds I am of opinion that it is not possible to give to the words occurring in cl. 17, "this agreement shall be suspended," their natural and

ordinary meaning, and that the words mean that deliveries under the contract are to be suspended. The result of this construction is that the agreement does not contain a clause suspending its entire operation during the war, but it is to be read as if the clause merely suspended deliveries, leaving the rest of the contract subsisting between the parties to be performed according to its tenor. But to carry out during the war any part of the contract would involve intercourse with the enemy and so would be illegal. Under cl. 2 of the agreement of 1910 the notice is to be given before April 30 in each year. This notice regulates not only the yearly quantity, but the monthly quantity, as delivery is to be given and taken in about equal monthly deliveries. Again, the notice exercising the option under cl. 2 of the agreement of 1910 cannot be given. Again, under cl. 6 of the agreement of 1910 notice is to be given before July 5 in the year following the year of delivery. There are other clauses, including the arbitration clause—cl. 21—of the agreement of 1908, all pointing to the necessity of intercourse although deliveries may be suspended under cl. 17, and thus rendering the further performance of the contract illegal. The result is that, in my opinion, the outbreak of war has dissolved the contract between the parties so far as regards the future performance after Aug. 4, 1914. The remedy of either side for what had previously been carried out remains in abeyance until the termination of the war: see *Esposito* v. *Bowden* (1); *Janson* v. *Driefontein Consolidated Mines* (2), per LORD LINDLEY ([1902] A.C. at p. 509).

There remains, however, another point of view from which the matter must be considered. The contract of 1910 not only provides that the defendants shall purchase the plaintiffs' whole production, but it also stipulates that the plaintiffs shall not sell their concentrates to any other person. This negative stipulation remains in force, according to the tenor of the agreement, as well during a war as during a temporary strike or accident, or breakdown of machinery. Again, by cl. 5 the defendants have the right to leave as much as 2,200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at plaintiffs' risk for an indefinite period. Thus the position is that the defendants cannot take delivery, and yet, according to the contract, the plaintiffs cannot sell their production elsewhere and must keep their floors and vats and other premises encumbered with concentrates which they are not permitted to dispose of, and thus the whole of this great industry must be brought to an entire standstill. I have in my mind and am fully aware of the letter of the defendants' solicitors of July 20, 1915, but the rights of the parties must be considered with reference to their position under the agreement at the outbreak of war. Moreover, even if the plaintiffs were entitled to sell elsewhere any concentrates produced during the war, it might be a matter of extreme difficulty to the plaintiffs to do so to the best advantage if they are unable to enter into forward contracts for definite periods, and can only dispose of such concentrates as at the moment they have on hand, and with the risk of being called upon, possibly at short notice, to resume deliveries to the defendants. The effect of such an agreement as the present one, dealing with an important commercial product on a very large scale, is to prevent the resources of the country from being developed and labour from being employed, and the value of the mineral from being realised and the proceeds utilised, in the best interest of the country. Moreover, the result of preserving intact for the defendants (as the agreement purports to do) all concentrates on the floors, in the vats, or otherwise made ready by the plaintiffs would be to enable the defendants upon the conclusion of peace to resume their trade as speedily and in as great volume as possible, and so to diminish the effect of the war on the commercial prosperity of the enemy country, which it is the object of this country during the war to destroy. To recognise such a contract and to give effect to it by holding that it remained legally binding upon the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy.

"It would be to undo by means of British tribunals the work done for the nation by its naval or military forces":

per LORD LINDLEY in *Janson* v. *Driefontein Consolidated Mines* (2) ([1902] A.C. at p. 507). Such an agreement is, in my opinion, void as tending to assist the King's enemies. To carry out such an agreement during the war, and to withdraw goods from commerce and preserve them for the enemy after the war, is little removed from actually trading with the enemy. In *Furtado* v. *Rogers* (3), LORD ALVANLEY, C.J., in delivering the judgment of the Court of Common Pleas, said (3 Bos. & P. at p. 198):

> "We are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament."

Moreover, upon what ground can an agreement not to sell goods during the war be binding in favour of a person who has become an alien enemy? He cannot during the war enforce such an agreement. The true answer must be that the tie has become, not suspended, but dissolved by the war. In *The Hoop* (4), LORD STOWELL said (1 Ch. Rob. at pp. 200, 201):

> "In the law of almost every country the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a persona standi in judicio. . . . A state in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence, and the whole of such commerce is attempted without its protection and against its authority."

This language is as applicable to the future performance of a contract entered into before the war as it is to entering into a contract during the war. The impossibility of enforcing it by an appeal to the law is the same in each case. Much of the language used by CHANCELLOR KENT in *Griswold* v. *Waddington* (5) with reference to a contract of partnership is also applicable to the present case. I am of opinion that the contract in question became dissolved on the outbreak of war, and that the judgment below was right, and that this appeal fails.

PHILLIMORE, L.J.—This action is brought under the Legal Proceedings against Enemies Act, 1915 [repealed], for a declaration that an agreement dated April 4, 1912, and made between a Victorian company of the same name as the plaintiff corporation and its liquidator of the first part, the plaintiff corporation of the second part, and the defendants of the third part, was abrogated and avoided by the breaking out of war between Great Britain and Germany on Aug. 4, 1914, and that the plaintiff corporation was and is released from any duty to supply the defendants with zinc concentrates or otherwise observe and perform the said agreement and two earlier agreements of Dec. 14, 1908, and June 20, 1910, between the Victorian company and the defendants, the benefits and obligations of which were transferred to the plaintiff corporation by the agreement of April 4, 1912. BRAY, J., before whom the case was tried, has given judgment for the plaintiff corporation, and the defendants have appealed.

The agreement of Dec. 14, 1908 (which I shall call the first agreement), provides for the sale by the Zinc Corporation of a large number of tons of zinc concentrates produced at Broken Hill, in the colony of Victoria. It is modified by the agreement of June 20, 1910 (which I shall call the second agreement), and the joint effect of the two is as follows: The Zinc Corporation is to sell and the defendants are to buy in each of the ten years 1910 to 1919 the sellers' production of zinc concentrates at the rate of not less than 85,000 or more than 95,000 tons in each year. The sellers are to give notice on or before April 10 in each year of the exact quantity they produce and deliver. The delivery is to be into railway trucks at the works. There are provisions in detail as to this delivery, as to intermediate

storage, as to the percentage of spelter, silver, and lead, for payments on account with final adjustment, and in certain cases repayment, for weighing, sampling, and assaying, for arbitration on the assays, for fixing the varying prices of spelter, and for establishing a trust fund. There is a clause—cl. 15—in the first agreement, enabling the sellers in the event of the price of spelter falling to a certain point to suspend the operation of the contract (which in this connection seems to mean suspend deliveries), but if they continue to produce they may be required by the buyers to continue to deliver. There are also cll. 17 and 18 in the first agreement and cl. 3 in the second agreement which will require more detailed attention.

The defendants being German subjects, this is an agreement which cannot continue to be performed during the war. I do not think there is any doubt about this. It would involve commercial intercourse with the enemy, which is unquestionably unlawful: *The Hoop* (4), *Esposito* v. *Bowden* (1), *Furtado* v. *Rogers* (3), *Janson* v. *Driefontein Consolidated Mines* (2), and *Robson* v. *Premier Oil and Pipe Line Co.* (6), and numerous other cases, English and American. The American cases up to date are collected in *Kershaw* v. *Kelsey* (7). This agreement being incapable of continued performance during the war—"the end of which cannot be foreseen," *Esposito* v. *Bowden* (1)—is primâ facie dissolved, abrogated, or avoided by the war: see *Esposito* v. *Bowden* (1) and other cases. But it is said for the defendants that this, which would be the general rule, is not applicable to this case, because the parties have made provision for this event, and have provided for the suspension or putting to sleep of the agreement during war between the two countries, or for the postponement of its execution till peace returns. For this purpose cl. 17 of the first agreement is relied on. [The lord justice read the clause.] It is said that either the words force majeure or the words "any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement" introduce and cover the following cause, "war between Great Britain and Germany," and that the agreement is suspended (whatever that may mean) during the war. I will assume that this may be so, and I will assume that a provision that in the event of war between the two nations the execution of the contract shall be suspended or postponed till peace returns can be lawfully made. But do the parties by this clause mean suspension of the agreement or only suspension of the duty of making or taking delivery as the case may be with the further suspension, if deliveries are suspended, of the duty of producing? The defendants contend that the whole agreement is suspended. Again, in their favour, I put aside the almost metaphysical objection that if the whole agreement is suspended the clause suspending is also suspended. Is it possible to say that the words in cl. 17 mean that the whole agreement is suspended, or even that every operative clause in the agreement is suspended? Let us look at some of the causes. Strikes may be long or short. War is of indefinite length. Floods and storms are short, but their consequences might perhaps last long. Stoppage of water supply, washaways of railways, breakdown of machinery, or inability to provide trucks are the most temporary incidents. Are all the elaborate provisions as to payment for past deliveries or repayment of overpayments to be suspended because there is a washaway? May the sellers sell to others during this period? There is the date in cl. 2 of the second agreement on or before which the sellers are to give notice of the quantity they intend to produce and deliver during the year. If they waited, as they lawfully might, till April 30 and a strike broke out on April 28 and continued for a week, would they have lost their right or not, performed their duty of giving notice, and is the quantity to remain unfixed for the year? In the same clause there is an option to be declared not later than Feb. 15 to which the same observations apply. These considerations make it difficult to hold that the words "this agreement shall be suspended" in cl. 17 mean that the agreement or that every operative clause in the agreement is suspended. There are other reasons. The not dissimilar words "suspend the operation of this contract" occur in cl. 15 of the first agreement, and it seems pretty clear that there they only mean suspend delivery. In cl. 18 it is said that

"in the event of suspension of deliveries from any of the causes set out in cll. 15 or 17" certain provisions for extending the period of the agreement and for making up the quantity short delivered shall come into operation. But where has suspension of deliveries been mentioned in cll. 15 and 17 if the defendants' contention be correct? And if it be said that the whole agreement has been suspended, and therefore the deliveries as a part of the operation, then how can cl. 18 be in force? It has been suspended too. Clause 19 is clearly intended to be in force, although the deliveries are suspended.

I come, therefore, to the conclusion that cl. 17 only provides for the suspension of deliveries and as incidental thereto of production, and not for suspension or postponement of the whole contract or of all the reciprocal duties under it. If this conclusion is reached the agreement cannot remain in force. It might, perhaps, be enough to say that it fell under the general rule expressed in *Esposito* v. *Bowden* (1). One might rely also upon the provision in cl. 18 for storing up the metal for the enemy hereafter, as to which see the observations of LORD ALVANLEY in *Furtado* v. *Rogers* (3). But there is a more serious objection in cl. 3 of the second agreement:

> "The sellers shall not so long as this agreement shall be in force sell any zinc concentrates to any person or persons, firm or firms, or corporation or corporations, other than the buyers."

By this clause the British subject is prevented from using his resources -and how important these particular resources are the facts in the case show—for the benefit of his country. The enemy is allowed to tie his hands during the period of the war. If "any act or contract which tends to increase the resources of the enemy" is unlawful, as was said in *Kershaw* v. *Kelsey* (7) (100 Mass. at p. 573), similarly any act or contract with the enemy which tends to diminish the resources of one's own country must be equally unlawful. If, therefore, one of the causes of suspension under cl. 17 is war between Great Britain and Germany, the agreement would be an unlawful one. If, however, as seems reasonable, we are to construe the agreement ut res magis valeat quam pereat, we shall not admit this as one of the causes of suspension; and in that case the parties have not provided for the contingency of this war and the ordinary rule prevails. The agreement has become incapable of performance by reason of the outbreak of war and has been dissolved. I think that the judgment of BRAY, J., is right, and that this appeal should be dismissed.

PICKFORD, L.J.—I agree that this appeal fails. I do not intend to set out the facts or the provisions of the agreement in detail. They have been sufficiently dealt with. I agree with BRAY, J., that, apart from the operation of cl. 17 of the agreement of Dec. 14, 1908, this contract would be dissolved as the carrying of it out would involve a trading with the enemy. But the defendants contend that the effect of cl. 17 is to suspend the whole contract during the continuance of the war, and by so doing avoid any unlawful intercourse with the enemy, leaving the contract in existence though suspended and binding on both parties after the end of the war. This argument depends on two matters: (i) Is war an exception within cl. 17? (ii) Is the whole operation of the agreement suspended by that clause or only the performance by way of delivery? For the purposes of this judgment I shall assume, without deciding, that war is an exception within cl. 17. But on that assumption I do not think the effect of the clause is to suspend and so for the time being put an end to the whole contract. The extent of the suspension must be the same in the case of all the excepted causes, and I think it is inconsistent with the terms of the contract that in all those cases the operation of all its terms is for the time being at an end. I agree, therefore, with the decision of BRAY, J., that the suspension of the agreement means only suspension of deliveries, and that the other terms of the contract remain in force.

I propose to rest my judgment on one of those terms, cl. 3 of the agreement of June 20, 1910. The effect of that clause is to prevent the sale by the plaintiffs

of any part of their concentrates during the continuance of the war. They cannot sell to the defendants because that would be trading with the enemy, and they cannot sell to anyone else because to do so would be a violation of the terms of their contract. There is, therefore, a restriction, by reason of a contract existing between them and an alien enemy, upon the free exercise by British subjects of their right to deal in the merchandise produced by them, in this case a very appreciable proportion of the total production of what may be a very valuable article to this country. This seems to me to be a relation between a British subject and an alien enemy of a nature which is contrary to public policy, because it is calculated to be of detriment to the interests of this country and of assistance to the King's enemies: see per LORD HALSBURY in *Janson* v. *Driefontein Consolidated Mines* (2), where he says ([1902] A.C. at pp. 491, 492):

> "In treating of various branches of the law learned persons have analysed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his or their view contrary to public policy."

It is also, if it be necessary to consider the matter, a relation of a commercial nature. I do not think that it is material that the agreement contained in cl. 3 was valid at the time it was made. As soon as the war began the defendants became alien enemies, and the relation between them and the plaintiffs, before that perfectly valid, became invalid. It seems to me that the case is exactly within the words of LORD TENTERDEN in his work on SHIPPING (5th Edn.), p. 427, quoted with approval by WILLES, J., when delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden* (1) (7 E. & B. at p. 784):

> "If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of this country, the agreement is absolutely dissolved."

It was argued before us that this only relates to the particular description of contract under consideration in that case, but I can see no difference in principle between that contract and any other, and I can see no difference in principle between an agreement to do an act by a British subject and an agreement imposing a restriction upon a British subject in favour of an alien enemy. This was the view taken by the Exchequer Chamber in *Esposito* v. *Bowden* (1), where WILLES, J., said (ibid.):

> "It may be added that the cases above put by LORD TENTERDEN cannot be treated as isolated propositions, but as instances of the general principle of law with which they are prefaced."

I do not in any way dissent from the conclusion that the existence of the unsuspended terms of the agreement would involve trading with the enemy, but in the view I take of the effect of cl. 3 I have not thought it necessary to consider that matter in detail.

Appeal dismissed.

Solicitors: *Birkbeck, Yeo & Co.*; *William A. Crump & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

PEERS *v.* CALDWELL. TAYLOR *v.* CALDWELL

[King's Bench Division (Ridley, Avory and Lush, JJ.), December 14, 1915]

[Reported [1916] 1 K.B. 371; 85 L.J.K.B. 754; 114 L.T. 609; 80 J.P. 181; 32 T.L.R. 190; 14 L.G.R. 346; 25 Cox, C.C. 325]

Gaming—Betting—Automatic machines—Game of skill—Successful player entitled to prize—Object of playing to win prize—Betting Act, 1853 (16 & 17 *Vict.*, *c.* 119), *ss.* 1, 3.

The first appellant owned automatic machines which were kept in the shop of the second appellant for the purpose of allowing them to be played with by persons visiting the shop, the profits being shared between the appellants. The player placed a halfpenny in the machine and then released a ball which gyrated down the machine through projecting metal pins, the object being that it should be caught in the cap of a clown at the bottom of the machine. If that was successfully done, the player received a check entitling him to either a pennyworth or twopennyworth of sweets from the shop and a free turn at the machine, but if the player failed he lost his halfpenny. On a prosecution of the appellants under s. 1 of the Betting Act, 1853 [see now s. 1 of the Betting and Gaming Act, 1960], the magistrate held that the game was one of skill, but that it was immaterial whether the game was of skill or of chance and that an offence had been committed under the Act.

Held (Lush, J., dissenting): the players using the machines were gambling on the chance of winning sweets and were not paying in order to compete in a game of skill, and, accordingly, although the magistrate had found that the game was one of skill, an offence had been committed.

Notes. Considered: *R.* v. *Peers*, *R.* v. *Brown* (1917), 86 L.J.K.B. 797; *R.* v. *Kirby*, *Parker and Patrick* (1927), 20 Cr. App. Rep. 12. Followed: *Bennett* v. *Ewens*, [1928] 2 K.B. 510.

As to unlawful games and automatic machines, see 18 Halsbury's Laws (3rd Edn.) 185, 206 (provisions now substantially repealed); and for cases see 25 Digest 422–427. For the Betting and Gaming Act, 1960, see 40 Halsbury's Statutes (2nd Edn.) 328.

Cases referred to:

(1) *Pessers, Moody, Wraith and Gurr, Ltd.* v. *Catt* (1913), 77 J.P. 429; 29 T.L.R. 381, C.A.; 25 Digest 426, *276*.

(2) *Bracchi Bros.* v. *Rees* (1915), 84 L.J.K.B. 2022; 113 L.T. 871; 79 J.P. 479; 13 L.G.R. 1365; 25 Cox, C.C. 133, D.C.; 25 Digest 426, *277*.

(3) *Bond* v. *Plumb*, [1894] 1 Q.B. 169; 70 L.T. 405; 58 J.P. 168; 42 W.R. 222; 10 T.L.R. 137; 38 Sol. Jo. 99; 17 Cox, C.C. 749; 10 R. 44, D.C.; 25 Digest 443, *367*.

(4) *Fielding* v. *Turner*, [1903] 1 K.B. 867; 72 L.J.K.B. 542; 89 L.T. 273; 67 J.P. 252; 51 W.R. 543; 19 T.L.R. 404; 20 Cox, C.C. 531, D.C.; 25 Digest 425, *271*.

Also referred to in argument:

Carlill v. *Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484; 61 L.J.Q.B. 696; 56 J.P. 665; 8 T.L.R. 680; 36 Sol. Jo. 628; affirmed, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 41 W.R. 210; 9 T.L.R. 124; 4 R. 176, C.A.; 12 Digest (Repl.) 59, *323*; 25 Digest 394, *s*.

R. v. *Deaville*, *R.* v. *Simpson*, [1903] 1 W.B. 468; 72 L.J.K.B. 272; 88 L.T. 32; 67 J.P. 82; 51 W.R. 604; 19 T.L.R. 223; 47 Sol. Jo. 280; 20 Cox, C.C. 389, C.C.R.; 25 Digest 446, *392*.

Dyson v. *Mason* (1889), 22 Q.B.D. 351; 58 L.J.M.C. 55; 60 L.T. 265; 53 J.P. 262; 5 T.L.R. 231; 16 Cox, C.C. 575, D.C.; 25 Digest 422, *251*.

Carlo v. *McIntyre* (1913), 51 Sc.L.R. 49.

Case Stated by the stipendiary magistrate for the city of Liverpool.

An information dated June 11, 1915, was preferred by Francis Caldwell, the

head constable for the city of Liverpool (the respondent), against Ernest Albert Peers, the first appellant, for that he on May 25, 1915, and other days thereafter, being a person using a shop at 38, Oldhall Street, Liverpool, knowingly and wilfully permitted the shop to be used for the purpose of money being received by him and on his behalf as the consideration for an undertaking to give thereafter a certain valuable thing, a check entitling the holder thereof to obtain goods to the value of twopence on a certain contingency relating to a certain game known as "The Clown," contrary to s. 1 of the Betting Act, 1853 [see now Betting and Gaming Act, 1960, s. 17]. A further information, also dated June 11, 1915, was preferred by the respondent against Catherine Taylor, the second appellant, for that she on May 25, 1915, and other days thereafter, being the occupier of a shop at 38, Oldhall Street, Liverpool, knowingly and wilfully permitted the same to be used for the same purpose.

On the hearing of the informations it was proved or admitted that the first appellant was the owner of two automatic machines known as "The Clown," which were placed and kept by him at the shop occupied by the second appellant, who carried on there a small confectionery, refreshment, and sweet shop. The automatic machines known as "The Clown" were worked as follows: The operator first placed a halfpenny in a slot on the right-hand side of the machine, and then, turning a handle, released a ball, which thereupon proceeded to gyrate from the top of the machine downwards through a number of projecting metal pins. Directly under the pins there was a bar to which was fixed the figure of a clown holding out a cap in his hand. This bar and figure could be manipulated by the operator by means of a handle in the left-hand side of the machine across the whole face of the machine, and the aim of the operator was to catch the ball, after it had passed through the pins, in the cap of the clown. If the operator was successful in so catching the ball a check was ejected from the machine having the worth of either 1d. or 2d., and the operator, in addition to receiving such check, also received the right to another turn at the machine free of charge. The checks were negotiable only in the shop. The shop was visited by a large number of persons, particularly youths and young boys, for the purpose of playing with the machines, and the police witnesses testified to the fact that while they were in the shop on May 30, 1915, between the hours of 12.50 p.m. and 1.2 p.m., seventeen boys of fourteen to fifteen years of age came into the shop and used the machines twenty-seven times between them. On the average, those who so visited the shop and so played with the machines were successful in catching the ball and so winning a check about one in every eight attempts. The checks were visible to the operator while he was playing with the machines, and he accordingly knew whether the check which he was seeking to obtain would be worth 2d. or only 1d. The terms and conditions on which the machines were placed and kept by the first appellant in the shop of the second appellant were as follows: The receptacle in each machine into which the halfpennies were received was kept locked, and the key was in the possession of the first appellant, who periodically attended at the shop for the purpose of unlocking it and taking the receipts. The second appellant, under an agreement with the first appellant, was paid by him the full amount of the face value of all the checks which had been won from the machines and negotiated in her shop as aforesaid, and also a further sum equal to 25 per cent. of the net takings of the machines after deduction therefrom of the amount paid to her by the first appellant in respect of such last-mentioned checks.

On behalf of the respondent it was contended that upon the before-mentioned facts it was clear that both the appellants ought to be convicted under the provisions of s. 3 of 16 & 17 Vict., c. 119 (the Betting Act, 1853).

On behalf of the appellants it was contended that it had already been decided by a court of higher jurisdiction that "The Clown Machine" was a game of skill and not of chance (see *Pessers, Moody, Wraith and Gurr, Ltd.* v. *Catt* (1)), and that neither of the appellants could be convicted of "betting" or of using the premises for "betting" with the persons who used the machines as aforesaid.

The magistrate was of opinion that he was bound by the decision that the Clown machine was a game of skill and not of chance, but he held for the purpose of the present proceedings that it was immaterial whether the game was one of skill or chance. He was further of opinion that in the circumstances stated the second appellant was knowingly permitting her premises to be used in contravention of s. 3 of the Betting Act, 1853, and that the first appellant was also using the premises wrongfully, and he accordingly convicted both appellants fining them 20s. each.

By the Betting Act, 1853, s. 1 provided:

"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any . . . game . . . or as or for the consideration for securing the payment or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid. . . ."

By s. 3:

"Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices. . . ."

Gordon Hewart, K.C., and *Caradoc Rees* for the appellants.

Rigby Swift, K.C., and *J. H. Layton* for the respondent.

RIDLEY, J.—In this case the magistrate considered that he was bound by the decision in *Pessers, Moody, Wraith and Gurr, Ltd.* v. *Catt* (1), to hold that the game was a game of skill and not of chance, but he held that it was immaterial whether it was a game of skill or not, and that it was his duty to convict. The magistrate was mistaken in supposing that as a matter of law he was bound to hold that the game was one of skill. No doubt skill enters into the game to a considerable extent, but in every case, as is shown by *Bracchi Bros.* v. *Rees* (2), the question is one of fact, and it would have been open to the magistrate to find that it was a game of chance. We must assume, however, that he found that it was a game of skill, and the question is whether the appellants have brought themselves within s. 1 of the Betting Act, 1853.

The word "bet" is not used in the second part of that section, under which these proceedings were taken, but nevertheless it covers betting in the strict sense of the word, and it also in my opinion includes transactions which may not in ordinary language be called betting. The first part of the section deals with betting, *eo nomine*, on credit. It was pointed out by LORD COLERIDGE, C.J., in *Bond* v. *Plumb* (3) that the preamble to the Act clearly refers to two separate and distinct evils, which it was the object of the legislature to suppress, (i) the opening of betting houses, and (ii) the receipt of money in advance upon an

undertaking to pay money in certain events. I think the fact that the Act was intended to deal with two separate and distinct offences ought not to be lost sight of.

It seems to me that the second part of s. 1 exactly covers what took place in this case when a person put a halfpenny into the slot and had the chance of getting 2d. worth of sweets. There is no reason why such a transaction should not be regarded as coming within the scope of the Act. In *Fielding* v. *Turner* (4), where the same question was raised as in this case—namely, whether a game carried on by means of an automatic machine was an unlawful game, LORD ALVERSTONE, C.J., said ([1903] 1 K.B. at p. 871):

> "It was then argued that there was no unlawful gaming because there was no individual who competed or played a game with the person who inserted a penny in the slot. This, we think, involves a fallacy. There are many lotteries and games of chance in which only the persons who actually stake take part; but here the holder or owner of the machine may be said to back his chance of the money falling into one of the four compartments, in which case it will be retained without return, as against the centre compartment, out of which alone any prize can be drawn. The keeper or owner of any such machine backs his chance against the person who uses it."

I think that that is the proper way to regard what took place in the present instance. This is the simple case of what, without using the word "bet," I will call a wager (to employ an ambiguous term) between a person putting a halfpenny in the slot on the one hand and the owner of the machine and the occupier of the shop on the other. I think, therefore, that the magistrate's decision ought to be affirmed.

AVORY, J.—I am of the same opinion. I will assume, for the purpose of my judgment, that this was a game of skill—i.e., a game which affords scope for skill and is not a mere game of chance. It must be borne in mind, however, that even if a game is a game of skill everyone who plays it does not necessarily play it with skill. A person who plays billiards, a game of skill, may always miss what he aims at and may frequently cut the cloth. A person who plays cricket, which is also a game of skill, may be bowled by every straight ball or caught off the wicket. In neither case does the player show any skill, though he is playing a game in which there is scope for skill. I think it is important to bear that in mind when we are considering what it was that the magistrate had to decide.

He had before him the fact that in the course of twelve minutes in one day seventeen boys used the machines twenty-seven times, and he had to decide whether the user of the machines brought their owner and the occupier of the shop within the second part of s. 1 of the Betting Act, 1853. That section applies to two different kinds of betting. The first part applies to persons who keep an office for the purpose of betting either on credit or for ready money with persons resorting to the office. The second part has been described as being aimed at ready money betting at an office which is kept for the purpose. But although the elliptical expression "ready money betting" has been applied to what the second part of the section is aimed at, yet it is important to remember that in that part the words "bet" and "betting" are not used but have been replaced by other words with a wider meaning, which apparently were employed in order to cover cases that might give rise to the contention that they did not constitute betting in the ordinary sense of the word. We have to determine whether there was any evidence on which the magistrate could find that the appellants were permitting the place to be used for the purpose of any money being received as the consideration for any promise, express or implied, to pay or give thereafter any money or valuable thing on any event relating to a game.

I agree that if it was clear that the halfpennies paid by the boys were paid as entrance fees for the purpose of enabling them to take part in a game of skill, that would not constitute betting and would not be an offence under the first part of

the section. But on the other hand, if it was clear that the consideration for the payment of the halfpenny was solely the promise on the part of the appellants to give 2d. worth of sweets if the ball fell into the clown's cap, that would be within the second part of the section. In the circumstances it was to my mind clearly open to the magistrate, although, following the decision in *Pessers, Moody, Wraith & Gurr, Ltd.* v. *Catt* (1), he came to the conclusion that he must treat this as a game of skill, to hold that the halfpennies were not paid as an entrance fee for taking part in a game of skill, but that the sole consideration for the halfpenny was the promise made by the appellants to give the boy 1d. or 2d. worth of sweets in the event of the ball falling into the clown's cap. I read the magistrate's finding as a finding to that effect when he says that, although the game was a game of skill and not of chance, yet that was immaterial because nevertheless the appellants were acting in contravention of the section. I take that to mean that in his opinion the boys were not in any sense paying their halfpennies as a consideration for the privilege of competing in a game of skill (and I do not for a moment believe that they were doing anything of the kind), but were simply gambling on the chance of getting 2d. worth of sweets. In the circumstances I think that the magistrate was right in holding that the case came within the second part of the section, and the appeal must be dismissed.

LUSH, J.—I regret to say that I have come to a different conclusion. These proceedings were taken, not under the Gaming Act, 1845, but under the Betting Act, 1853. I think that if they had been taken under the Gaming Act, 1845, there were materials on which the magistrate could have convicted, for I do not agree with his view that he was bound as a matter of law to hold that the game was a game of skill. But was he right in convicting under the Betting Act, 1853? That that is a betting Act, pure and simple, is in my opinion perfectly clear from the preamble, from the title, at which the court is entitled to look, and indeed from the language used in the various sections. The title of the Act is "An Act for the Suppression of Betting Houses," and the preamble recites that a kind of gaming had sprung up tending to injury by the opening of places called betting houses. That it is a Betting Act appears to have been recognised by the court in *Bond* v. *Plumb* (3) where the argument for the respondent was that s. 1 was disjunctive, the first part relating to opening, keeping, and using premises for the purpose of betting with persons resorting thereto, and the second part relating to persons using such places for the purpose of receiving deposits on bets. It was not suggested that the Act had any further or wider scope, and I think the court accepted the view that it was an act for the suppression of betting.

Has the magistrate found that these premises were used for the purpose of betting, and if so, was it open to him, on the materials before him, so to find? I do not see that he has found that the premises were used for the purpose of betting. He makes no reference to betting or to the scope or purpose of the Act. Feeling himself obliged to hold that the game was a game of skill, he held that the premises were used for the purpose of money being received as a consideration for a promise to pay money on a game—i.e., a game of skill. In my view, unless on the materials before him the magistrate could and did find that the premises were used for the purpose of receiving deposits on bets or for betting purposes, there could be no conviction under this Act. It is certainly strange if, although under the Gaming Act, 1845, there could have been no conviction in respect of these transactions on the footing that the game was a game of skill, yet there could be a conviction under the Betting Act, 1853, for the same series of acts although the game was a game of skill.

In my view it is not necessary to decide whether, if the game were a game of pure chance, there could be a conviction under the Betting Act, 1853. I doubt very much whether there could be; it seems to me that the proper Act under which to proceed would be the Gaming Act, 1845. But if the game be a game

of skill and not of chance, it seems to me impossible to describe the transaction as the use of premises for the purpose of money being received as the consideration for a promise to pay money on a contingency relating to a game.

What really happened was that the boys paid their halfpennies in order to compete, if I may use the expression, in what has now been held to be a game of skill, on the terms that if they were skilful enough to make the machine do what they desired they were to receive 2d. worth of sweets, but otherwise they were not to receive it. I cannot bring myself to see that they betted with anybody or that the transaction was in any sense a betting transaction. Of course it is quite possible for persons taking part in a game either of skill or of chance to bet as to whether they will succeed or fail. But there the money paid would be paid as the terms of the wager or of the bet. Here the halfpennies were paid, no doubt not for the certainty of obtaining the sweets, but for the purpose of obtaining them, because those who paid thought that they were skilful enough to be able to succeed in the game in which they were invited to compete. Unless this was a transaction in the nature of betting, I do not think that it comes within the Betting Act, 1853. In *Fielding* v. *Turner* (4) proceedings precisely the same as these were taken under the Gaming House Act, 1854, and not under the Betting Act, 1853, and though it may be a mischievous practice to invite boys to play with these machines, yet I do not think we are warranted in extending the terms of the Betting Act, 1853, so as to make the Act apply to a case which cannot properly be said to come within the description of betting or a transaction in the nature of betting. For these reasons I regret to say that the convictions were wrong.

Appeals dismissed.

Solicitors: *Crowder, Oldhams & Co.*, for *G. J. Lynskey & Son*, Liverpool; *F. Venn & Co.*, for *E. R. Pickmere*, Liverpool.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

Re LAWES-WITTEWRONGE. MAURICE *v.* BENNETT

[Chancery Division (Warrington, J.), January 19, 1915]

[Reported [1915] 1 Ch. 408; 84 L.J.Ch. 472; 112 L.T. 931]

Will—Construction—Bequest of "net profits" of company—Bequest of "net profits" of partnership—Gift indefinite in point of time—Gift of principal or only of income.

A testator made a bequest of the "net profits" of a limited company and one of the "net profits" of a partnership.

Held: (i) the rule that a gift of income indefinite in point of time carries the fund producing the income applied to a bequest of the "net profits" of a limited company, but not to one of the "net profits" of a partnership; (ii) "net profits" did not include debentures held by the testator nor moneys owing to him by the company as a creditor.

Notes. As to bequests of unlimited gifts of income, see 34 Halsbury's Laws (2nd Edn.) 243–245; and for cases see 44 Digest 667 et seq. As to bequest of a "business," see 34 Halsbury's Laws (2nd Edn.) 246; and for cases see 44 Digest 692 et seq.

Cases referred to in argument:

Adamson v. *Armitage* (1815), 19 Ves. 416; Coop. G. 283; 34 E.R. 571; 44 Digest 667, *5069.*

Blann v. *Bell* (1852), 2 De G.M. & G. 775; 22 L.J.Ch. 236; 20 L.T.O.S. 162; 16 Jur. 1103; 42 E.R. 1075, L.JJ.; 44 Digest 666, *5052*.

Adjourned Summons taken out by Charles Maurice to have his interests under the codicil ascertained.

Sir Charles Bennett Lawes-Wittewronge, after making his will and a first codicil thereto, the provisions of which are not material to be stated, made a second codicil, dated Oct. 5, 1911, to his will in these terms:

"I also make this further addition to my codicil and leave one-fifth share of the net profits in all my commercial undertakings, being John Bennett Lawes and Co., Ltd., the Millwall Rubber Co., Ltd., and the X. Rubber Co., to Charles Maurice, Manton Grange, Marlborough, Wilts."

The testator died on Oct. 6, 1911. John Bennett Lawes & Co., Ltd. (hereinafter called the chemical company), was formed by the father of the testator in the year 1890, and registered under the Companies Acts, 1862 to 1886, as a company limited by shares for the purpose of acquiring and carrying on a business of chemical manufacturers. The capital of the company was £140,000, divided into shares of £100 each. At the time of his death the testator held 684 of these shares of the aggregate amount of £68,400. In 1910 the testator with Charles Maurice and another, who were then directors of the company, gave a joint and several guarantee to the Union of London and Smiths Bank, Ltd., for the repayment of an advance made to the chemical company of £22,000 and interest. In May, 1911, the testator also gave the bank a sole guarantee for the repayment of a further advance to be made to the company of £10,000 with interest, and these sums were still owing at his death. By way of security for these guarantees the chemical company issued to the testator in May, 1911, a debenture for the nominal amount of £16,000, and as further security the company deposited with him a lease of certain premises. The testator was at his death a creditor of the company for £8,540 in respect of advances made to them. The Millwall Rubber Co., Ltd., the second of the commercial undertakings mentioned in the codicil, was a registered company of which the testator held at his death 8,428 fully paid up shares. The testator had advanced to this company sums amounting to £25,000, and by way of security the company had issued to him a debenture for the same amount. On Oct. 31, 1911, the Millwall Rubber Co. went into voluntary liquidation, and on the same day the executors of the testator appointed a receiver of the undertaking and property of the company comprised in the debentures. The remaining commercial undertaking mentioned in the codicil, the X. Rubber Co., was a partnership entered into verbally by the testator with certain other persons who were the inventors of a pump. The testator was responsible for the debts of the partnership on the understanding that he was to have two-thirds of the assets of the partnership. He had advanced a sum of £1,485 on account of the partnership. After his death his executors advanced a further sum of £800 on the same account out of the estate of the testator. The executors entered into an agreement in May, 1912, with the remaining partners that the above advances were to be repaid out of the assets of the partnership, and that two-thirds of the profits were to belong to the testator's estate. The chemical company's undertaking was subsequently sold.

Clauson, K.C., and *Ashworth James* for the applicant.

H. Terrell, K.C., and *Bischoff* for the executors and trustees of the will.

WARRINGTON, J.—The question in this case turns on the meaning and effect of a very few words in the second codicil to the will of the testator. [HIS LORDSHIP read the bequest and stated the facts as to the testator's interest in the three undertakings, and continued:] What is the meaning and effect of those words in the codicil? To deal in the first place with the testator's interests in John Bennett Lawes & Co. and the Millwall Rubber Co., the expression "share of the net profits" cannot, in my opinion, include moneys owing to the testator as a creditor. I think

that the expression "one-fifth share of the net profits" means "one-fifth share of that which I receive from the net profits made by these undertakings," a share of the fund produced by the businesses after deducting the liabilities and expenses. Therefore, the plaintiff is not entitled to any part of the two loans of £8,540 and £25,000, or of the debenture of the Millwall Rubber Co.

Leaving the X. Rubber Co. to be dealt with separately, I have now to deal with the testator's remaining interests in the two limited companies, his holding of shares in those companies. What is the effect of the gift of a share of the net profits? It is an undoubted rule of law, or rather, perhaps, of construction, that a gift unlimited in point of time of the income of a fund is a gift of the fund itself, and the reason is obvious, for it would be absurd to say that the income arising from a fund was for all time to be paid to one person, while the corpus of the fund was to belong to someone else. What I have to consider is whether the rule is applicable to the case of dividends derived by a shareholder from shares in a limited company. I can see no reason why it should not. Dividends arising from a share in a limited company are the fruit of the share, and therefore a gift unlimited in time of the dividends on a share in a company is as much a gift of the share as a gift of the income of a sum of Consols is a gift of the sum itself. In the present case I find a gift of the testator's net profits in John Bennett Lawes & Co. and the Millwall Rubber Co. What can a gift of "net profits" in a limited company mean except a gift of that which the testator was entitled to receive on his shares in the company? A shareholder is entitled to the dividends which are duly declared according to the articles of association of the company, and therefore a gift of the profits of shares amounts to a gift of the dividends on them, and that amounts to a gift of the corpus of the shares. Since the testator's death his interest in John Bennett Lawes & Co. has been sold, and the plaintiff is accordingly entitled to one-fifth of the purchase moneys and second debentures now representing that interest, and also to one-fifth of the testator's share holding in the Millwall Rubber Co.

The case of the X. Rubber Co. is peculiar. That is a partnership firm, not a limited company. I cannot see how the net profits of a share in a partnership can come under the rule to which I have referred. The net profits of a partnership business are not the fruit of the capital employed in the business alone, but are the result of the employment of the capital and of the exertions of the partners as well; moreover, a partner's share of the profits may, and often does, bear no relation to the share in which he is interested in the capital of the partnership. Therefore, the rule does not apply to a gift of a share of the net profits of a partnership, and such a gift does not entitle the legatee to a share in the corpus of the assets; but the words of the gift must have some meaning and effect given to them, and the true meaning is that the legatee, his executors, administrators, or assigns, are entitled to receive a share of that part of the net profits which would otherwise have been payable to the executors of the testator so long as the partnership business is being carried on.

Solicitors: *Walton & Co.*; *Bischoff, Coxe, Bompas & Bischoff.*

[*Reported by* N. TEBBUTT, ESQ., *Barrister-at-Law.*]

Re OXLEY. JOHN HORNBY & SONS *v.* OXLEY AND ANOTHER

[Court of Appeal (Cozens-Hardy, M.R., Buckley and Phillimore, L.JJ.), February 17, 18, 1914]

[Reported [1914] 1 Ch. 604; 83 L.J.Ch. 442; 110 L.T. 626; 30 T.L.R. 327; 58 Sol. Jo. 319]

Executor—Business of testator carried on—No interference by testator's creditors—Implication of assent—Right of executor to indemnity—Rights of creditors of business after testator's death.

Executors carried on the testator's business, although there was no provision in the will directing them to do so, for the benefit of one of themselves, a beneficiary. Creditors of the testator knew that the business was being carried on, but took no steps to interfere with it. The business having failed, creditors of the business in respect of debts arising after the testator's death sought a declaration that the executors were entitled to an indemnity out of the assets of the business in priority to the testator's own creditors, and that they (the new creditors) were entitled to the benefit of that indemnity.

Held: it was not to be inferred from the fact that the old creditors did not intervene and insist that the business should be stopped, but merely stood by and did not interfere, that they assented to the business being carried on for the benefit of the estate with the result that the executors were entitled to be indemnified out of the estate and the new creditors of the business were entitled to avail themselves of that indemnity.

Re Brooke, Brooke v. *Brooke* (1), [1894] 2 Ch. 600, overruled.

Re Hodges, Hodges v. *Hodges* (2), [1899] 1 I.R 480, disapproved.

Notes. Distinguished: *Re Murphy's Estate, Morton* v. *Marchanton* (1930), 74 Sol. Jo. 321.

As to power to carry on the business of the deceased, see 16 Halsbury's Laws (3rd Edn.) 366–369; and for cases see 24 Digest (Repl.) 664, 665.

Cases referred to:

(1) *Re Brooke, Brooke* v. *Brooke*, [1894] 2 Ch. 600; 64 L.J.Ch. 21; 71 L.T. 398; 8 R. 444; 24 Digest (Repl.) 664, *6531.*

(2) *Re Hodges, Hodges* v. *Hodges*, [1899] 1 I.R. 480; 24 Digest (Repl.) 665, **1624.*

(3) *Re Millard, Ex parte Yates* (1895), 72 L.T. 823; 24 Digest (Repl.) 664, *6532.*

(4) *Re Gorton, Dowse* v. *Gorton* (1889), 40 Ch.D. 536; 58 L.J.Ch. 403; 60 L.T. 305; 37 W.R. 341, C.A.; on appeal sub nom. *Dowse* v. *Gorton*, [1891] A.C. 190; 60 L.J.Ch. 745; 64 L.T. 809; 40 L.J.Ch. 745; 64 L.T. 809; 40 W.R. 17, H.L.; 24 Digest (Repl.) 664, *6530.*

Appeal from a decision of Joyce, J., on a summons by which the plaintiffs sought a declaration that the defendants, executors who had been carrying on the testator's business, were entitled to an indemnity out of the assets of the business in priority to the testator's own creditors, and that they (the plaintiffs), who were new creditors of the business, were entitled to the benefit of that indemnity.

The testator, a boilermaker, who died on Aug. 4, 1908, by his will dated May 19, 1908, after appointing his wife Mary Abigail and his son Charles Jacob Oxley joint executors thereof, devised and bequeathed all his real and personal estate unto his wife for her absolute use and benefit, subject to the payment by her of all his debts, funeral expenses, and the expenses and duties incidental to the proving of his will. After the death of the testator the executors continued to carry on the business as "executors of Barker Oxley" till the beginning of November, 1912, when, by an order in bankruptcy, dated Nov. 6, 1912, they were adjudicated bankrupt. This action was commenced by creditors of the testator at the time of his death, for the administration of the testator's estate, and by an order

therein dated Nov. 7, 1912, a receiver of the testator's personal estate and manager of the business was appointed, and the usual accounts and inquiries in a creditor's administration action were ordered. On Mar. 8, 1913, this summons was taken out by the present creditors of the business of the testator as carried on by the executors between the death of the testator and November, 1912. The summons was adjourned into court and was heard on Dec. 4 and 5, 1913, before JOYCE, J., who held that mere standing by and non-interference by the testator's creditors were not sufficient, where one of the executors was the beneficial owner and the other her son, to give them a right of indemnity for debts contracted in carrying on the business. The executors had carried on the business for the benefit of themselves and not for the benefit of the old creditors, and, therefore, applying the decision in *Re Millard, Ex parte Yates* (3), the summons would be dismissed. The plaintiffs appealed.

Cunliffe, K.C., and *Horace Freeman* for the new creditors.
Hughes, K.C., and *W. J. Whittaker* for the executors.

COZENS-HARDY, M.R.—This is an appeal from a decision of JOYCE, J., and it raises a point which has been presented to us as one of great difficulty. I am bound to say I do not feel pressed with any of the suggested difficulties.

The case is one in which a boilermaker made a will, and appointed as executors his widow and one of his sons. The widow was the sole residuary legatee. The estate as sworn to by the executors for the purposes of probate was solvent, and I have not heard anything to satisfy me or even to suggest the probability that the estate was not perfectly solvent at the death of the testator. The will contained no provision whatever about carrying on his business. There was no trust to that effect in the will. But the widow, who was obviously dependent upon what she could get from the business for her maintenance, carried the business on with the aid of the son, who was co-executor, and two other sons, I think, who were employed in the business and who received wages. The result was that the widow got, I think, it is said, £2 a week, but I am not quite sure of that figure, which supported her until the time arrived in the autumn of 1912, when the executors, who had carried on the business under the style of Executors of the Testator Barker Oxley, got into difficulties and execution was put in. That was followed by bankruptcy proceedings. It was also followed by an action commenced by Hornby & Sons on behalf of themselves and all other the creditors of the deceased against the executors. What was that action, and what was the decree that was made upon it? It was the commonest of common administration decrees. The only order that was made was for an account of the assets of the testator. I do not read the order because it is in a perfectly well-known common form. There is nothing whatever about assets which were produced by the trading subsequent to the death of the testator. It simply is a proceeding in which admitted creditors say that there are assets of the testator which are still bona testatoris in existence, and that the same must be applied to the payment of their debts. But then it is said that the executors carried on the testator's business for, roughly, three or four years; that they did it openly; and that they did it trading as executors. The creditors must have known those facts, and I assume they did know them. I think that it is proved that they did know that the business was being carried on by the executors. It is, therefore, said that there is something which entitles the executors to have a lien upon all the assets of the testator to indemnify them against the liabilities which they have incurred in carrying on this business, and it is said first of all that *Dowse* v. *Gorton* (4) decides this point in their favour.

Dowse v. *Gorton* (4) seems to me to be a case which is very strongly indeed against the present application, and certainly is not in favour of it. It was a case where there was a trust to carry on the testator's business—a trust which bound the beneficiaries under the will; to give, not a personal indemnity, but an indemnity out of the estate in favour of the trustees who in the due exercise of that trust carried on the business. Then came this question: Were the creditors

bound to give the same indemnity? Had they put themselves in the true legal position of being beneficiaries or cestuis que trust under the trust contained in the will? It was held there that they had put themselves into that position, and that they could not in those proceedings, and having regard to the view which they had themselves taken in that action, be allowed to approbate and to reprobate at the same time. The proceedings which were there taken are briefly stated [1891] A.C. at p. 193. An originating summons was taken out by one of the true creditors of the testator, asking not merely that all the assets of the testator at the date of the testator's death, but everything which was in existence at the date when the business ceased to be carried on by the trustees should be applied in payment of the debts of the testator, and, further, that there should be no claim whatever for indemnity by the executors. That is to say, the summons sought to get the benefit of the subsequent trading without any provision for giving indemnity to the persons who had produced those assets. Anything more different than the present case from *Dowse* v. *Gorton* (4) I cannot imagine. The plaintiffs never claimed the subsequent assets. They had taken simply a common administration decree. But in that case the House of Lords, following the Court of Appeal except in one respect, went into the considerations which tended to show and did satisfy the court that there was an actual assent to the trustees carrying on this business for the benefit of the creditors. That being so, it was not difficult to arrive at the conclusion which seems to me inevitably to have followed that the creditor who had given that assent was in precisely the same position as a beneficiary under the will, and just as a beneficiary under the will could not take the subsequent assets without giving effect to the indemnity, so the creditor who deliberately elected to come in could not get the benefit of the subsequent assets without giving effect to the indemnity. That really is, I think, the substance of *Dowse* v. *Gorton* (4). LORD MACNAGHTEN gives a very elaborate and valuable judgment as to the rights of a creditor of a testator in a case like that, and he points out that if the creditor knows of the trading and is minded to do so, he can take proceedings against the trustees for a breach of trust for endangering the assets in carrying on the business more than was required for the necessary disposal of the assets of the business. To me it is quite startling to say that a creditor of a testator having a knowledge of that which he might claim to be a breach of trust is bound by abstaining from taking such proceedings to say that those proceedings were carried on by his assent, and that for all purposes he must be deemed to have assented to that breach of trust. Take any other breach of trust than this. I, a creditor, may know that the executors have invested £10,000 of the estates in an improper security which has been lost. Am I to be deemed to have acquiesced in that, and am I debarred from claiming to be paid out of the true assets of the testator's estate which were left after the breach of trust? I think that the proposition scarcely requires to be more than stated.

It is said that, assuming that you must establish that there has been assent or consent, it is sufficient to prove acquiescence—that is to say, not objecting for a considerable period of time. I am quite unable to concur in that view. I think that the passage in LORD HERSCHELL'S judgment in *Dowse* v. *Gorton* (4) ([1891] A.C. at p. 199) that

> "the mere fact that a creditor stood by under such circumstances, and did not immediately take steps to enforce his debt, would not of itself entitle the executors, as against him, to be indemnified out of the estate,"

puts that very clearly indeed subject only to the one point which counsel for the new creditors made upon the word "immediately." I do not think that there is any great stress laid upon that word. And if authority were wanted for the first time I should certainly be prepared to hold that merely standing by with knowledge of the trading—doing nothing, in other words—is not of itself sufficient to constitute the original creditor of the testator as a person entitled to the subsequent assents, and, therefore, bound to give effect to the indemnity. What, if any, are the acts

of assent which are relied upon here? I do not think that any single act which has been done by any of the three creditors brings the case within the assent or consent which is required by *Dowse* v. *Gorton* (4).

Then it is said that there is the judgment of KEKEWICH, J., in *Re Brooke, Brooke* v. *Brooke* (1), and likewise the judgment of the Master of the Rolls in Ireland, to which I must also refer, in *Re Hodges, Hodges* v. *Hodges* (2). It is said that those two judgments do not interpret *Dowse* v. *Gorton* (4) in the way that I have stated, and lay down propositions that entitle the creditors in the present case to succeed. But with great respect to KEKEWICH, J., I cannot assent to the passages in his judgment which I am about to read. They do not seem to me to be the law. He says ([1894] 2 Ch. at p. 607):

> "In a case of this kind, where, after the death of trader, the business is carried on by the executor for some time, and then ultimately there is a conflict between the creditors, properly so called, of the testator, and the creditors of the business, that is, of the executor who carries on the business out of the assets of the testator, then it is for the creditors of the business to show, if they can, that the business was carried on with the assent of the creditors of the testator, or for the creditors of the testator to show the contrary. The creditors of the testator have their own remedy: they can step in at any time. They must be presumed to know of the death of the testator, and that the business is being carried on by the executor, and the law says that that cannot be done without their assent."

With great respect to the learned judge, that is a proposition which cannot be maintained. He goes on to say:

> "Therefore, if they have not interfered, they must be treated as having assented, and the indemnity of the executrix follows by reason of their assent."

In so far as that illustration—that mere standing by, mere knowledge, amounts to giving of assent—I cannot concur in that view; and I think that the dictum, or decision if you like, is one which cannot be the law. The Master of the Rolls in Ireland in *Re Hodges, Hodges* v. *Hodges* (2) really follows, I think, what KEKEWICH, J., said. He takes the same view that mere knowledge and abstaining from interference is sufficient, that the right of the creditor like any other right may be prejudiced, be lost by acquiescence and by neglect. And he says: "It may be a case where the creditors have forfeited their rights by laches or acquiescence." With great respect to the learned Master of the Rolls I think that in following the decision of KEKEWICH, J., he was following a decision which we ought not to consider as good law and which so far as it is necessary ought to be overruled by us.

I do not refer to the bankruptcy case of *Re Millard, Ex parte Yates* (3), in which two of the lords justices differing from LORD ESHER took a view which seems to me quite inconsistent with the new creditors' case here. There it was plain that there was acquiescence and knowledge. But this court, or the majority of this court, took the view that that was not such evidence of consent to the carrying on of a business for the benefit of the original creditors as was sufficient. They held there, and RIGBY, L.J., in particular, held there as I hold here, that the business was not carried on for the benefit of the creditors of the testator. I have no doubt that in the present case the business was carried on in good faith for the benefit of the widow and the family of the testator, who, for three or four years had been maintained out of the assets. Therefore, for the reasons that I have given, this appeal fails and must be dismissed with costs.

BUCKLEY, L.J.—Where a trader dies leaving assets including his business, and leaving creditors including his trade creditors, the rights of his creditors are to have his assets realised in due course of administration and applied in pay

ment of their debts. The dead man may or may not by his will have directed or authorised his executors to carry on his business. Whether he has done so is to the creditors perfectly immaterial. The present is a case in which there was no direction in the will to carry on the business. But in point of fact, the executors have carried on the business, and there arises a contest as between creditors who have become such after the testator's death in carrying on the business, and those who were creditors at the time of the testator's death. The latter creditors claim to be paid in priority by virtue of the assertion of the right of the executors to indemnity out of the assets for the liabilities of the business. That is the question which has been argued before us.

I only propose to say something upon two points which have been argued. The first is this. It is said that by certain letters written in December a claim was made on behalf of the creditors of the old business to all the assets as they had become in carrying on the business after the death of the testator. No doubt if the old creditors—those who were creditors of the testator himself—make a claim, as they did in *Dowse* v. *Gorton* (4), to the assets of the business as carried on by the executors—if they claim to be entitled to the assets of the business as there found at a later date when executors have carried on the business—it may well be that by so doing they are adopting the acts of the executors in carrying on the business by saying that the assets thus acquired are their assets. That has not taken place in the present case. What took place was that the old creditors issued their writ for administration of the estate of their testator. They took a common administration judgment directing inquiries; an account of what was due to the creditors; an account of the funeral expenses; an account of the testator's personal estate coming to the hands of the executors of his will, and so on; and an inquiry as to the outstanding personal estate. They obtained an order for a receiver which was limited in the same way to a receivership of the assets of the testator. The letters which are relied upon are two, perhaps three, in which the receiver, I agree, put forward a claim to the assets as they were at the time after the carrying on of the business, and it is said that something arises upon that. To my mind nothing arises upon it at all. The receiver either was or was not entitled to those assets. In my view of the case, he was not entitled to those assets. He was a receiver of the assets of the testator at the time of his death and as now to be found, and the claim put forward by the receiver had no effect at all, as regards determining any question whether or not the old creditors had assented to the carrying on of the business. I put aside, therefore, any contention which is raised upon those letters of the receiver.

The second point is the main one of the present case. The death was in August, 1908, and the business was carried on until 1912, a period of four years. I agree that that was a substantial time. The proposition which has been argued before us may be expressed thus. If, with knowledge on the part of the old creditors, the business has been carried on and the old creditors have not interfered, that amounts to an assent to the business being carried on by the executors for the estate with the result that the executors are entitled to be indemnified out of the estate, and, consequently, the creditors of the subsequent business are entitled to avail themselves of that. In my opinion, there is no authority for that proposition at all. You must express the assent which is referred to in either one of three ways. You may mean assent to carrying on the business in fact; or you may mean assent to carrying on the business for the old creditors as agents of the old creditors; or you may mean assent to carrying on the business for the estate of which the old creditors are creditors, and against which they have a right to resort. The most you can get out of knowledge and absence of action of any kind is assent to carrying on the business in fact. The position is, that an old creditor is entitled to say: "You must not carry on this business; you are doing it wrongfully as against me." By doing nothing he is simply abstaining from exercising a right of action which he would have. He would be entitled to insist that the business should be stopped and sold, and that he should be paid. But there is a long step

from saying that by not intervening and insisting upon the business being stopped he has assented to the executors carrying on the business either as agent for him so as to make him liable, or that he assented to its being carried on for the estate in the sense of acquiring further assets which would fall into the fund out of which he, as creditor, is entitled to be paid. The argument that mere knowledge and absence of action one way or the other in any way precludes the old creditor from saying that he stands upon his original rights, is altogether inconsistent with *Dowse* v. *Gorton* (4).

The Master of the Rolls has already made observations upon *Re Brooke*, *Brooke* v. *Brooke* (1), which is KEKEWICH, J.'s decision, and *Re Hodges*, *Hodges* v. *Hodges* (2), which is a decision in Ireland. I do not think it necessary that I should say more than that I entirely agree with what the Master of the Rolls has just said. KEKEWICH, J., says this ([1894] 2 Ch. at p. 607):

> "Therefore, if they [the creditors] have not interfered, they must be treated as having assented, and the indemnity of the executrix follows by reason of their assent."

With all respect to the learned judge, I do not think that that is a correct statement of the law. In order to introduce the principle of *Dowse* v. *Gorton* (4) you must establish that the old creditor has so acted either by claiming as he did in *Dowse* v. *Gorton* (4) the assets of the new business or by affirmative acts by which he adopts the act of the executors in carrying on the business as to show that he has abandoned that which is, primâ facie, his rights. That which has been asserted by the plaintiffs in the present case is to have the assets of their testator administered in due course for payment of their debts. Or, if the creditor has assented to another course—namely, that the fund to which he is entitled to look should be risked in trade with the result that there may be loss or there may be further additions made for his benefit, the principle of *Dowse* v. *Gorton* (4) will apply. It seems to me that you must show an active affirmative assent, and that merely standing by with knowledge and doing nothing is not sufficient. For these reasons this appeal fails.

PHILLIMORE, L.J.—I agree that this appeal fails. In *Dowse* v. *Gorton* (4) the Court of Appeal, and the House of Lords, affirming with a variation the order of the Court of Appeal, held that where a man carrying on business dies and leaves a will and the executors carry on the business in continuation the executors may in respect of liabilities which they incur in carrying on that business have a right to an indemnity out of the assets of the testator's estate, and new creditors with whom the executors contract may stand in the shoes of the executors by having that indemnity, and that indemnity is a charge upon the assets of the testator, which will come in priority to the claims of the testator's creditors. That will happen, in one event which is thus stated by LORD HERSCHELL and in slightly different language by LORD MACNAGHTEN in the House of Lords, LORD HANNEN, the third learned Lord concurring with the other judges. LORD HERSCHELL puts it in this way ((1891), A.C. at p. 200):

> "Under the circumstances I think the proper inference is that the businesses were not merely continued for the benefit of those interested under the will, but that they were also carried on with the assent of the representatives of Luke Turner [a creditor] for the purpose of securing the payment of the debt due to them."

LORD MACNAGHTEN states that the question is whether or not the testator's businesses were continued for the benefit of his creditors.

That is the principle of law, and we have to apply that principle of law to the facts of the present case. It must be done with the consent—or assent, if you like—of the testator's creditors recognising the business as being carried on for their benefit and assenting to its being so carried on. In *Re Millard, Ex parte Yates* (3) the members of the Court of Appeal differed as to the precise effect of

the facts. But they all agreed that there must be consent of the creditor or that the business should be carried on. Unfortunately, in *Re Brooke, Brooke* v. *Brooke* (1), KEKEWICH, J., thought that there was a further canon implied by the House of Lords' decision, and that standing by with knowledge was to be deemed to be consent—not to be a portion of the evidence of consent, but to be deemed to be consent. And in *Re Hodges, Hodges* v. *Hodges* (2) the Master of the Rolls in Ireland thought it becoming to follow the decision of another court of first instance, that of KEKEWICH, J., in *Re Brooke, Brooke* v. *Brooke* (1). I agree with the other members of the court that those two decisions go a great deal further than is warranted by the decision of the House of Lords in *Dowse* v. *Gorton* (4). They laid down a canon which is not a true canon in these matters. It still remains a question of fact whether or not the old creditors of the testator have consented to the business being carried on for their advantage. That being a pure question of fact, I think that the learned judge in the court below came to a right decision in the present case. For it was not proved here that the old creditors of the testator had consented or assented to the carrying on of the testator's business at all. Much less had they assented to its being carried on for their advantage. Therefore, I agree with the judgment of JOYCE, J.

Appeal dismissed.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley*, for *A. E. Masser*, Leeds; *F. B. Brook*, for *A. V. Hammond*, Bradford.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

R. LESLIE, LTD. *v.* SHIELL

[COURT OF APPEAL (Lord Sumner, Kennedy, L.J., and A. T. Lawrence, J.). March 16, 17, April 6, 1914]

[Reported [1914] 3 K.B. 607; 83 L.J.K.B. 1145; 111 L.T. 106; 30 T.L.R. 460; 58 Sol. Jo. 453]

Infant—Tort—Liability for—Fraudulent misrepresentation—Tort directly connected with void contract—Loan obtained during infancy by representation that infant of full age—Money no longer in infant's possession—Recovery of amount of loan in action for money had and received—Equitable relief.

An infant obtained loans from a firm of moneylenders by a fraudulent misrepresentation that he was of full age.

Held: the infant was not liable to repay the loans either as damages for fraudulent misrepresentation, or as moneys had and received by him to the use of the lenders, or on the ground that he was compellable in equity to refund the moneys which he had obtained by fraud.

Notes. Applied: *Fawcett* v. *Smethurst* (1914), 84 L.J.K.B. 473. Referred to: *Mahomed Syedol Ariffin* v. *Yeon Ooi Gark*, [1916] 2 A.C. 575.

As to liability of infants for breach of contract and tort, see 21 HALSBURY'S LAWS (3rd Edn.) 138 et seq.; and for cases see 28 DIGEST (Repl.) 496 et seq. (contracts), 520–523 (misrepresentation), and 523–526 (other torts).

Cases referred to:

(1) *Johnson* v. *Pye* (1665), 1 Sid. 258; 1 Keb. 905, 913; 1 Lev. 169; 82 E.R. 1091; 28 Digest (Repl.) 520, *373*.

(2) *Burnard* v. *Haggis* (1863), 14 C.B.N.S. 45; 2 New Rep. 126; 32 L.J.C.P.

189; 8 L.T. 320; 9 Jur.N.S. 1325; 11 W.R. 644; 143 E.R. 360; 28 Digest (Repl.) 523, *402*.

(3) *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854), 9 Exch. 422; 2 C.L.R. 512; 22 L.T.O.S. 318; 18 Jur. 191; 2 W.R. 233; sub nom. *Fairhurst* v. *Liverpool Adelphi Loan Association*, 23 L.J.Ex. 163; 28 Digest (Repl.) 520, *374*.

(4) *Jennings* v. *Rundall* (1799), 8 Term. Rep. 335; 101 E.R. 1419; 28 Digest (Repl.) 523, *401*.

(5) *Zouch d. Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794; 1 Wm. Bl. 575; 97 E.R. 1103; 28 Digest (Repl.) 486, *28*.

(6) *Bristow* v. *Eastman* (1794), 1 Esp. 172; Peake, 291, N.P.; 28 Digest (Repl.) 526, *419*.

(7) *Re Seager, Seeley* v. *Briggs* (1889), 60 L.T. 665; 28 Digest (Repl.) 524, *404*.

(8) *Cowern* v. *Nield*, [1912] 2 K.B. 419; 81 L.J.K.B. 865; 106 L.T. 984; 28 T.L.R. 423; 56 Sol. Jo. 552, D.C.; 28 Digest (Repl.) 518, *350*.

(9) *Alton* v. *Midland Rail. Co.* (1865), 19 C.B.N.S. 213; 34 L.J.C.P. 292; 12 L.T. 703; 11 Jur.N.S. 672; 13 W.R. 918; 144 E.R. 768; 12 Digest (Repl.) 51, *279*.

(10) *Re Jones, Ex parte Jones* (1881), 18 Ch.D. 109; 50 L.J.Ch. 673; 45 L.T. 193; 29 W.R. 747, C.A.; 28 Digest 522, *387*.

(11) *Sinclair* v. *Brougham*, post, p. 622; [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 30 T.L.R. 315; 58 Sol. Jo. 302, H.L.; 12 Digest 316, *2436*.

(12) *Esron* v. *Nicholas* (1733), 1 De G. & Sm. 118; 63 E.R. 996; sub nom. *Exroy* v. *Nicholas*, 2 Eq. Cas. Abr. 488, L.C.; 28 Digest (Repl.) 548, *640*.

(13) *Stikeman* v. *Dawson* (1847), 1 De G. & Sm. 90; 4 Ry. & Can. Cas. 585; 16 L.J.Ch. 205; 8 L.T.O.S. 551; 11 Jur. 214; 63 E.R. 984; 28 Digest (Repl.) 521, *382*.

(14) *Ketsey's Case* (1613), Cro. Jac. 320; 79 E.R. 274; sub nom. *Keteley's Case* 1 Brownl. 120; sub nom. *Kirton* v. *Eliott*, 2 Bulst. 69; 28 Digest (Repl.) 542, *576*.

(15) *Earl of Buckinghamshire* v. *Drury* (1762), 2 Eden, 60; 28 E.R. 818, H.L.; 28 Digest (Repl.) 521, *381*.

(16) *Evelyn* v. *Chichester* (1765), 3 Burr. 1717; 97 E.R. 1062.

(17) *Lemprière* v. *Lange* (1879), 12 Ch.D. 675; 41 L.T. 378; 27 W.R. 879; 28 Digest (Repl.) 543, *588*.

(18) *Nelson* v. *Stocker* (1859), 4 De G. & J. 458; 28 L.J.Ch. 760; 33 L.T.O.S. 277; 5 Jur.N.S. 751; 7 W.R. 603; 45 E.R. 178, L.JJ.; 28 Digest (Repl.) 521, *383*.

(19) *Mohori Bibee* v. *Dharmodas Ghose* (1902), 1 L.R. 30 Calc. 539; 7 C.W.N. 441; L.R. 30 Ind. App. 114; 28 Digest (Repl.) 526, **210*.

(20) *Wright* v. *Snowe* (1848), 2 De G. & Sm. 321; 64 E.R. 144; 28 Digest (Repl.) 523, *394*.

(21) *Levene* v. *Brougham* (1909), 25 T.L.R. 265; 53 Sol. Jo. 243, C.A.; 28 Digest (Repl.) 520, *380*.

(22) *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (1858), 3 De G. & J. 63; 27 L.J.Bcy. 33; 31 L.T.O.S. 242; 4 Jur.N.S. 1257; 6 W.R. 640; 44 E.R. 1192, L.JJ.; 4 Digest (Repl.) 282, *2586*.

(23) *Watts* v. *Creswell* (1714), 2 Eq. Cas. Abr. 515; 9 Vin. Abr. 145; 22 E.R. 435, L.C.; 28 Digest (Repl.) 525, *416*.

(24) *Beckett* v. *Cordley* (1784), 1 Bro.C.C. 353; 28 E.R. 1174; 35 Digest 451, *1921*.

(25) *R.* v. *Wilson* (1879), 5 Q.B.D. 28; 49 L.J.M.C. 13; 41 L.T. 480; 44 J.P. 105; 28 W.R. 307; 14 Cox, C.C. 378, C.C.R.; 4 Digest (Repl.) 28, *234*.

(26) *Maclean* v. *Dummett* (1869), 22 L.T. 710, P.C.; 4 Digest (Repl.) 29, 242.

(27) *Clarke* v. *Cobley* (1789), 2 Cox, Eq. Cas. 173; 30 E.R. 80; 28 Digest (Repl.) 525, *413*.

(28) *Cory* v. *Gertcken* (1816), 2 Madd. 40; 56 E.R. 250; 28 Digest (Repl.) 523, *392*.

(29) *Chubb* v. *Griffiths* (1865), 35 Beav. 127; 55 E.R. 843; 28 Digest (Repl.) 526, *424*.

(30) *Woolf* v. *Woolf*, [1899] 1 Ch. 343; 68 L.J.Ch. 82; 79 L.T. 725; 47 W.R. 181; 43 Sol. Jo. 127; 28 Digest (Repl.) 697, *2066*.

(31) *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 165, 363; 2 Eq. Rep. 1229; 23 L.J.Ch. 793; 2 W.R. 599; 61 E.R. 759; sub nom. *Vaughan* v. *Vanderstegen*, *Vaughan* v. *Wiggins*, *Gales* v. *Lord Dunboyne*, *Oates* v. *Wiggins*, 23 L.T.O.S. 309; 27 Digest (Repl.) 126, *929*.

(32) *Stocks* v. *Wilson*, [1913] 2 K.B. 235; 82 L.J.K.B. 598; 108 L.T. 834; 29 T.L.R. 352; 23 Mans. 129; 28 Digest (Repl.) 509, *221*.

(33) *Miller* v. *Blankley* (1878), 38 L.T. 527; 28 Digest (Repl.) 518, *358*.

(34) *Bartlett* v. *Wells* (1862), 1 B. & S. 836; 31 L.J.Q.B. 57; 5 L.T. 607; 26 J.P. 228; 8 Jur.N.S. 762; 10 W.R. 229; 121 E.R. 924; 28 Digest (Repl.) 520, *377*.

(35) *Moses* v. *Macferlan* (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 12 Digest (Repl.) 605, *4679*.

(36) *Re Beauchamp Brothers*, *Ex parte Beauchamp*, [1894] 1 Q.B. 1; 63 L.J.Q.B. 101; 69 L.T. 646; 42 W.R. 110; 9 R. 35; 10 Morr. 277, C.A.; on appeal sub nom. *Lovell and Christmas* v. *Beauchamp*, [1894] A.C. 607; 63 L.J.Q.B. 802; 71 L.T. 587; 43 W.R. 129; 1 Mans. 467; 11 R. 45; sub nom. *Re Beauchamp Brothers*, *Ex parte Beauchamp*, 10 T.L.R. 682, H.L.; 4 Digest (Repl.) 29, *244*.

Appeal by the defendant from a decision of HORRIDGE, J.

The plaintiffs, a registered firm of moneylenders, brought an action against the defendant claiming £475 as damages for fraudulent misrepresentation, and, alternatively, as money had and received by the defendant to the use of the plaintiffs. The action was tried before HORRIDGE, J., and a jury, and the jury, in answer to a question left to them by the learned judge, found that the plaintiffs were induced to make two loans of £200 each by the fraudulent misrepresentations of the defendant that he was of full age. On further consideration, HORRIDGE, J., gave judgment for the plaintiffs, with costs, for £400, on the ground that a court of equity would not allow an infant to retain what he had obtained by fraud and would order restitution to be made by the infant. The defendant appealed.

H. Dobb for the defendant.

J. B. Matthews, *K.C.*, for the plaintiffs.

Cur. adv. vult.

April 6, 1914. The following judgments were read.

LORD SUMNER.—At the time of the transaction in question the defendant was an infant; he succeeded in deceiving some moneylenders by telling them a lie about his age, and so got them to lend him £400 on the faith of his being adult. Perhaps they were simpler than moneylenders mostly are; perhaps this infant looked unusually mature. At any rate, when they awoke to the fact that they could not enforce their bargain and sought to recover the £400 paid, charging him with fraud, the jury found that the defendant had been guilty of fraud, and he does not now complain of the verdict. On further consideration HORRIDGE, J., gave judgment against him for the full amount of the money that he received. It is not a pretty story to begin life with, and one might have expected that the defendant's chief anxiety would have been to live it down, but money is money, and I suppose £400 is more than he cares to pay, or rather to repay, if he can manage to avoid it. Accordingly, he appeals, alleging that there is no process of law by which the moneylenders can get their money back from him, and if this is so he must succeed on this appeal.

The claim first pleaded is for the amount of principle and interest as damages sustained, because by his fraud the plaintiffs have been induced to make and act

upon an unenforceable contract. As long ago as *Johnson* v. *Pye* (1) it was decided that, although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid.

> "One cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto":

per BYLES, J., in *Burnard* v. *Haggis* (2) (32 L.J.C.P. at p. 191). A married woman, says POLLOCK, C.B., in *Liverpool Adelphi Loan Association* v. *Fairhurst* (3) (9 Exch. at p. 429), speaking before the common law had been altered by the Married Women's Property Act, 1882, is

> "liable for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of affecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were allowed it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture, for there is not a contract of any kind which a feme covert could make, whilst she knew her husband to be alive, that could not be treated as a fraud. For every such contract would involve in itself a fraudulent representation of her capacity to sue. . . . In the case of an infant it was held, for a similar reason, that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. . . . If the action should be maintainable 'all the pleas of infancy would be taken away, for such affirmations are in every contract.'"

The Chief Baron's quotation is from *Johnson* v. *Pye* (1). As LORD KENYON, C.J., says (8 Term. Rep. at pp. 336, 337) in *Jennings v. Rundall* (4) alluding to *Zouch d. Abbot and Hallet* v. *Parsons* (5):

> "This protection was to be used as a shield and not as a sword; therefore, if an infant commit an assault or utter slander, God forbid that he should not be answerable for it in a court of justice. But when an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract."

It is, perhaps, a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile rogue slipped through. The rule is well settled. No action of deceit lay against the present defendant, and this claim was abandoned, but for the purpose of this case it is important to observe the principles on which an infant's immunity is established in this regard. Nor does the other cause of action pleaded fare any better. To the claim for the principal moneys paid to the infant under the contract that failed as for money had and received to the plaintiffs' use there are at least two answers: the infancy itself was an answer before 1874 at common law, and the Infants Relief Act, 1874, is an answer now. An action for money had and received against an infant has been sustained where in substance the cause of action was ex delicto: *Bristow* v. *Eastman* (6), approved before 1874; *Re Seager* (7), and cited without disapproval in *Cowern* v. *Nield* (8). Even this has been doubted. But when the substance of the cause of action is contractual it is certainly otherwise. To money had and received and other indebitatus counts infancy was a defence just as to any other action in contract: *Alton* v. *Midland Rail. Co.* (9), per WILLES, J. (34 L.J.C.P. at pp. 297, 298); *Re Jones, Ex parte Jones* (10), per JESSEL, M.R. (18 Ch.D. at p. 118); DICEY ON PARTIES, p. 284; BULLEN AND LEAKE'S PRECEDENTS OF PLEADING (3rd Edn.), p. 605. Further, under the statute the principle which at common law relieved an infant from liability for a tort directly connected with

a voidable contract—namely, that it was impossible to enforce in a roundabout way an unenforceable contract—equally forbids courts of law to allow, under the name of an implied contract or in the form of an action quasi ex contractu, a proceeding to enforce part of a contract which the statute declares to be wholly void. This has been recently illustrated in the closely analogous case of a claim on the footing of money had and received for moneys paid and irrecoverable under what in law was a lending and borrowing ultra vires: *Sinclair* v. *Brougham* (11).

The ground on which HORRIDGE, J., held the defendant liable was that by reason of his fraud he was compellable in equity to repay the money actually received and professedly borrowed and compellable too by a judgment in personam for the amount, not by any mere proprietary remedy. The rule in equity has been so stated at times by text-book writers, both remote and recent: FONBLANQUE'S EQUITY (1820, 5th Edn.), p. 177; ROSCOE'S NISI PRIUS (16th Edn.), 672; WACE ON BANKRUPTCY (1904), p. 6, but of authority for it there is very little. In *Esron* v. *Nicholas* (12), a decision of LORD KING'S, was much relied upon. He is reported to have said, "infants have no privilege to cheat men"—a wholesome truth indeed, but I should hardly call it a principle. The case was examined by KNIGHT BRUCE, V.C., in *Stikeman* v. *Dawson* (13), who concluded that the facts as reported do not support the decree as made. He procured the note in the registrar's book and found it impracticable to appreciate the decision without knowing the evidence and the pleadings in full. It is a case in which an infant stood by (apparently without actual fraud) while his guardians or a person purporting to be his guardian granted a lease. He received or took the benefit of the fine, but when he came of age he repudiated the lease. In a suit to compel him either to grant the plaintiff a new lease or refund the fine, the decree was that if he did not grant the lease he should pay back the fine. This seems to be the converse of a line of decisions, both at law and in equity, the gist of which is that a person who takes and keeps property cannot rely on infancy to release him from its burdens, especially if sued when of age as in some instances was the case: Year Book, 2 Hen. 6, 31 B.; *Kirton* v. *Eliott* (14); *Earl of Buckinghamshire* v. *Drury* (15); *Evelyn* v. *Chichester* (16); *Lemprière* v. *Lange* (17). Whatever may be thought of some of these decisions, they do not touch the present case. There is a long gap in the cases relied upon after *Esron* v. *Nicholas* (12).

For a very long time and in many forms equity has interfered to give relief against frauds committed by infants, or has refused it to infants guilty of fraud, but the practice and even the principles applicable to such cases were long ill-defined. KNIGHT BRUCE, V.C., in *Stikeman* v. *Dawson* (13), said (1 De G. & Sm. at p. 109):

> "An infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense, and for civil purposes, in the view of a court of equity, though perhaps only when pubertati proximus or older, and not, I suppose, at so early an age as in a criminal sense, and for criminal purposes, and may therefore commit a fraud for which, or for the consequence of which, he may after his majority be made civilly answerable in equity. . . . I agree that in what cases in particular a court of equity will thus exert itself is not easy to determine."

Though many cases have been decided on this subject none has been cited to us till one in last year, in which the decision has directly been that the defendant must pay back under a judgment purely in personam a sum equal to that which he obtained during infancy under a purported contract of lending or borrowing, which was entered into by the lender on the faith of the borrower's fraudulent assertion that he was of full age.

There are, however, some dicta of importance and some decisions which are alleged to bear indirectly on the point. In *Nelson* v. *Stocker* (18), TURNER, L.J., says (4 De G. & J. at p. 464):

"If the case had depended simply upon the point of the defendant having represented himself to be of age when he was not of age, I should have felt no doubt about it. . . . Infants are no more entitled than adults are to gain benefits to themselves by fraud, and had the case therefore depended upon this point alone I should have agreed more fully with the decision of the Vice-Chancellor,"

which was that the defendant should be decreed to pay £1,000 under his covenant made when an infant to place that sum in the hands of trustees contained in a marriage settlement executed by him and by other parties after he had fraudulently represented himself to be of full age. As, however, the party to the settlement who was most concerned, namely, the infant's wife, knew the truth, the lords justices allowed the appeal. It will be seen that the actual decision in *Nelson* v. *Stocker* (18) does not touch the present case, nor does the dictum if its principle be estoppel after majority against denying the truth of the statement made when under age, as explained by SIR FORD NORTH in *Mohori Bibee* v. *Dharmodas Ghose* (19) (L.R. 30 Ind. App. at p. 122): and see *Wright* v. *Snowe* (20). The observations of the Court of Appeal in *Levene* v. *Brougham* (21), that then there would be no such estoppel, were made apparently without a citation of any of these cases, but in any case the Infants' Relief Act, 1874, would be an answer to estoppel.

Much reliance was placed on *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (22), with which should be read the comments on it in *Re Jones, Ex parte Jones* (10), by BACON, C.J. (18 Ch.D. at p. 115) (which are in point though his actual decision was overruled), and by BAGGALLAY, L.J. (ibid. at p. 123). In that case the debtor King, while under age, had obtained advances from the association by a fraudulent misrepresentation that he was of full age. He was adjudicated bankrupt after he came of age and the association was admitted to prove in the bankruptcy for the amount advanced. The lord justice arrived at this conclusion somewhat reluctantly on the authority of uncited decisions of LORD COWPER, LORD HARDWICKE and LORD THURLOW. LORD COWPER's case is probably *Watts* v. *Creswell* (23), in which he says that if an infant is old enough and cunning enough to carry on a fraud, he ought in a court of equity to make satisfaction for it. LORD HARDWICKE's opinion may be that in *Earl of Buckinghamshire* v. *Drury* (15) (2 Eden, at p. 71)—"minors are not allowed to take advantage of infancy to support a fraud"—against which should be set LORD MANSFIELD's more particular statement in the same case (ibid. at p. 72) that if the infant

"took an estate, and was to pay rent for it, he should not hold the estate, and defend himself against payment of the rent, by pretence of infancy."

The allusion to LORD THURLOW, probably, is to *Beckett* v. *Cordley* (24), where he said (1 Bro. C.C. at p. 358), "if there was fraud, of which the infant was conusant, she would be bound as much as an adult." If these be the authorities relied on in *Re King* (22), and I can find none nearer, they hardly touch the decision in that case, nor do they or the decision itself in *Re King* (22) affect the case now before us. There the bankruptcy standing unchallenged and the question being how the assets should be administered among competing creditors or claimants, it was held that persons who had been defrauded by the bankrupt when under age and thereby induced to lend him money had a claim on his assets, not against him personally, which was available in competition with creditors in the full sense of the word. It is clear that JESSEL, M.R., thought the decision anomalous and one not to be extended *Re Jones, Ex parte Jones* (10). Since then it has been decided in *R.* v. *Wilson* (25) that an infant cannot be convicted under s. 12 of the Debtors' Act, 1869 [see now s. 159 of Bankruptcy Act, 1914], of quitting the country fraudulently with property that ought to be divided among his creditors, since in law he has none. Whatever may be said of *Re King* (22) now, it does not govern the present case, but it must be admitted that the language of the lords justices is hardly consistent with any other view than that the bankrupt was in

equity personally liable to pay the debt in question. There is further language of a similar kind in *Maclean* v. *Dummett* (26) (22 L.T.R. at p. 711), where the Privy Council speaks of an infant as "contracting debts" in his trade by fraudulently asserting himself to be of full age, but this again is not necessary to the decision.

These seem to be all the material dicta. As to the cases, *Clarke* v. *Cobley* (27) was one in which the court restored the status quo affected by an infant's fraud by ordering him to return promissory notes, the surrender of which he had procured by falsely stating that he was of age and by putting him under terms not to plead the Statute of Limitations if sued upon them, but a decree against him to pay the amount of the notes, though he was now of age, was expressly refused. In *Cory* v. *Gertcken* (28), when SIR T. PLUMER, V.-C., says (2 Madd. at p. 49),

> "though in general a payment to an infant may be bad, yet if the infant practises a fraud he is liable for the consequences,"

he only decided that a person could not make his trustee pay over again a sum that he had got from him by fraudulently representing himself while still an infant to be already of full age, and in *Chubb* v. *Griffiths* (29) LORD ROMILLY, M.R., when saddling an infant defendant with costs who had been passing off his safes as "Chubb's safes," says that he does so on the principle laid down in *Cory* v. *Gertcken* (28). What he conceived this principle to be I can hardly tell, but at any rate it is not a general liability in equity for fraud. JESSEL, M.R., in *Re Jones, Ex parte Jones* (10) (18 Ch.D. at p. 118), regards *Cory* v. *Gertcken* (28) as a pure action of tort. The grounds of an infant defendant's liability for costs were again discussed in *Woolf* v. *Woolf* (30), another case of similar dishonesty, and the liability was rested on the above principle and authority also without any hint of a wider one that in equity an infant is generally liable for fraud. I think that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show that when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party received from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant even by means of a fraud. This applies even to *Re King* (22). Restitution stopped where repayment began, as KINDERSLEY, V.-C., puts it in *Vaughan* v. *Vandercstegen* (31), an analogous case, "you take the property to pay the debt."

In 1914 in *Stocks* v. *Wilson* (32) an infant who had obtained furniture from the plaintiff by falsely stating that he was of age and had sold part of it for £30, was personally adjudged by LUSH, J., to pay this £30 as part of the relief granted to the plaintiff. This is the case which more than any other influenced HORRIDGE, J., in the court below. I think it is plain that LUSH, J., conceived himself to be merely applying the equitable principle of restitution. The form of the claim was that, by way of equitable relief, the infant should be ordered to pay the reasonable value of the goods which he could not restore because he had sold them. The argument was that equity would not allow him to keep the goods and not pay for them, that if he kept the property he must discharge the burden, and that he could not better his position by having put it out of his power to give up the property. LUSH, J., expressly said that it was a jurisdiction to compel the infant to make satisfaction, and the remedy was not on the contract. He said ([1913] 2 K.B. at pp. 242, 243):

> "What the court of equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages or compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it."

But now comes the proposition which applies to the present case, and is open to challenge. "if he has obtained money he can be compelled to refund it." The

learned judge thought that the fundamental principle in *Re King* (22) was a liability to account for the money obtained by the fraudulent representation, and that in the case before him there must be a similar liability to account for the proceeds of the sale of the goods obtained by this fraud. If this be the ratio decidendi, though I have difficulty in seeing what liability to account there can be, and certainly none is named in *Re King* (22), the decision is distinguishable from the present case and is independent of the above dictum, and I need express no opinion about it. In the present case there is clearly no accounting. There is no fiduciary relation. The money was paid over in order to be used as the defendant's own, and he has so used and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but a compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find the Court of Chancery never would have enforced any liability under circumstances like the present any more than a court of law would have done, and I think that no ground can be found for the present judgment, which would be an answer to the Infants Relief Act, 1874. Accordingly, the appeal succeeds. The judgment must be set aside and entered for the defendant. He will have the costs here, where he succeeded, and of the further consideration below where he ought to have succeeded. Further than this there should be no costs given him. He cannot be made to pay the costs of the action in which he was entitled to judgment, but I think as he was charged with fraud and found guilty of it, he must pay the costs of that issue to be set off against such costs as he gets, and as to any other general costs of the action which must be small, I think there is good ground for saying that there be no order for payment on either side.

KENNEDY, L.J.—The plaintiffs, a firm of moneylenders, sue in this action the defendant, an infant, claiming £475 and interest as damages for fraudulent misrepresentation, and, alternatively, £475 as money had and received by the defendant to the use of the plaintiffs. The alleged misrepresentation was a statement of the defendant that he was of age, made by him in order to induce the plaintiffs to lend him, as they did, two sums of £200 each in December, 1911. The case was heard by HORRIDGE, J., sitting with a common jury. The verdict was that the plaintiffs were induced to make both loans by the fraudulent misrepresentation. HORRIDGE, J., has held that an action ex delicto raising a claim for damages for fraud would not lie against an infant when, as in this case, the fraud was an inducement to the contract the non-performance of which was the basis of the pecuniary injury for which the plaintiffs claim compensation in damages. This, in my judgment, was clearly right. The law is well put by SIR FREDERICK POLLOCK in his PRINCIPLES OF CONTRACT (8th Edn.), p. 78:

> "He [i.e., the infant] cannot be sued for a wrong when the cause of action is in substance ex contractu, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women, the law does not allow. . . . But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable."

The first proposition was established as long ago as 1665 in *Johnson* v. *Pye* (1), and is dwelt upon by the judges of the King's Bench in *Jennings* v. *Rundall* (4). The second is illustrated, in regard to an infant, by *Burnard* v. *Haggis* (2) in 1863, and in regard to the analogous case of a married woman who has represented herself as a feme sole or sui juris by the judgments of the Court of Exchequer pronounced by POLLOCK, C.B., in *Liverpool Adelphi Loan Association* v. *Fairhurst* (3), in 1854.

In regard to the second and alternative claim in this action—a claim as pleaded for £475 as money had and received by the defendant to the use of the plaintiffs, which the learned judge has in his judgment reduced to £400, by the omission, I presume, of interest, I am equally of opinion that the plaintiff's case cannot be maintained. I venture, with all due deference to the fact of the citation of it with approval in 1889 by KAY, J., in *Re Seager* (7), and by my brother PHILLIMORE in 1912 in *Cowern* v. *Nield* (8), to doubt whether in *Bristow* v. *Eastman* (6), tried by LORD KENYON, where an infant had fraudulently converted moneys of the plaintiff to his own use, and, therefore, there was a good cause of action, and substantially ex delicto, and wholly independent of contract, the plaintiffs' claim if and so far as it depended on an indebitatus count upon which the plaintiff was entitled to succeed, ought to have prevailed against a plea of infancy. Be that as it may, I am certainly of opinion that in the present case, where the defendant is an infant and the cause of action is in substance ex contractu and is so directly connected with the contract of loan that the action would be an indirect way of enforcing that contract so far as regards the principal money lent, the plaintiffs were not entitled to recover up their alternative common law claim for money had and received by the defendants for their use. I think that this would be so, as the law stood before 1874, and further that to hold otherwise now would be improperly to open the door to a serious inroad upon the statutory provisions of the Infants Relief Act, 1874, ss. 1 and 2, and the Betting and Loans (Infants) Act, 1892, s. 5. It appears to me that HORRIDGE, J., intended so to hold, and to dismiss the plaintiffs' claim not only so far as it rested on the claim for damages for fraudulent misrepresentation, but also so far as it rested on the claim on an implied contract for money had and received to the use of the plaintiffs. I think that is so, although he gave judgment for the plaintiffs in an action in which those were the only claims pleaded, and so far as the report informs us, no amendment of the plaintiffs' pleadings was asked for or granted. Reading the concluding portion of the judgment commencing with the words

> "There remains, however, the question whether or not a court of equity would order restitution to be made by an infant who had obtained property by fraud"

(29 T.L.R. at p. 555), I think that the learned judge, having all the facts and the finding of the jury before him, held that the just and proper course was, without requiring any formal amendment, to treat the plaintiffs as entitled to base their claim upon an assertion such as was pleaded by the plaintiff in the recent case of *Stocks* v. *Wilson* (32), before LUSH, J., to which HORRIDGE, J., expressly refers in an earlier passage in his judgment. Such a course was, in my opinion, not only unobjectionable, but right.

We have, therefore, to consider in this court whether or not the defendant lay under such an equitable liability to the plaintiffs as entitled them to the judgment for £400 which the learned judge has entered in their favour. Now beyond all question there are cases in which a court of equity will interfere to prevent the fraud of an infant, such as an express misrepresentation of full age, from working an injustice. There is, at the same time, excellent authority for declining to define in positive terms the range of such interference. In *Stikeman* v. *Dawson* (13), a case in 1847 referred to by counsel in the course of their arguments, KNIGHT BRUCE, V.C., after quoting certain language of ULPIAN and PAULUS to show the view of the civil law in regard to the fraud of infants, proceeded thus (1 De G. & Sm. at p. 109):

> "Unquestionably it is the law of England, that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense, and for civil purposes, in the view of a court of equity, though perhaps only when pubertati proximus or older, and not, I suppose, at so early an age as in a criminal sense and for criminal purposes, and may, therefore, commit a fraud for which, or the consequence of which,

he may after his majority be made civilly liable in equity. I am not now speaking of cases in which infants, if liable at all, are liable at law only, or in which adults, if suable in respect of acts done during infancy, are suable at law only. But as far as equity is concerned, the practical application of the rule or doctrine to which I have just been referring must not seldom, I conceive, be matter of much delicacy and difficulty. I agree with a learned author, who says, that in what cases in particular a court of equity will thus exert itself it is not easy to determine."

I shall certainly not embark upon an adventure of which so eminent a master of equity as KNIGHT BRUCE, V.C., has spoken thus discouragingly. Happily, it is not necessary to do so for the decision of the present case. We have not to discover to what other cases the rule or doctrine ought to be held to extend, but whether there is either apparent principle or binding judicial authority for its application to this particular case, in which the plaintiffs have been held by HORRIDGE, J., entitled in virtue of it to obtain by an action in personam repayment from an infant of the principal money owing to them under a contract of loan into which the lenders were induced to enter by a fraudulent representation of the borrower that he was of full age. After a careful consideration of the numerous reported decisions which have been brought to our attention by the industry of counsel, I have come to the conclusion that the judgment by HORRIDGE, J., cannot be supported.

I am not satisfied that the rule or doctrine of equity referred to by KNIGHT BRUCE, V.C., has ever been so applied. LORD SUMNER in his judgment, which I have had the opportunity of reading, has so fully and, in my humble judgment, so satisfactorily dealt with the equity cases and the judicial dicta on which the plaintiffs' counsel sought to find support from the judgment in their favour, as well as the recent judgment of LUSH, J., in *Stocks* v. *Wilson* (32), that it is quite needless for me to consider those cases or those dicta in detail. I desire, however, to add a few further observations. In the first place, it appears to me that while courts of equity have interfered to make an infant restore property found in his possession which he had obtained by fraudulent misrepresentation, as, e.g., the promissory notes in the old case of *Clarke* v. *Cobley* (27); to compel the recognition, in regard to property in his possession, of rights and interests of persons whom he has misled into entering into transactions in regard to it (cf. *Watts* v. *Creswell* (23)); and to prevent the payment over again to the infant of moneys of which he has procured the payment already by a representation of full age, as in *Cory* v. *Gertcken* (28), there is no case in which I can find that a court of equity has given judgment against an infant in circumstances like the present—that is to say, has interfered on the ground of the fraud of the infant whereby he induced the making of a contract of loan—to order the infant to pay the plaintiff a sum equal to the sum borrowed under the void contract, and so in effect, to the amount of the principal lent, to give validity as against the infant to a void contract. In the next place, I desire to say that in my view, while there are no doubt dicta in the judgments of the lords justices in *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (22), upon which the plaintiffs in this case naturally lay stress, the decision ought, as I understand the judgment of LINDLEY, J., in *Miller* v. *Blankley* (33) (38 L.T. at p. 530)—and the language used by JESSEL, M.R., in the later case of *Re Jones, Ex parte Jones* (10) appears to me to be in accord—to be treated as expressing the law in bankruptcy and not as expressing a doctrine of general application. The action in *Miller* v. *Blankley* (33) was an action of debt against a builder for goods supplied. He pleaded infancy as a defence. The plaintiff's counsel relied upon *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (22). In the course of his judgment LINDLEY, J., said (38 L.T. at p. 530):

"We are now asked to carry further the doctrine which TURNER, L.J., in *Re King* (22) expressed his reluctance to act upon. He concurred, however, in

the judgment of KNIGHT BRUCE, V.C.; and no doubt that case must be taken to decide that where an infant borrows money upon a fraudulent misrepresentation, and subsequently becomes bankrupt, the debt is provable in his bankruptcy. I think that is still law in bankruptcy, but we should not take the doctrine any further."

In my judgment, the nature of the claim in the present case is not one to which the equitable rule or doctrine invoked by the plaintiffs applies so as to make the action maintainable, and this appeal must be allowed. As to costs, I concur in the special order stated by the president of this court in his judgment.

A. T. LAWRENCE, J.—The plaintiff sues for £475: first, as damages for deceit; secondly, for money had and received to his use. The plaintiff is a money-lender who made loans to the defendant while he was an infant. He was induced to do so upon the faith of false representations made by the defendant as to his age. The defendant pleads his infancy. It was admitted that upon the authorities the cause of action in deceit must fail: *Johnson* v. *Pye* (1); *Bartlett* v. *Wells* (34).

The defendant was of an age when he would be responsible criminally and also for his torts independent of contract, but not for frauds in obtaining a contract, because to hold him responsible in damages for such frauds would in effect be to hold him responsible for the contract so obtained. It would be a simple thing for those who prey upon infants to obtain from them materials which could be used to support a charge of fraud as easy as obtaining the usual promissory note. The result would be that the infant would have both to establish his infancy and to face a charge of fraud. It has been the policy of the law to protect infants; they have been held incapable of binding themselves by their contracts, with certain exceptions not material to this case. That this is the law was admitted, but it was urged for the plaintiff that these considerations do not affect the claim for "money had and received." HORRIDGE, J., was induced to take the view, following a decision of LUSH, J., in *Stocks* v. *Wilson* (32), that there was in equity a right to relief to the extent of the money actually received. It was said for the plaintiff that the action for money had and received was not founded upon a promise implied by law, but rested upon what was called by counsel a "doctrine of equity." I do not think this argument is well founded. There are, no doubt, many cases in which equity will find relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But I think it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud.

The contracts of an infant which were formerly voidable only, are now by the Infants Relief Act, 1874, made absolutely void. He is further protected in respect of loans by the Betting and Loans (Infants) Act, 1892, ss. 3, 4, and 5. These statutes are as binding upon the equitable as they are upon the common law jurisdiction of the court. I do not think it is correct to say that the action for money had and received is wholly independent of contract. It arises wherever money has been received which ex aequo et bono belongs to the plaintiff. In such case the law implies a promise to pay it to the plaintiff, but where the express promise to repay the money is by statute "absolutely void," it is impossible to imply a promise to repay the same money: see observations of JESSEL, M.R., in *Re Jones, Ex parte Jones* (10) (18 Ch.D. at p. 118). To do so would be to (in large part) defeat the policy of the statute, and would violate the well-established principle that where there is an express promise no other like promise can be implied. LORD MANSFIELD in *Moses* v. *Macferlan* (35) excepted debts "contracted during infancy" from the operation of the action for money had and received, showing that he regarded it as an action depending upon an implied promise.

None of the authorities cited to us, in my opinion, extended to establish the plaintiff's claim in this case. The judgment in *Stocks* v. *Wilson* (32) seems to treat the subsequent sale of property by the infant as wrongful and as affording a foundation for treating the money obtained thereby as received to the plaintiffs' use. If this had been so, if it had been a wrong independent of contract, it would no doubt have made a case in which the plaintiff could by waiving the tort have afforded a consideration for the implied promise to pay over the proceeds, and he could have recovered in the common law court "for money had and received." But this is rendered impossible by the judge's finding that the property in the goods had passed to the infant before he disposed of them (and, as to the major portion thereof, that he did so with the concurrence of the plaintiffs in the action). The really wrongful act was the obtaining the goods under the contract of purchase by the pretence that he was of full age; as to that it was admitted that he could not be sued in tort for the fraud. There was, therefore, no actionable tort independent of contract which could be waived to form the consideration for an implied promise. In *Watts* v. *Creswell* (23), which was relied upon, the fraudulent infant was in possession of the lands as to which he had misrepresented the title, and was setting up a former settlement upon himself to defeat the mortgagee under that title. It was held that he could not do so in equity without making satisfaction for the fraud. This is a long way from establishing anything like an equity to sue as for money had and received. If when the action is brought both the property and the proceeds are gone, I see no ground upon which a court of equity could have founded its jurisdiction. In *Esron* v. *Nicholas* (12) (which is very imperfectly reported) the defendant was ordered to pay a premium received while he was an infant in respect of a lease granted by a person whom he had falsely represented to be his guardian. He was now claiming to receive the rents and profits reserved under a subsequent lease of this very property granted by himself after he came of age. KNIGHT BRUCE, V.C., does not seem to have approved of the case (see *Stikeman* v. *Dawson* (13)), but at least it can be said that the infant's possession of the property and claim to set up the later lease and to receive the rents and profits thereof afforded a ground for the intervention of the court of equity. In *Stikeman* v. *Dawson* (13) the Vice-Chancellor, it is true, refuses relief against the infant upon the ground that he had made express misrepresentation; but there the infant was seeking to recover a certificate of shares which he had sold and handed over to the purchasers. In such a case, if fraud were established against the infant, there would be ground for equity to interfere to restrain him from receiving the certificate without making compensation for the money obtained by the fraud.

The only case which has been cited to us which gives rise to any difficulty is *Re King, Ex parte Unity Joint Stock Banking Association* (22), where a proof in bankruptcy was allowed in respect of a loan made to the bankrupt when an infant on the faith of a fraudulent misrepresentation that he was of full age. KNIGHT BRUCE, L.J., treated himself as bound by authority and the court reluctantly allowed the proof. I have examined all the cases cited on that occasion and cannot find that any one of them goes to the length supposed. The case may be applicable in bankruptcy, but certainly ought not to be extended generally so as to impair the protection which the law affords to infants. I think it cannot now be regarded as of general application: see *R.* v. *Wilson* (25); *Re Jones, Ex parte Jones* (10); *Lovell and Christmas* v. *Beauchamp* (36). If the cause of action for money had and received existed, I should expect to find ample authority for it, as whenever an honest moneylender lends to an infant he has probably been deceived as to the age of the borrower. I think this appeal should be allowed and judgment entered for the defendant.

Appeal allowed.

Solicitors: *B. Barnett*; *Dressler & Earl.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

MONRO *v.* BOGNOR URBAN DISTRICT COUNCIL

[Court of Appeal (Pickford and Bankes, L.JJ.), February 12, 1915]

[Reported [1915] 3 K.B. 167; 84 L.J.K.B. 1091; 112 L.T. 969; 79 J.P. 286]

Arbitration—Stay of legal proceedings—Allegation of fraud by plaintiff—Right of defendants to stay.

A building contract which had been entered into between the plaintiff and the defendants for the construction of sewerage works contained an arbitration clause which provided that if at any time any question, dispute, or difference should arise between the parties upon or in relation to or in connection with the contract, the matter should be referred to arbitration. During the progress of the works disputes arose between the parties mainly as to the nature of the site upon which the works were to be carried out, which the plaintiff alleged was different from that which he had been led to believe by the specification. The plaintiff having brought an action against the defendants claiming (inter alia) damages for fraudulent misrepresentation whereby he was induced to enter into the contract, the defendants took out a summons asking that all proceedings in the action be stayed and the matter be referred to arbitration.

Held: the action, being based on fraud, referred to matters wholly outside the powers of the arbitrator, with which he could not possibly deal, and so could not be said to be a question, dispute, or difference upon or in relation to or in connection with the contract and as such referable to arbitration under the arbitration clause.

Notes. As to refusal of an application to stay proceedings because of an arbitration clause, see 2 Halsbury's Laws (3rd Edn.) 26 et seq.; and for cases see 2 Digest (Repl.) 486 et seq.

Case referred to:

(1) *Kennedy, Ltd.* v. *Barrow-in-Furness Corpn.* (1909), Hudson, Building Contracts, 7th Edn., p. 520, C.A.; 2 Digest (Repl.) 431, *79.*

Also referred to in argument:

Russell v. *Russell* (1880), 14 Ch.D. 471; 49 L.J.Ch. 268, 42 L.T. 112; 2 Digest (Repl.) 486, *399.*

Davies v. *Alliance Assurance Co.* (1904), unreported, cited in Russell on Arbitration (9th Edn.), p. 50.

Appeal by the plaintiff from an order of Lord Coleridge, J., in chambers.

The plaintiff claimed (i) damages for fraudulent misrepresentation by the defendants whereby the plaintiff was induced to enter into a contract with the defendants for sewerage and other works and suffered loss; (ii) an injunction restraining the defendants from using or in any way dealing with the plaintiff's plant and materials now on the defendant's premises; (iii) remuneration for work and labour done, money expended, and materials supplied by the plaintiff at the defendants' request; and (iv) a declaration that the contract made between the plaintiff and the defendants was void and should be rescinded. The material clauses in the contract dated Feb. 16, 1914, between the parties were:

"Clause 4. A borehole has been sunk upon the site, and it has been ascertained that the top 18 ft. of the subsoil consists of somewhat wet, very loose sand and clay, and below this depth the stratum is of stiff clay.

"Clause 129. If at any time any question, dispute, or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract, the matter shall be referred to and determined by the engineer, Mr. Edmund Herbert Stevenson, of No. 38, Parliament Street, Westminster, or, failing him, by a person to be mutually agreed upon, or, failing agreement, to some person appointed by the president for the time being of the Institution of Civil Engineers. Work under the

contract shall continue during the arbitration proceedings. The award of the arbitrators shall be final and binding upon the parties. . . ."

On July 18, 1914, the plaintiff commenced the present action, and on July 27, 1914, the defendants took out a summons asking "that all further proceedings in this action be stayed pursuant to s. 4 of the Arbitration Act, 1889." In support of this application the clerk to the defendant council made an affidavit in which he said that the matters in dispute and difference in the action were within the scope of the agreement to submit to arbitration and were fit and proper to be referred to and decided by arbitration pursuant to the terms of the said agreement and by the arbitrator to be appointed thereunder, and that at the time when the action was commenced the defendant council were and still remained ready and willing to do and concur in all things necessary for causing the said matters to be decided by arbitration under the said agreement and for the proper conduct of such arbitration. In his affidavit in reply the plaintiff said that the fraudulent misrepresentations alleged by him to have been made by the defendants whereby he was induced to enter into the contract were that the specification contained the statement (set out in cl. 4) that subsequently to his entering into the said contract he discovered that the above statement was untrue and that no borehole had been sunk on the site of the present works, and that the borehole which had been sunk had been sunk upon a different site some distance from that referred to in the specification; that he believed that the statement in the specification was false to the knowledge of the defendants and repudiated the contract, and he submitted that it was no longer binding upon him, and that therefore there was good and sufficient reason that the action should not be stayed. On the hearing of the summons before the master on Dec. 15, 1914, the plaintiff was cross-examined upon his affidavit, and the master said that he did not think any primâ facie case had been made out at all which would justify him in treating the contract as being at an end and the arbitration clause as having no effect. He did not think the plaintiff had formed any precise opinion about the nature of the soil or that he (the plaintiff) had gone into it in a way which would enable him to justify a charge of legal fraud against the defendants. It was not such a case as would justify him in refusing to stay the action, and, the defendants agreeing that the matter should not go to their engineer, it seemed to him that they would get a very good tribunal otherwise. The master accordingly made an order in terms of the summons, the defendants consenting that the dispute should be referred to a referee to be agreed, or, in default, to be nominated by the President of the Institute of Civil Engineers.

On Jan. 15, 1915, LORD COLERIDGE, J., made an order dismissing the plaintiff's appeal, being of opinion that the effect of the correspondence was to show that the plaintiff had affirmed the contract.

Holman Gregory, K.C. (*Hinde* with him), for the plaintiff.
Schiller, K.C., and *Richardson* for the defendants.

PICKFORD, L.J.—I think that this appeal must be allowed. A contract was entered into on Feb. 16, 1914, between the plaintiff and the defendants for the construction of sewerage and other works at Bognor. It contained an arbitration clause which was in the following terms: [HIS LORDSHIP read cl. 129.] The plaintiff, the contractor, was of opinion that he had been misled by a statement made in the specification that a borehole had been sunk upon the site upon which he was to build. The words in the specification were: [HIS LORDSHIP read cl. 4.] The plaintiff alleged that that was a fraudulent statement, that no borehole had ever been sunk upon the site upon which he was to build, and that the condition of the ground upon the site where he had to work was very different from that represented to have existed in the borehole. On that ground he brings this action. The plaintiff's claim is

"for damages for fraudulent misrepresentation by the defendants whereby the plaintiff was induced to enter into a contract with the defendants for

sewerage and other works at Bognor and has suffered loss, and for an injunction to restrain the defendants from using or in any way dealing with the plaintiff's plant and materials now on the defendant's premises."

The defendants would only have a right to deal with materials and plants under the contract, and the plaintiff is asking for an injunction to prevent them from doing so. The claim then goes on:

"The plaintiff also claims for work and labour done, money expended, and materials supplied by the plaintiff for the defendants at their request."

The following amendment was subsequently made: "The plaintiff also claims a declaration that the said contract is void and that it be rescinded." The defendants applied to stay the action and to have it referred to arbitration under the arbitration clause. They filed an affidavit to which the plaintiff filed another affidavit in reply. He was cross-examined upon that affidavit before the master, who came to the conclusion that there was no ground for the charge of fraud. Now, I do not think that that was a question for the master at all.

The question was whether this action should be stayed. In my opinion this is in no sense of the word an action upon the contract at all. It is an action for damages for fraudulent misrepresentation which induced the plaintiff to enter into the contract, and it is also an action for an injunction to prevent the defendants from using or in any way dealing with the plaintiff's plant and material, and then, in the alternative, although not in terms so expressed, there is a claim for work and labour done upon a quantum meruit which he could not maintain if his contract were in existence, because he could then only sue for any instalments that might be due according to the terms of the contract. It is, therefore, in no sense an action on the contract at all. Nor do I think that it is an action in relation to or in connection with the contract. In one sense it is an action in relation to or in connection with the contract, because if there had never been any contract there would never have been any cause of action, there would never have been any representation, and there would never have been any claim for damages. But it is not in relation to or in connection with the contract, in my opinion, within the meaning of the arbitration clause. That being so, I think the action is with reference to matters wholly outside the powers of the arbitrator and with which he could not possibly deal. It may be a very bad action; the master thinks it is. The defendants, if they have a sufficiently strong opinion about it, and if they have sufficient materials to do so, have the power to apply to stay the action or to dismiss it on the ground of it being frivolous and vexatious, or on the ground that the claim discloses no cause of action, or that it is an abuse of the process of the court. They have all those steps that they can take if they think fit to do so. But that is not the point that we have to decide. What we have to decide is whether this is an action that ought to be brought within the provisions of the arbitration clause by being stayed and the dispute raised on it referred to arbitration within that clause. I do not think that it is an action which comes within the arbitration clause at all, and therefore I think there was no power to stay it, and it ought not to have been stayed. I think the master proceeded on a wrong basis. He said:

"I do not think this is a well-founded action. I think there is no case of fraud, and therefore I will stay the action and send it to arbitration—that is to say, I will send to arbitration something that the arbitrator has no power to deal with at all."

Then the learned judge dealt with it on another ground, not at all on the same ground as the master had decided it on, but upon this ground, that the plaintiff could not maintain the action by reason of the fact that he had, by a letter dated June 24, elected to affirm the contract, and therefore, could not sue for damages for the fraudulent misrepresentation which he alleged had induced him to enter into it; still less could he sue for rescission. That seems to me to be a matter

which, if it be correct, is a matter to be decided in the action. It may show that the action cannot be maintained, but it does not show that the action is one which falls within the terms of the arbitration clause. I think the learned judge was wrong, and that his decision should be set aside. I do not know that any of the authorities are exactly on all fours with this case, but the case to which BANKES, L.J., referred of *Kennedy, Ltd.* v. *Barrow-in-Furness Corpn.* (1) seems to me to be very much in point and in principle the same as this case. I think the appeal should be allowed.

BANKES, L.J.—I agree. It seems to me that a person who takes out a summons such as this to stay proceedings on the ground that the question which is thereby raised ought to be referred to arbitration has, as the first step, to establish that the matter in question in the legal proceedings is one which is within the scope of the submission to arbitration, and that is the real question which has to be decided here. In the first place, one has to see what the matter in question in the legal proceedings is, and then to consider whether it comes within the scope of the submission to arbitration. Here the plaintiff has brought an action and endorsed his claim upon the writ. The defendants, without waiting for the statement of claim, which I think they might have done, have elected to take out a summons at once to stay the action of which the claim has been indorsed on the writ. I do not think the plaintiff ought to be in a better position because he has amended the writ. At the same time, I do not think that the amendment alters the character of the claim. It is a claim for damages for fraudulent misrepresentation whereby the plaintiff was induced to enter into a contract, and there are also claims for consequential relief, one of which is put in the form of a claim for work and labour done, but the essence of the claim is that the plaintiff is asserting that he was induced by fraud to enter into the contract, and that therefore the contract never was binding. If that is the nature of the claim, it seems to me plain that it does not come within the scope of the submission to arbitration, and it is no answer to say that the plaintiff has mistaken his remedy and ought not to have brought this form of claim which he cannot substantiate, and, if you look into it, you will find that he ought to have brought a different action altogether, and, if he had, it would have been plain that it came within the submission to arbitration. It seems to me that it is of no use saying that. The only point which we have to consider is whether the claim which is brought—whether it is good, bad, or indifferent—comes within the submission to arbitration. I am not saying it by way of encouragement, but it may be there are grounds upon which the defendants could satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious. They may be able to do so upon the ground which seems to have induced the master to take the action he did, or they may do it on the ground which seems to have induced the learned judge to take the view he did. As I said before, I am not saying it by way of encouragement, but those considerations which seem to have affected the master and the learned judge were material only, as it seems to me, if the question they had to consider was whether the case made was a frivolous and vexatious one and ought to have had no weight at all upon the question as to what the plaintiff's claim in fact was. One can only find out what the plaintiff's claim is by looking at the writ, if the matter has not gone beyond the writ, or his statement of claim if it has arrived at that stage. I think that the decisions both of the master and of the learned judge were founded upon a misapprehension of the real question which had to be decided, and however inconvenient it may be to the defendants, who naturally desire that any dispute shall be settled by arbitration, it seems to me that our only course is to allow this appeal and to say that the plaintiff's present claim is not within the scope of the submission to arbitration.

Appeal allowed.

Solicitors: *Walters & Co.*; *Haslam & Sanders*, for *Joseph Jubb*, Bognor.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re LIND. INDUSTRIALS FINANCE SYNDICATE, LTD. *v.* LIND

[Court of Appeal (Swinfen Eady, Phillimore and Bankes, L.JJ.), June 18, 21, 22, July 9, 1915]

[Reported [1915] 2 Ch. 345; 84 L.J.Ch. 884; 113 L.T. 956; 59 Sol. Jo. 651; [1915] H.B.R. 204]

Mortgage—Ranking—Mortgage of expectancy—Bankruptcy of mortgagor—Mortgagees not proving in bankruptcy—Further assignment of expectancy—Priority between mortgage and further assignment.

L. mortgaged his expectancy of a share in his mother's personal estate on intestacy to the N. Co. in 1905, and to A. in 1908. Later in 1908 L. was adjudicated bankrupt. Neither the N. Co. nor A proved in the bankruptcy. After his discharge L. made a further assignment of his expectancy to the plaintiffs. L.'s mother died intestate in 1918. The plaintiffs contended that the mortgages to the N. Co. and A. were of no value as their rights amounted only to contracts to assure in the future, and because of the bankruptcy L. had been released from the mortgage debts.

Held: (i) an assignment for value of future property bound the property directly it was acquired, automatically on the happening of the event, and without any further act on the part of the assignor, and did not merely rest in and amount to a right in contract.

Metcalfe v. *Archbishop of York* (1) (1835), 1 My. & Cr. 547; *Holroyd* v. *Marshall* (2) (1862), 10 H.L.Cas. 191; *Lyde* v. *Mynn* (3) (1833), 1 My. & K. 683; *Re Reis, Ex parte Clough* (4), [1904] 2 K.B. 769, and dictum of Lord Macnaghten in *Tailby* v. *Official Receiver* (5) (1888), 13 App. Cas. 523 at p. 543, approved,

(ii) the mortgagees N. Co. and A. had elected to rely upon their security and not to prove, and, therefore, as mortgagees they stood outside the bankruptcy; moreover any contract contained in the mortgage deeds for vesting the future property in the mortgagees was ancillary, not to the debt, but to the mortgage by which the debt was secured: *Thompson* v. *Cohen* (6) (1872), L.R. 7 Q.B. 527; *Cole* v. *Kernot* (7) (1872), L.R. 7 Q.B. 534, n; and *Collyer* v. *Isaacs* (8) (1881), 19 Ch.D. 342, explained and distinguished; and, therefore, the N. Co. and A. were entitled to rank in front of the plaintiffs.

Notes. Section 37 of the Bankruptcy Act, 1883, has been replaced by s. 30 of the Bankruptcy Act, 1914.

Followed: *Re Gillot's Settlement, Chattock* v. *Reid*, [1933] All E.R. Rep. 334. Referred to: *Re Dent, Ex parte Trustee*, [1923] 1 Ch. 113; *Performing Right Society* v. *London Theatre of Varieties*, [1924] A.C. 1; *Re Warren, Wheeler* v. *Mills*, [1938] 2 All E.R. 331.

As to assignment of after acquired property, see 2 Halsbury's Laws (3rd Edn.) 324; and for cases see 4 Digest (Repl.) 339. For the Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.), 321.

Cases referred to:

(1) *Metcalfe* v. *Archbishop of York* (1835), 6 Sim. 224; 4 L.J.Ch. 154; 58 E.R. 577; affirmed (1836), 1 My. & Cr. 547; 6 L.J.Ch. 65, L.C.; 35 Digest 524, *2534*.

(2) *Holroyd* v. *Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 20 Digest 252, *159*.

(3) *Lyde* v. *Mynn* (1833), 1 My. & K. 683; Coop. temp. Brough. 123; 47 E.R. 44, L.C.; 4 Digest (Repl.) 338, *3075*.

(4) *Re Reis, Ex parte Clough*, [1904] 2 K.B. 769; 73 L.J.K.B. 929; 91 L.T. 592; 53 W.R. 122; 20 T.L.R. 547; 11 Mans. 229, C.A.; affirmed [1905] A.C. 442; 74 L.J.K.B. 918; 93 L.T. 491; 54 W.R. 114; 21 T.L.R. 702; 12 Mans. 347, H.L.; 4 Digest (Repl.) 292, *2665*.

(5) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; 5 Digest (Repl.) 751, *6463*.

(6) *Thompson* v. *Cohen* (1872), L.R. 7 Q.B. 527; 41 L.J.Q.B. 221; 26 L.T. 693; 36 J.P. 822; 4 Digest (Repl.) 186, *1692*.

(7) *Cole* v. *Kernot* (1872), L.R. 7 Q.B. 534, n.; 41 L.J.Q.B. 221; 7 Digest (Repl.) 163, *876*.

(8) *Collyer* v. *Isaacs* (1881), 19 Ch.D. 342; 51 L.J.Ch. 14; 45 L.T. 567; 30 W.R. 70, C.A.; 4 Digest (Repl.) 339, *3080*.

(9) *Robinson* v. *Ommanney* (1882), 21 Ch.D. 780; 51 L.J.Ch. 894; 47 L.T. 78; 30 W.R. 939; affirmed (1883), 23 Ch.D. 285; 52 L.J.Ch. 440; 49 L.T. 19; 31 W.R. 525, C.A.; 4 Digest (Repl.) 338, *3079*.

(10) *Carr* v. *Allatt* (*Executors of Tweedale*), *Allatt* (*Executors of Tweedale*) v. *Carr* (1858), 27 L.J.Ex. 385; 6 W.R. 578; 7 Digest (Repl.) 123, *715*.

(11) *Brown* v. *Bateman* (1867), L.R. 2 C.P. 272; 36 L.J.C.P. 134; 15 L.T. 658; 15 W.R. 350; 7 Digest (Repl.) 15, *65*.

(12) *Reeve* v. *Whitmore*, *Martin* v. *Whitmore* (1863), 4 De G.J. & Sm. 1; 3 New Rep. 15; 33 L.J.Ch. 63; 9 L.T. 311; 9 Jur.N.S. 1214; 12 W.R. 113; 46 E.R. 814, L.C.; 7 Digest (Repl.) 123, *716*.

(13) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest (Repl.) 277, *2542*.

(14) *Re Clarke*, *Coombe* v. *Carter* (1887), 35 Ch.D. 109; 56 L.J.Ch. 642; 56 L.T. 467; 35 W.R. 388; 3 T.L.R. 410; affirmed 36 Ch.D. 348; 56 L.J.Ch. 981; 57 L.T. 823; 36 W.R. 293; 3 T.L.R. 818, C.A.; 8 Digest (Repl.) 555, *95*.

(15) *Grey* v. *Kentish* (1749), 1 Atk. 280.

(16) *Meek* v. *Kettlewell* (1843), 1 Ph. 342; 13 L.J.Ch. 28; 2 L.T.O.S. 205; 7 Jur. 1120; 41 E.R. 662, L.C.; 8 Digest (Repl.) 628, *659*.

(17) *Re Mudge*, [1914] 1 Ch. 115; 83 L.J.Ch. 243; 109 L.T. 781; 58 Sol. Jo. 117, C.A.; 8 Digest (Repl.) 560, *130*.

(18) *Smith* v. *Lucas* (1881), 18 Ch.D. 531; 45 L.T. 460; 30 W.R. 451; 20 Digest 424, *1549*.

(19) *Pullan* v. *Koe*, [1913] 1 Ch. 9; 82 L.J.Ch. 37; 107 L.T. 811; 57 Sol. Jo. 97; 43 Digest 1019, *4602*.

(20) *Legard* v. *Hodges* (1792), 1 Ves. 477; 3 Bro.C.C. 531; 30 E.R. 447, L.C.; 43 Digest 551, *3*.

Also referred to in argument:

Abbott v. *Stratton* (1846), 9 I.Eq.R. 233; 3 Jo. & Lat. 603; 12 Digest (Repl.) 277, **1032*.

Pearce v. *Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122; 70 L.J.Ch. 446; 84 L.T. 525; 17 T.L.R. 366; 8 Mans. 239, C.A.; 5 Digest (Repl.) 1009, *8739*.

Re Hide, *Ex parte Llynvi Coal and Iron Co.* (1871), 7 Ch. App. 28; 41 L.J.Bcy. 5; 25 L.T. 609; 20 W.R. 105, L.JJ.; 4 Digest (Repl.) 287, *2625*.

Belding v. *Read* (1865), 3 H. & C. 955; 6 New Rep. 301; 34 L.J.Ex. 212; 13 L.T. 66; 11 Jur.N.S. 547; 13 W.R. 867; 159 E.R. 812; 5 Digest (Repl.) 749, *6455*.

Deering v. *Bank of Ireland* (1886), 12 App. Cas. 20; 56 L.J.P.C. 47; 56 L.T. 66; 35 W.R. 634, H.L.; 4 Digest (Repl.) 331, **1238*.

Finlay v. *Chirney* (1888), 20 Q.B.D. 494; 57 L.J.Q.B. 247; 58 L.T. 664; 52 J.P. 324; 36 W.R. 534; 4 T.L.R. 322, C.A.; 27 Digest (Repl.) 26, *39*.

Appeal from a judgment of WARRINGTON, J. ([1915] 1 Ch. 744), upon a Special Case.

WARRINGTON, J., decided that (i) the mortgages to the Norwich Union Life Insurance Society and to H. J. Arnold were valid and effectual mortgages by

H. J. L. Lind of his share of his expectancy in his mother's (Florence Lind's) personal estate on intestacy, and (ii) both the Norwich Union Life Insurance Society and H. J. Arnold were entitled to rank in priority to the plaintiffs, Industrials Finance Syndicate Ltd. The plaintiffs appealed. The facts are set out in the headnote and in the judgment of SWINFEN EADY, L.J.

Hughes, *K.C.*, and *R. E. Moore* for the plaintiffs.
Coldridge, *K.C.*, and *Luxmoore* for H. J. Arnold.
Tomlin, *K.C.*, and *Attwater* for the Norwich Union Life Insurance Society.
F. Whinney for G. Lind, the administrator of the estate of Florence Lind.

Cur. adv. vult.

July 9, 1915. The following judgments were read.

SWINFEN EADY, L.J.—This is an appeal from the judgment of WARRINGTON, J., upon a Special Case, in which the facts are fully stated. It will be sufficient to state that on Feb. 21, 1905, Florence Lind, widow, was absolutely entitled to one-third of the residuary personal estate of her late father, then represented by certain investments and cash set out in a schedule to a deed of that date; that Florence Lind was then of unsound mind, so found by inquisition, and had been continuously insane since the year 1895, and had not made any testamentary disposition of her property; and that if she were then to die her next-of-kin would be ten persons, of whom her son, Hugh Lind, would be one. Hugh Lind had thus a reasonable expectation of becoming entitled to a share of his mother's personal estate upon her death intestate. He had not any estate or interest, present or future, vested or contingent, in his mother's property; he had only a spes successionis, a possibility of becoming possessed in the future of a share of his mother's personal estate. On Feb. 21, 1905, he executed a mortgage for £800 to the Norwich Union Life Insurance Society of this possibility, by the description of

> "All that and those the share or shares, rights, estate and interest whatsoever of or to which the mortgagor as next-of-kin of the said Florence Lind, or one of them, or otherwise howsoever is or will be or may be at any time hereafter become possessed of or entitled to in any manner whatsoever expectant upon, or upon, the death of the said Florence Lind, of and in"

her personal estate, whether specified in the schedule thereto or not, including her third share or other her share and interest in her father's residuary personal estate, together with power for the society in the name of the mortgagor or otherwise to demand, sue for, recover, and give effectual receipts for the mortgaged premises, or any part thereof and settle all accounts in respect thereof. On May 20, 1908, Hugh Lind executed a second mortgage upon the same premises in favour of H. L. Arnold to secure £1,500, and the security is expressed to be subject to the prior mortgage of Feb. 21, 1905. On Aug. 15, 1908, Hugh Lind was adjudicated a bankrupt, and on Oct. 12, 1910, obtained his discharge. Neither the Norwich Union nor Arnold proved in the bankruptcy. By a deed dated May 29, 1911, Hugh Lind, in consideration of £260, as beneficial owner, assigned his expectancy to the plaintiffs, subject to a trust thereby declared, as to one moiety thereof in favour of himself. On Feb. 15, 1914, Florence Lind died intestate. By a deed dated Mar. 6, 1914, and endorsed on the deed of May 29, 1914, Hugh Lind, by way of further assurance, assigned to the plaintiffs the share to which he was then actually entitled, and which had purported to be assigned by the therein-within written indenture, and the trust of one moiety for himself was repeated.

The plaintiffs contend that the securities of the Norwich Union and Arnold are of no value, and that the plaintiffs are now absolutely entitled to the share under their deeds of 1911 and 1914, free from any incumbrance. They base this claim upon the bankruptcy of Hugh Lind and his discharge while Florence Lind was still living. They say that the rights of the Norwich Union and Arnold rested

only in contract, and amounted only to contracts to assure in the future, and by way of security for their mortgage debts; that by reason of the bankruptcy the bankrupt has been released from the mortgage debts; that the contracts to assure his expectant interest gave rise only to a right of proof which was not exercised; that any covenant for further assurance was only ancillary to and for the purpose of securing the mortgage debts, and that as the debts are discharged by the bankruptcy and discharge of the debtor, the covenant for further assurance is no longer in force. No question has been raised that any assignee took without notice of prior dealings, nor that any priority has been gained by any notice given after the death to Florence Lind's legal personal representative. These considerations do not arise in the present case.

Is the contention well founded that the rights of mortgagees of an expectancy rest only in contract, giving rise to a right of proof if the assignor shall become bankrupt before the expectancy vests in interest, but otherwise barred by the bankruptcy, and discharge of the bankrupt? In my opinion the answer must be in the negative; that the security of the mortgagee remains in force, and becomes effective whenever the expectancy vests in interest. In *Metcalfe* v. *Archbishop of York* (1) an incumbent duly charged his then present benefice with an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would fully charge the same with the annuity, and that in the meantime the same should be charged and chargeable with the annuity. In 1811, when this transaction was entered into, it was lawful for an incumbent to charge his benefice; but no legal charge on the new benefice was executed until 1818, by which time it had become unlawful, as the Act of 13 Eliz., c. 20, prohibiting the charges on benefices, had then been revived. The Lord Chancellor (Lord Cottenham), affirming the Vice-Chancellor of England (Sir Lancelot Shadwell), held that the deed of 1811 constituted a good equitable charge which attached upon the new benefice as soon as it was acquired. He said it was contended that the covenant

> "amounted only to a covenant for a legal charge, which had become illegal before any attempt was made to enforce it. I am clearly of opinion, however, that this is not the true construction of the deed of 1811, and that there is an equitable charge, independently of the covenant to execute a legal charge."

It was then said for the defendants that all equitable charges rest upon specific performance, and the right to have a legal charge. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee, by the deposit of deeds, to ask for a legal mortgage? It will be observed that in this case the incumbent had no interest whatever in the new benefice at the date when he gave the equitable charge upon it, and yet so soon as the new benefice was acquired it was held that the equitable charge attached, without any further document having been executed. The case shows that an agreement to charge future property creates an immediate equitable charge upon the property coming into existence, independently of the contract to execute some further charge, and cannot be said to rest in contract only.

In *Holroyd* v. *Marshall* (2) it was held by the House of Lords that an assignment by way of mortgage of machinery to be acquired in the future gave a good title to such machinery from the moment when it was acquired, and without any novus actus interveniens. Lord Westbury, L.C., there said (10 H.L.Cas. at p. 211):

> "If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the

specific performance. If it be so, then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

In the same case LORD CHELMSFORD considered the nature of the equity created by agreements to transfer or to charge future acquired property, whether it is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, and decided in favour of the latter view. He added (ibid. at p. 220):

"At law property non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it."

In *Tailby* v. *Official Receiver* (5) LORD MACNAGHTEN stated that *Holroyd* v. *Marshall* (2) laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd* v. *Marshall* (2) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done. LORD MACNAGHTEN then dealt with LORD WESTBURY, L.C.'s reference in *Holroyd* v. *Marshall* (2) to the subject of specific performance, and proceeded to point out that considerations applicable to suits for specific performance ought not to be transferred to cases of equitable assignment where nothing remained to be done in order to define the rights of the parties. He added (13 App. Cas. at p. 547):

"The truth is that cases of equitable assignment or specific lien, when the consideration has passed, depend on the real meaning of the agreement between the parties . . . When that is ascertained you have only to apply the principle that equity considers that done which ought to be done, if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created."

See also *Lyde* v. *Mynn* (3), *Re Clarke* (14), approved in the House of Lords as "unquestionably correct," and *Re Reis* (4). It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor, and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for.

It was urged by the appellants that having regard to the wide language of s. 37 of the Bankruptcy Act, 1883 [now s. 30, of the Bankruptcy Act, 1914,] with regard to debts and liabilities provable in bankruptcy, all liability of the assignor of every kind, under the mortgages of 1905 and 1908, was provable; and that as the debts created by the mortgage deeds were extinguished by the bankruptcy, the contract relating to the future property, which was merely ancillary to and for the purpose of securing the debt, was also discharged. The answer is that the mortgagees under the deeds of 1905 and 1908 elected to rely upon their security,

and not to prove, and therefore, as mortgagees they stand outside the bankruptcy; and, moreover, that any contract contained in those deeds for vesting the future property in the mortgagees was ancillary not to the debt, but to the mortgage by which the debt was secured; in like manner as the covenant not to revoke a will which had appointed a sum of money to a mortgagee was so held in *Robinson* v. *Ommanney* (9) both by KAY, J., and the Court of Appeal. In the same case it was also decided that such a covenant is not released by the bankruptcy of the covenantor, where (as here) there was no breach before the bankruptcy. KAY, J., instanced the case of an ordinary mortgage with the usual covenant for further assurance, where it could not be said that, because the covenantor became bankrupt and was discharged from personal liability for the debt, the consideration was merely gone, and the covenant for further assurance no longer enforceable.

The plaintiffs relied especially upon *Thompson* v. *Cohen* (6), *Cole* v. *Kernot* (7), and *Collyer* v. *Isaacs* (8) in support of their contention that a contract for the assignment of future property, however absolute in form, only amounts to a contract to assign, for the breach of which the assignor incurs a liability provable in bankruptcy, and from which he is released by the order of discharge. It must be remembered that before any of these cases was decided there was a well-established distinction in the case of instruments dealing with chattels, between an assignment of them and a mere licence to seize, between the creation of an interest and a mere licence to take possession; and this distinction carried with it important legal consequences. *Carr* v. *Allatt* (10) and *Brown* v. *Bateman* (11) are instances of the former, where the title of the assignee prevailed, the rule being that wherever there is a clear indication of intention to pass an interest the court will so construe the instrument as to give effect to that intention. *Reeve* v. *Whitmore*, *Martin* v. *Whitmore* (12) is an instance of the latter (a licence to seize). LORD WESTBURY, L.C., said (33 L.J.Ch. at p. 66):

> "The difference, therefore, is very clear and distinct with regard to the operation of the deed: it is the difference between a present contract that the mortgagee should have a right and an interest attaching immediately by force of the contract upon all that property which in futuro might be brought on the premises, and a contract that the mortgagee should have a power of entering upon the premises for the purpose of seizing and taking possession of that future property. The contract that he should have a power to seize appears to me to be perfectly distinct from a contract that he should have a present and immediate right which would attach instanter upon the property brought upon the premises without the act of seizure. I think he has no such thing. I think the true extent and operation of the deed was merely this, that he had passing to him by virtue of the contract a right and a security on, and an interest in, all the then existing property, and the security is accompanied by a power enabling him at any time to enter upon the premises, and take the future property that might be found there. But a power is a very different thing from an interest: and if the extent and limit of the contract be merely that he should have such a power, then an interest would not arise under the power till the power was exercised, subject, however, to the observations which I shall hereafter make with reference to the exercise of that right."

In this state of the law *Thompson* v. *Cohen* (6) arose for decision. It was held that the bill of sale in that case merely amounted to a licence to seize, BLACKBURN, J., saying (L.R. 7 Q.B. at p. 533) that there was nothing

> "amounting to an equitable mortgage, like the case of *Holroyd* v. *Marshall* (2). Here is a simple licence to seize after-acquired goods for the purpose of selling them and discharging the debt, and the debt being gone, we think the collateral licence to seize goes with the principal debt."

Cole v. *Kernot* (7) was dealt with by MELLOR, J., on the same footing; he said that the court were all satisfied that the two cases were identical in principle.

Therefore whatever the actual language of the instrument in *Cole* v. *Kernot* (7) the court must have construed it as amounting only to a licence to seize. *Collyer* v. *Isaacs* (8) may be explained in the same way. The bill of sale in question was given by a trader, at one time an engineer and tool maker, and subsequently a billiard-slate manufacturer, and it embraced all chattels then on the premises, or which at any time thereafter might be brought thereon, in addition or in substitution. Unless, therefore, the bill of sale were construed as a floating security, not extending to future chattels until seized, the debtor could not carry on his business: there was also an express power in the deed for the mortgagee to enter and take possession of the said goods and chattels, and this probably explains why JESSEL, M.R., referred to the deed as being "in form" an assignment, and LUSH, L.J., added:

> "but which in fact amounted to a contract that he would appropriate any chattels which he might bring upon the premises to an already existing security."

The document was construed as a licence to seize, but not as an actual assignment of future chattels. Having regard, however, to s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, the distinction between an assignment of future chattels and a licence to seize has become of less importance than formerly. I am of opinion that the judgment of WARRINGTON, J., was right, and that the Norwich Union and Arnold are both entitled to rank in priority to the plaintiffs, and that this appeal should be dismissed.

PHILLIMORE, L.J.—I need not re-state the facts. We have to determine whether the assurances made by H. J. L. Lind by way of mortgage of his expectancy of a share in the personal estate of his mother operated so directly upon the property that after the mother's death the assignees could take it notwithstanding the intervening bankruptcy and discharge of H. J. L. Lind.

Assignments of property not then in existence pass, as such, nothing. "A man cannot in equity, any more than at law, assign what has no existence"; see per JESSEL, M.R., in *Collyer* v. *Isaacs* (8), 19 Ch.D. at p. 351. The assignment does, however, operate as a contract to assign if and when the property comes into existence, and to use the words of the same great judge,

> "when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."

This is intelligible and workable if nothing happen between the date of the assignment (construed as a contract to assign) and the date when the property comes into existence; but if in the intervening period something happen which may affect the contract, as, for instance, a statutory discharge of the assignor from all his obligations, does the contract to assign still become in due course a complete assignment? If the assurance rests in contract and if by consequence the only way in which equity fastens upon the property be by the operation of the doctrine of specific performance, then the liability under the contract would be, as it seems to me, discharged by bankruptcy. This being an assurance by way of mortgage would not come within the class of cases excepted by s. 37 (6), of the Bankruptcy Act, 1883 [now see s. 30 of the Bankruptcy Act, 1914], nor within the special classes of cases referred to by the EARL OF SELBORNE in *Hardy* v. *Fothergill* (13), (13 App. Cas. at p. 360), nor I think within the decision of the Court of Appeal upon a covenant to settle after-acquired property in *Re Reis* (4). That these later covenants may be exceptionally preserved is shown by the language of JESSEL, M.R., in *Collyer* v. *Isaacs* (8) (19 Ch.D. at p. 354). In order that the assignment may survive and have its effect, it must give to the assignee something more than a mere right in contract—something in the nature of an estate or interest.

The real question in this case is whether the assurances by H. J. L. Lind remained in contract, or whether upon the property coming into existence they automatically, and without any novus actus interveniens, passed his estate or interest in his

share of his mother's personal estate to the assignees. That the assurances remain in contract might be inferred from some language of LORD WESTBURY, L.C., in *Holroyd* v. *Marshall* (2), which I venture to quote (10 H.L.Cas. at p. 211):

> "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

These expressions, taken perhaps without sufficient regard to their context, have led to misapprehension in several cases (as pointed out by LORD MACNAGHTEN in *Tailby* v. *Official Receiver* (5) (13 App. Cas. at p. 544). *Re Clarke* (14) might have been added to his list, and in this connection the language used in *Re Reis* (4) even after LORD MACNAGHTEN's judgment must not be forgotten. If the right has to be enforced by a suit for specific performance of a contract, involving as it does "some of the nicest distinctions and most difficult questions that come before the Court" (see per LORD MACNAGHTEN, 13 App. Cas. at p. 547), then the right is in contract only and the statutory discharge in bankruptcy should operate, as BLACKBURN, J., observed in *Thompson* v. *Cohen* (6) and I think that we must take it that it was upon this ground that the Court of Appeal decided *Collyer* v. *Isaacs* (8) to which I shall refer later on. But notwithstanding these allusions to the doctrine of specific performance of contracts, it is I think well and long settled that the right of the assignee is a higher right than the right to have specific performance of a contract, that the assignment creates an equitable charge which arises immediately upon the property coming into existence. Either then no further act of assurance from the assignor is required, or if there be something necessary to be done by him to pass the legal estate or complete the title, he has to do it not by reason of a covenant for further assurance the persistence of which through bankruptcy it is unnecessary to discuss, but because it is due from him as trustee for his assignee.

Among the many cases which determine this, I select the following: *Metcalfe* v. *Archbishop of York* (1). The facts in that case were as follows. In 1803, the Act 43 Geo. 3, c. 84, repealed the Act 13 Eliz., c. 20, which prohibited the charging of benefices. In 1817 the Act 43 Geo. 3, c. 84, was repealed, and the effect of this repeal was to revive the Act of Elizabeth. In 1811 an incumbent charged his then present benefice with an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would fully charge the same with the annuity, and that, in the meantime, it should be charged and chargeable with the annuity. In 1814 the incumbent was presented to another benefice, but no legal charge was executed upon it until the year 1818, when such charges had become again prohibited; yet it was held by the Vice-Chancellor and the Lord Chancellor that the deed of 1811 constituted a good equitable charge which attached upon the new benefice as soon as it was acquired. In this case LORD COTTENHAM, L.C., said (2 My. & Cr. at p. 556):

> "Suppose the deed of 1811 had not contained any covenant to execute a legal charge upon any newly acquired benefice, but merely a proviso and agreement that any such newly-acquired benefice should be charged and chargeable with and liable to the payment of the said annuity, could it be doubted that, upon

Mr. Warrington becoming vicar of Leake in 1814, that benefice became equitably chargeable with the annuity? If so, can the covenant to make a legal charge destroy the equitable charge? Can the covenant for further and better assurance destroy the assurance actually executed? On the part of the defendants, the appellants, this was hardly questioned; but it was contended that the covenant was all one, and that it amounted only to a covenant for a legal charge, which had become illegal before any attempt was made to enforce it. I am clearly of opinion, however, that this is not the true construction of the deed of 1811, and that there is an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants that all equitable charges rest upon specific performance, and the right to have a legal charge. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee by a deposit of deeds to ask for a legal mortgage? I am, for this reason, of opinion that the Vice-Chancellor's judgment was correct in giving effect to this equitable charge upon the vicarage of Leake to secure the annuity."

In *Holroyd* v. *Marshall* (2) the judgment of LORD CHELMSFORD and the judgment of LORD WESTBURY, L.C., if taken in its entirety, are to the same effect; and this finally is the decision in *Tailby* v. *Official Receiver* (5).

As against this current of decisions we have to deal with three cases on bills of sale in which attempts to bind future household furniture and effects were frustrated. The two cases in the Queen's Bench, *Thompson* v. *Cohen* (6) and *Cole* v. *Kernot* (7), may be explained as decisions upon the construction of the particular bills of sale, it being inferred from the terms of the documents that the mortgagor made no assurance of future chattels, but merely gave a licence to seize as ancillary to the security for the debt; though that was not the view taken of them by BAGGALLAY, L.J., in *Collyer* v. *Isaacs* (8). But this last case cannot, in my opinion, be so explained. The reasoning by which the court arrived at its judgment is thus stated by JESSEL, M.R. (19 Ch.D. at p. 351):

> "Until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability. That being so, when the party who contracts becomes bankrupt the liability in respect of that contract is a liability provable in the bankruptcy, but by the 49th section he is released, with certain exceptions, from every liability provable, and so, upon obtaining his discharge, the bankrupt will say, 'I am discharged from the liability; it was only a liability to which I was subject at the time of bankruptcy, and from that the discharge I have obtained releases me.' "

The very fact that the Master of the Rolls reserves his opinion as to the effect of one special form of assurance of after-required property—namely, a covenant in a marriage settlement—lends weight and point to his previous language. The actual decision may be supported, as WARRINGTON, J., thought it might (and as possibly the decisions in the Queen's Bench also might), on the ground that the security given by the bill of sale was like a debenture in the nature of a floating security. But this was not the process by which the Court of Appeal arrived at its conclusion. And I am bound to say that I think that the Court of Appeal in *Collyer* v. *Isaacs* (8) took the more logical view.

I do not understand an assignment which at the time only operates as a contract, but when the property comes into possession operates without more as an actual assurance; and even if this were intelligible I do not understand why in its chrysalis state it is not subject to the laws of a chrysalis, why, being still only a contract, it is not discharged by a discharge of contracts. And I may add that I think it would be better as matter of public policy that all assignments of bare futurities were made impossible. But the law is settled in the other sense by the highest authority, and therefore WARRINGTON, J., was right, and this appeal should be dismissed.

BANKES, L.J—The question for decision in this appeal is whether the discharge in bankruptcy of Hugh James Lawrence Lind put an end to all obligations and rights created by the indentures dated respectively Feb. 21, 1905, and May 20, 1908, and made between Hugh Lind on the one part and the Norwich Union Life Insurance Society and H. Lewis Arnold of the other part respectively.

The assignments were assignments of a mere expectancy, and I do not think it is material to discuss the nature of the expectancy. There is this, however, to be said, that the fund of which the mother was entitled to a share is set out in detail in the schedules to the deeds, and the assignor's interest was apparently fairly safe, as his mother was a lunatic, so found, and she had made no will. In speaking of assignments of a similar kind to the present, LORD HERSCHELL, in *Tailby* v. *Official Receiver* (5) said (13 App. Cas. at p. 530):

> "I confess I am unable to see any sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him, and one assigning future bequests and devises to which he may under any will become entitled. The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence and it is sought to enforce the security."

For the purpose of this judgment I propose to treat the assignments as if they were assignments of after-acquired property merely. It has long been settled that a court of equity will give effect to an assignment for good consideration of a mere expectancy though such an interest was not assignable at law. In *Grey* v. *Kentish* (15) LORD HARDWICKE, L.C., is reported to have said:

> "A husband cannot assign in law a possibility of the wife, nor a possibility of his own, but this court will notwithstanding support such an assignment for valuable consideration. . . ."

This passage is cited with approval by LORD LYNDHURST in *Meek* v. *Kettlewell* (16). One way in which equity supports such an assignment is by treating the transaction, though in form an assignment, as containing or importing a covenant to do that which is necessary to effect the validity of the assignment: see per COZENS-HARDY, M.R., in *Re Mudge* (17), [1914] 1 Ch. at p. 122. And one method by which a court of equity would compel the performance of such a covenant would, in a proper case, be by granting a decree for specific performance.

The argument for the plaintiffs has been rested on two grounds: first, that the covenant to assign, which must be read into each assignment, was ancillary only to the debt covenanted to be paid, and that as the said debt has been released by the discharge in bankruptcy, the security, if any, afforded by the covenant to assign has gone also; second, that the covenant to assign, being a mere personal obligation, was discharged by the discharge in bankruptcy.

The first question must depend upon the construction of the deeds themselves. I can find nothing in the language of the deeds to support this contention. On the contrary, if it be assumed that the deeds create some kind of security upon the debtor's interest as next-of-kin to his mother, it seems obvious that the security was intended to be in addition to that created by the personal covenant of the debtor to pay. If the plaintiff's argument is sound in the present case, I see no reason why it should not be applied to every mortgage executed to secure repayment of a loan. This question was dealt with in argument as though it was in some way affected by the provisions of the Bankruptcy Act. I cannot agree with this suggestion. If the argument is sound, it must be because of the provisions of the deed creating the security, or not at all. The covenant in my opinion, as was stated to be the case in *Robinson* v. *Ommanney* (9), is ancillary to the security and not to the debt. The second contention is the one on which the plaintiffs mainly relied. In support of this contention it was urged that the policy of the Bankruptcy Acts is that when a bankrupt obtains his discharge he is completely freed

from all his obligations and put into a position to make a fresh start. This is quite true as regards his personal obligations, but it is not true as regards his property. The policy of the Bankruptcy Acts with regard to burthens placed upon his property by the bankrupt is that the property shall at the option of the secured creditor remain subject to all burthens legitimately placed upon it prior to the bankruptcy. The interests in question in the present case were not property within the meaning of the Bankruptcy Acts at any time during the assignor's bankruptcy, but, assuming that they had been, WARRINGTON, J., in deciding as he did, did nothing in violation of the policy of the bankruptcy laws.

This, however, is not the real question in this appeal. The real question is as to the exact effect which equity gives to the assignments in question and as to the operation of the Bankruptcy Acts upon the covenant which equity imports into them. I will deal with this last point first. There is no decision precisely in point, but there is a body of judicial opinion upon the question. The covenant which has to be considered is a covenant to assign after-acquired property. The question which has to be determined is whether the existence of that covenant at the date of the bankruptcy created without more a mere liability within the meaning of s. 37 (8) of the Bankruptcy Act, 1883 [now see s. 30, of the Bankruptcy Act, 1914], which must be deemed to be a debt provable in the bankruptcy. If it did, then the discharge in bankruptcy operated as a discharge from all liability under the covenant. If it did not, then the matter is one outside the Bankruptcy Acts altogether, and the covenant is unaffected by the bankrupt's discharge. The authorities to which I will refer are *Robinson* v. *Ommanney* (9), where KAY, J., expressed the opinion that a covenant for further assurance in a mortgage deed could be enforced in spite of the discharge in bankruptcy of the mortgagor. In *Hardy* v. *Fothergill* (13) the EARL OF SELBORNE deals with this question in these words (13 App. Cas. at p. 360):

> "There may be contracts, such for example as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, &c.; which on a fair interpretation of these words [that is the words of s. 31 of the Bankruptcy Act, 1869] ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy."

COZENS-HARDY, L.J., in *Re Reis* (4) expresses no sort of doubt upon this latter question. He says ([1904] 2 K.B. at p. 777):

> "When once it has been decided that the covenant is one of which specific performance can be obtained, it follows that the right to specific performance is not barred by the bankruptcy."

STIRLING, L.J., says the same. But for the difficulty occasioned by *Collyer* v. *Isaacs* (8), to which I refer later, I should have had no hesitation in acting upon the opinion of the learned judges to which I have referred, and saying that the covenants to assign the after-acquired interests in his mother's property were not affected by the bankrupt's discharge in bankruptcy.

There remains the other question, whether these assignments do not in equity give the respondents an interest in the property itself. Upon this question there is again no decision precisely in point, if the question is regarded from the point of view of the effect of a discharge in bankruptcy, but there is in my opinion abundant authority which settles the question in principle. If the view of a Court of Equity on this point had been that the only way in which to do equity in the case of an assignment of after-acquired property was to construe the assignment as a covenant to assign it, then in cases where the property came into existence something would have had to be done by the covenantor to give effect to his

covenant; but I find that time after time it has been laid down, perhaps not always in the same words, that directly the property comes into existence the assignment fastens on it and without any actus interveniens the property is regarded in equity as the property of the assignee. In support of this statement of the law I would refer to *Metcalfe* v. *Archbishop of York* (1), *Smith* v. *Lucas* (18), *Pullan* v. *Koe* (19), *Tailby* v. *Official Receiver* (5). The language of LORD WATSON and LORD MACNAGHTEN in this last-mentioned case is very emphatic. LORD WATSON says (13 App. Cas. at p. 533):

> "There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee";

and LORD MACNAGHTEN says (ibid. at p. 546):

> "Long before *Holroyd* v. *Marshall* (2) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which LORD THURLOW said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust'; *Legard* v. *Hodges* (20)."

It appears to me to be manifest from these statements of the law that equity regarded an assignment for value of future acquired property as containing an enforceable security as against the property assigned quite independent of the personal obligation of the assignor arising out of his imported covenant to assign. It is true that the security was not enforceable until the property came into existence, but nevertheless the security was there, the assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence. WARRINGTON, J., in the court below put his view into these words:

> "In the present case I am of opinion that the mortgagees were at the time of the bankruptcy entitled not merely to the benefit of a personal obligation on the part of the mortgagor resulting in a claim for damages, but to a prospective interest in the distributive share in question taking effect automatically on the death of Florence Lind."

For the reasons stated above, I think that there is a question whether the personal obligation on the part of the mortgagor in a case like the present results in a claim for damages, if by that is meant results only in a claim for damages, but I quite agree with the latter part of the learned judge's statement of the position of the mortgagees.

The only difficulty in the case to my mind is created by *Collyer* v. *Isaacs* (8). This was a decision of the Court of Appeal, which is binding upon us, and unless the case is distinguishable from the present we should be bound to follow it. In that case the security given was a bill of sale. It contained an assignment of after-acquired property and a licence to seize the property in certain events, one of which was the bankruptcy of the grantor of the bill of sale. The grantor instituted proceedings in bankruptcy for the liquidation of his own affairs and he obtained his discharge in the liquidation. The grantee did not prove, but relied on his security. After his discharge the grantor recommenced business and acquired new plant for the purposes of this business. The grantee entered and seized this plant, and the grantor then moved the court for an injunction to restrain the grantee from remaining in possession, or from removing or selling the plant. In the court below the argument for the grantor was that the debt having been

discharged, no property acquired after the debt ceased to exist could be made available to secure it. For the grantee it was contended that the assignment was a valid assignment in equity which entitled the grantee to take the course he did. HALL, V.C., decided in favour of the grantee, stating in his judgment that courts of equity have treated instruments dealing with non-existent property as being transfers of property as effectual for non-existing as they were for existing property. In the Court of Appeal the arguments for the appellant were the same as were advanced in the present case. In giving their judgments none of the learned judges refer to the question of whether the covenant did or did not give a right to specific performance, nor did they deal in terms with the question of whether an assignment of after-acquired property could in equity create an interest in the property when acquired, and they based their decision entirely upon the operation of the Bankruptcy Act upon the particular bill of sale before them. JESSEL, M.R., treats the case as one where there was a general liability in respect of a debt which was barred by a discharge in bankruptcy with a liability in respect of a covenant to secure that debt. So limited, the decision is not an authority against the view taken by WARRINGTON, J., and which I think was right. There is one passage in the judgment of JESSEL, M.R., in which he says (19 Ch.D. at p. 351):

> "Until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability."

This passage has been referred to as if it was a statement that the only remedy on the contract sounded in damages. I do not so read the passage, nor do I think, if the passage could be so read, that it is in accordance with the authorities to which I have referred. For the above reasons I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Nye, Moreton, & Clowes*; *Hartcup & Davis*; *Hicks, Arnold, & Mozley*; *Walker, Martineau & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re GREAT COBAR, LTD. BEESON *v.* GREAT COBAR, LTD.

[CHANCERY DIVISION (Warrington, J.), March 11, 1915]

[Reported [1915] 1 Ch. 682; 84 L.J.Ch. 468; 113 L.T. 226; [1915] H.B.R. 79]

Company—Debenture—Receiver—Application to disregard onerous sole agency agreement made by company—Goodwill of company not affected by agreement.

In a debenture-holder's action a receiver was appointed of the assets and property of the defendant company. The receiver claimed that he should be at liberty to disregard an agreement made between the defendant company and the M. company before the issue of the debentures under which the M. company were to be sole agents for the sale of copper and silver from the defendant company's mines on certain terms for a period of 15 years. The receiver claimed that this agreement was onerous and that he could do better if he was at liberty to sell the produce of the mines as he thought fit.

Held: as the agreement in no way affected the value of the goodwill of the business, there was no obligation on the receiver to carry the agreement into effect.

Re Newdigate Colliery, Ltd, (1), [1912] 1 Ch. 468, distinguished.

Notes. As to the appointment of a receiver and the effect, see 6 HALSBURY'S LAWS (3rd Edn.) 508 et seq.; and for cases see 10 DIGEST (Repl.) 817 et seq.

Case referred to:

(1) *Re Newdigate Colliery, Ltd., Newdegate* v. *Newdigate Colliery Ltd.*, [1912] 1 Ch. 468; 81 L.J.Ch. 235; 106 L.T. 133; 28 T.L.R. 207; 19 Mans. 155, C.A.; 10 Digest (Repl.) 833, *5460*.

Also referred to in argument:

Reid v. *Explosives Co., Ltd.* (1887), 19 Q.B.D. 264; 56 L.J.Q.B. 388; 57 L.T. 439; 35 W.R. 509; 3 T.L.R. 588, C.A.; 10 Digest (Repl.) 830, *5427*.

Re Thames Ironworks, Shipbuilding, and Engineering Co., Ltd., Farrer v. *Thames Ironworks, Shipbuilding, and Engineering Co., Ltd.* (1912), 106 L.T. 674; 28 T.L.R. 273; 56 Sol. Jo. 413; 10 Digest (Repl.) 831, *5445*.

Re Marriage, Neave & Co., North of England Trustee, Debenture and Assets Corpn. v. *Marriage, Neave & Co.*, [1896] 2 Ch. 663; 65 L.J.Ch. 839; 75 L.T. 169; 60 J.P. 805; 45 W.R. 42; 12 T.L.R. 603; 40 Sol. Jo. 701, C.A.; 10 Digest (Repl.) 830, *5429*.

Whinney v. *Moss Steamship Co., Ltd.*, [1910] 2 K.B. 813; 79 L.J.K.B. 1038; 103 L.T. 344; 26 T.L.R. 650; 54 Sol. Jo. 736; 15 Com. Cas. 316; affirmed sub nom. *Moss Steamship Co., Ltd.* v. *Whinney*, [1912] A.C. 254; 81 L.J.K.B. 674; 105 L.T. 305; 27 T.L.R. 513; 55 Sol. Jo. 63; 12 Asp.M.L.C. 25; 16 Com. Cas. 247, H.L.; 10 Digest (Repl.) 824, *5384*.

Parsons v. *Sovereign Bank of Canada*, [1913] A.C. 160; 82 L.J.P.C. 60; 107 L.T. 572; 29 T.L.R. 38; 20 Mans. 94, P.C.; 10 Digest (Repl.) 830, *5434*.

Adjourned Summons.

The plaintiff, who was the receiver of The Great Cobar, Ltd., the defendant company, applied for an order that he might disregard an agreement made between the defendant company and Henry R. Merton and Co., Ltd., on May 23, 1906, whereby it was agreed that the Merton company, for a period of 15 years, from Jan. 1, 1907, determinable as therein provided, should be the sole agent of the defendant company for the whole world for the sale of all the copper and silver from the defendant company's mines which for the time being the company might desire to sell, and the defendant company were to pay and the Merton company to retain out of the moneys payable to it a certain commission. The last clause of the agreement provided that:

"The company shall not by the sale of its business, by winding-up, reconstruction, or otherwise terminate or put an end to this agreement, but shall provide that any company or person to whom the company's mines or business shall be transferred shall be bound by the terms of this agreement, and shall enter into a supplementary agreement with the agent to give full effect thereto."

On May 24, 1906, the company issued first mortgage debentures secured by a charge on the freehold and leasehold properties of the company and by a charge on its whole undertaking. The prospectus which accompanied the issue of the debentures, and which also invited applications for shares under the heading of "contracts" mentioned (inter alia) this contract as follows:

"(10) Dated May 23, 1906, between the company of the one part and Henry R. Merton and Co., Ltd., of the other part, appointing the latter sole agent of the company for fifteen years for the sale of the company's copper and silver."

The plaintiff, a debenture-holder, had brought a debenture-holders' action against the company, the usual order had been made, and A. F. Whinney had been appointed receiver of the property and assets of the company, and to manage its business on behalf of the debenture-holders. The plaintiff now applied for an order that the receiver and manager might be at liberty to disregard the agreement of May 23, 1906.

Tomlin, K.C., and *H. E. Wright* for the plaintiff.
Percy Vaughan for Great Cobar, Ltd.
Hughes, K.C., and *Gordon Brown* for Henry R. Merton and Co., Ltd.

WARRINGTON, J.—This is a debenture-holders' action. On April 6, 1914, Mr. Whinney was appointed receiver of the assets of the company and to manage its business. The plaintiff applies that the receiver and manager may be at liberty to disregard an agreement dated May 23, 1906, made between the defendant company of the one part and Henry R. Merton and Co., Ltd., of the other part whereby the last-named company was to be the sole agent of the defendant company for the sale of copper and silver from the company's mines on the terms and conditions therein set forth.

The facts are very short. The agreement in question was made on May 23, 1906, prior to the issue of the debentures. It was an agreement made between the company of the one part and the agent of the other part, and it provided that the agent should for a period of fifteen years from Jan. 1, 1907, be the sole agent of the company for the whole world for the sale of copper and silver from the company's mines which the company might desire to sell on certain terms as to commission, and it contained this provision in the final clause: [HIS LORDSHIP read the last clause of the agreement, and continued:] In the prospectus which accompanied the issue of the debentures the fact of the existence of this contract was stated, but the debentures were in no way made subject to the performance of the contract. The debentures are in the ordinary form of a charge on the undertaking of the company. The receiver has been appointed to manage the company's business, and it is clear upon the evidence that the equity of redemption is worthless; in fact, the company appears and does not oppose the plaintiff's application. It is opposed by the agents themselves, who had leave from JOYCE, J., to appear here. Now, is it or is it not right that the receiver should be at liberty to disregard this contract? He says that it is an onerous contract, and that he can do better if he is at liberty to sell the produce of the mines as he may think fit.

The only authority which I think is at all in point is *Re Newdigate Colliery, Ltd.* (1). In that case the business was that of a colliery company. The company before the appointment of the receiver had entered into a number of forward contracts for the supply of coal. The price of coal having in the meantime risen, the plaintiff in the action asked that the receiver and manager might be at liberty

to disregard all these contracts so that he might be in a position to sell the coal at a higher price. The court refused that application in that general form, and did so on this ground, that a part of the security was the goodwill of the business, that the receiver was appointed to protect and keep up the value of the goodwill as much as any other part of the security, and that if he were to disregard all these contracts he would so damage the reputation of the company that he would practically destroy the goodwill. Having read the judgments in that case in full, I think that that was undoubtedly the ground on which the court refused the order in that case. COZENS-HARDY, M.R., in particular, and FLETCHER MOULTON, L.J., not quite emphatically, both expressed the view that an objection to the application in that case at all events was the generality of the form in which it was put, and the Master of the Rolls expressly guarded himself against deciding that in a particular case it might not be proper to let a receiver disregard a contract entered into with the company.

What is the position in the present case? The agreement here was entered into with the company whilst it was carrying on business itself. The debenture-holders took their security without being bound by the contract; neither is the receiver and manager bound by it. He will not be incurring any liability at law or in equity to pay damages if he disregards it. I express no opinion for the moment on the question whether the contract has otherwise come to an end by the appointment of a manager, either on the theory applicable to contracts for service, or on the theory that the company are no longer selling any goods to which the contract relates. I think that it is much better not to express any opinion on that question isasmuch as it might possibly prejudice the rights of the parties hereafter. What I do say is that this contract in no way affects the value of the goodwill of the business. There is therefore no obligation on the receiver that I can see, morally or otherwise, to carry this company's contract into effect. He is appointed to manage the business of the company, and it is for him to determine through what agents, and generally in what way, the produce of the company's mines should be sold. I think, therefore, that I must make an order in accordance with the application that the receiver be at liberty to disregard the agreement.

Solicitors: *Burn & Berridge*; *Paines, Blyth & Huxtable*; *Linklater, Addison & Brown.*

[*Reported by* N. TEBBUTT, ESQ., *Barrister-at-Law.*]

GALLOWAY *v.* HALLÉ CONCERTS SOCIETY

[CHANCERY DIVISION (Sargant, J.), June 5, 1915]

[Reported [1915] 2 Ch. 233; 84 L.J.Ch. 723; 113 L.T. 811; 31 T.L.R. 469; 59 Sol. Jo. 613; [1915] H.B.R. 170]

Company—Calls—Power to make calls differing in amount upon members of same class—Validity of call.

Primâ facie it is improper for directors to make a call on part of a class of shareholders who stand in the same relations to the company as the other members of the class without making a similar call on all the other members of that class. Even though there may be power to make such a call the question is always whether in the circumstances it is proper to exercise the power.

Notes. As to a call on shares in general, see 6 HALSBURY'S LAWS (3rd Edn.) 225 et seq.; and for cases see 9 DIGEST (Repl.) 332 et seq.

Cases referred to:

(1) *British and American Trustee and Finance Corpn.* v. *Couper*, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 42 W.R. 652; 10 T.L.R. 415; 1 Mans. 256; 6 R. 146, H.L.; 9 Digest (Repl.) 151, *883.*

(2) *Preston* v. *Grand Collier Dock Co.* (1840), 11 Sim. 327; 2 Ry. & Can. Cas. 335; 59 E.R. 900; sub nom. *Preston* v. *Guyon*, *Preston* v. *Hall*, 10 L.J.Ch. 73; 5 Jur. 146; 9 Digest (Repl.) 207, *1314.*

Motion.

The plaintiffs, William Johnson Galloway and Oliver Standbrooke Holt, were members of the defendant society, which was formed in 1899 under the Companies Acts then in force as a company limited by guarantee. The memorandum of association provided, inter alia, that in the event of the society being wound-up each member should contribute to the assets for the payment of debts, etc., such amount as might be required not exceeding £5. By cl. 7 of the articles of association:

"Each member shall be liable to contribute and shall, when demanded, pay to the committee any sum or sums not exceeding in the aggregate the sum of £100, which is hereinafter referred to as the contribution. The liability to the contribution shall be additional to and without prejudice to any liability in case of winding-up under the guarantee clause in the memorandum of association. The committee may from time to time make such calls as they think fit upon each member in respect of all moneys unpaid on his contributions, and each member shall pay the amount of every call so made upon him to the persons, in the manner, and at the time and places appointed by the committee."

By cl. 8:

"A call shall be deemed to have been made at the time when the resolution of the committee authorising such call was passed."

The plaintiffs who had differences with the defendant society either delayed or failed to pay certain calls. In consequence of this, the defendant society resolved on Mar. 31, 1915, that the plaintiffs' respective balances of contributions should be called up. In this action the plaintiffs claimed (i) a declaration that the resolution was invalid and that the calls made in pursuance of them were unenforceable; (ii) an injunction to restrain the defendant society from attempting to enforce them. This was a motion for an interim injunction, which by consent was treated as the trial of the action.

Clauson, K.C., and *Sheldon* for the plaintiffs.

Cyril Atkinson, K.C., and *A. F. Topham* for the defendants.

SARGANT, J.—This is a motion to restrain the defendants, the Hallé Concerts Society, from enforcing certain calls of £80 and £75 respectively made on the plaintiffs, William Johnson Galloway and Oliver Standbrooke Holt, as members of the society. There may be some difficulty in granting an injunction exactly in accordance with the notice of motion, because it might appear to be restraining persons from applying to the courts of law, including the King's Bench Division of the High Court of Justice, for the purpose of enforcing their rights there, and of course that is not possible since the Judicature Act, but the parties desire to have the question determined before me to-day, and the writ asks for a declaration on the subject, that is to say, a declaration that certain resolutions passed by the committee of the defendant society making these calls were invalid and ultra vires, and that the calls were not enforceable against the plaintiffs or either of them. Therefore, I can deal now with the whole question between the parties.

The society is a company formed under the Companies Acts, and not for the purpose of private gain. It is a company limited by guarantee, and on the usual conditions the Board of Trade has dispensed with the addition to its title of the word "Ltd." It was formed for the purpose of promoting the Hallé Concerts, as those were carried on at the time and are now carried on in the City of Manchester. Under the memorandum of association each member is to contribute in the event of winding-up a sum of £5, and under the articles of association of the company it is provided by art. 7 that

> "Each member shall be liable to contribute and shall, when demanded, pay to the committee any sum or sums not exceeding in the aggregate the sum of £100, which is hereafter referred to as the contribution."

Then the committee are to be empowered to make such calls as they think fit upon each member in respect of the moneys unpaid on the contributions, and those contributions are in addition to the sum of £5 that can be called up in the winding-up. It appears that for some time past the plaintiffs have not been in accord with the general policy of the society and have objected to certain calls that have been made by the society. They objected to a call made in June, 1911, of £7, and they appear not to have paid until December, 1912, or thereabouts. They objected to a call made of £3 in June, 1913, and in respect of that call county court proceedings were necessary and were successful. They objected also to a call of £10 made on each shareholder in 1914—as a matter of fact I am told their contributions in respect of that call were not paid until a day or two after the issue of the writ in these proceedings. That being so the committee passed a resolution to this effect. I will read it from the minutes:

> "The secretary reported that there were certain guarantors who had not paid the call of £10 made in June last [this was on Mar. 31 of 1915]. He desired especially to call attention to the cases of Mr. W. J. Galloway and Mr. O. S. Holt [those are the plaintiffs] who had refused to pay the call of £3 in June, 1913, and had even gone so far as to allow themselves to be sued in court for the amount. As it was evident that they did not intend to pay the call of £10 made in June, 1914, the society would have the trouble of again suing them for the amount [that does not appear to have been the case in the result] and it was resolved therefore that the sum of £80 be called up in respect of the contribution of Mr. W. J. Galloway and £75 in the case of Mr. O. S. Holt respectively, payable at Williams Deacon's Bank, Ltd., St. Ann's Street, on or before April 30, 1915. This amount to be in addition to the sum of £10 owing in respect of the call made in June, 1914, and Mr. Dunderdale was instructed to take the necessary steps to recover these moneys."

The question arises whether the society is entitled to call up the full amount uncalled on the shares of Mr. Galloway and Mr. Holt while making no similar call on the shares of the other members of the society, because they have given trouble in the past in securing and enforcing the payment of the previous calls made by

them. It is said under the articles there is power to make calls on particular members without making corresponding calls on the other members, and then it is further said that if that is so this is a proper case in which to exercise that power. I do not think that I need determine under art. 7 whether there is a power to make a call on one member without making a similar call on another member who is in exactly the same position with regard to payment up on his shares. I do not see anything in the actual language of the article to prohibit it. The article of course was framed for the purpose of defining in this respect the relations between the members of the society as well as for the purpose of determining the relations between the members themselves. It may be in a proper case, which is the phrase used by the solicitor for the defendants, such power may be exercised—there may be such power—but I am still left with the obligation of considering whether this is a proper case. It seems to me that primâ facie, as was pointed out in the judgment of LORD MACNAGHTEN in *British and American Trustee and Finance Corpn.* v. *Couper* (1), that there is by virtue of the ordinary law of partnership an implied condition of equality between shareholders in a company, and that primâ facie it is entirely improper for the directors to make a call on part of a class of shareholders who stand in the same relation to the company as the other members of the class without making a similar call on all the other members of that class. The point was, as a matter of fact, as it seems to me, decided as long ago as *Preston* v. *Grand Collier Dock Co.* (2), and that case is referred to with approval and taken as being the law by LORD LINDLEY in his book on COMPANIES (6th Edn.) at p. 578. Is it right to make this call on these two persons only for this large amount merely because they have been dilatory in paying previous calls? It is said certain expense is caused to the society by the necessity of enforcing these repeated calls against them, and that less expense will be caused if the moneys can be called up in a lump sum. I do not think that is a sufficient reason. So far as legal expenses are concerned, those legal expenses can be recovered in the ordinary way, and I cannot think that the mere fact that letters have been written to the plaintiffs before the matter was put in the solicitors' hands is a sufficient reason for the course that has been adopted. In the present case the result might be more unfair to the plaintiffs than in an ordinary case, because as far as I can see under the memorandum of association on a winding-up of the company there is no certainty at all that the £80 and the £75 in question would come back to the plaintiffs in priority to the payments that would have to be made to the other members of the society. However that may be, it seems to me that the reason given by the committee of the society for making the calls on these two persons separately from any similar calls on the other members of the society is altogether insufficient, and accordingly I propose making a declaration substantially to the effect asked by the writ.

Solicitors: *Rawle, Johnstone & Co.*; *Dunderdale, Dehn & Co.*, for *Dunderdale & Co.*, Manchester.

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

Re VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL

[CHANCERY DIVISION (Astbury, J.), November 17, 18, 1915]

[Reported [1916] 1 Ch. 100; 85 L.J.Ch. 115; 113 L.T. 1208; 80 J.P. 89; 60 Sol. Jo. 141; 14 L.G.R. 171]

of nation of lands and buildings of beauty or historic interest"—National of nation of lands and buildings of beauty or historic interest"—National Trust.

By s. 4 of the National Trust Act, 1907, the National Trust was established "for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life."

Held: these objects are charitable.

Notes. Considered: *I.R.Comrs.* v. *Yorkshire Agricultural Society*, [1927] All E.R.Rep. 536; *Re Cranstoun, National Provincial Bank, Ltd.* v. *Royal Society for the Encouragement of Arts, Manufactures and Commerce*, [1932] 1 Ch. 537. Referred to: *General Medical Council* v. *I.R.Comrs., English Branch Council of General Medical Council* v. *I.R.Comrs.*, [1928] All E.R.Rep. 252; *Re Spensley's Will Trusts, Barclays Bank, Ltd.* v. *Staughton*, [1954] 1 All E.R. 178.

As to the general purposes of the National Trust, see 28 HALSBURY'S LAWS (3rd Edn.) 177. For the National Trust Act, 1907, see 17 HALSBURY'S STATUTES (2nd Edn.) 402.

Cases referred to:

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(2) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

(3) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, *291.*

(4) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879.*

(5) *Blair* v. *Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, *865.*

(6) *Perring* v. *Trail* (1874), L.R. 18 Eq. 88; 43 L.J.Ch. 775; 30 L.T. 248; 22 W.R. 512; 8 Digest 379, *717.*

(7) *Kendall* v. *Granger* (1842), 5 Beav. 300; 11 L.J.Ch. 405; 6 Jur. 919; 49 E.R. 593; 8 Digest (Repl.) 394, *867.*

Also referred to in argument:

Thomson v. *Shakespear* (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.JJ.; 8 Digest (Repl.) 358, *364.*

Originating Summons taken out by the National Trust for Places of Historic Interest or Natural Beauty against the Attorney-General and the Official Trustee of Charity Lands to decide whether the objects of the National Trust as set out in the National Trust Act, 1907, were charitable, and whether the Trust was bound by the Mortmain and Charitable Uses Acts, 1888–1891 [now repealed]. The case

is only reported on the question whether the objects of the National Trust are charitable.

Charles Gurdon for the National Trust.
J. Austen-Cartmell for the Attorney-General.
W. R. Sheldon for the Official Trustee of Charity Lands.

ASTBURY, J.—The National Trust Act, 1907, which incorporated for the purposes of the Act the plaintiff trust, provided that the trust should be established

> "for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest, and as regards lands for the preservation (so far as practicable) of their natural aspect, features, and animal and plant life."

The question I am asked to decide is whether the objects and purposes of this trust as so established are charitable or not.

It is contended on behalf of the trust itself that its purposes are not confined to what are known in the law as charitable purposes, and a number of authorities have been cited with the view of pressing that contention. Apart altogether from the authorities, I should have thought that primâ facie there could be little doubt that this national trust was essentially a charitable trust for the benefit of the nation generally. With regard to the authorities, the question is whether they do or do not support that view. In *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), LORD MACNAGHTEN, quoting largely from SIR SAMUEL ROMILLY's argument in the earlier case of *Morice* v. *Bishop of Durham* (2) (10 Ves. at p. 532), said ([1891] A.C. at p. 583):

> "How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

In terms there can be no question that the fourth head obviously and necessarily includes such a purpose as that defined by this Act of 1907. It is suggested that those words must be taken with qualification. In *Re Foveaux*, *Cross* v. *London Anti-Vivisection Society* (3), CHITTY, J., said ([1895] 2 Ch. at p. 504):

> "The method employed by the court is to consider the enumeration of charities in the statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose—something tending to the benefit of the community."

Then, again, within that test it seems to me that unquestionably this is and must be a charitable purpose. I have had a number of decisions quoted in which the gift in question was for purposes so defined as to include what the courts have held might or might not be charitable objects or purposes. For instance, in *Re Macduff*, *Macduff* v. *Macduff* (4) the headnote says ([1896] 2 Ch. 451):

> "A bequest of money 'for some one or more purposes, charitable, philanthropic, or ,' is not bad simply by reason of the existence of the blank, but must be treated as one 'for charitable or philanthropic purposes.' Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable."

In the judgments in that case, although possibly there is some slight difference in the extent to which the opinions of the different judges who decided it went, there is nothing that I can find which throws any doubt upon the view I take in the present case. This case is not that the trustees should hold the property of this trust for the specific purposes or for some other purposes in their discretion. They are strictly limited to the specific objects and purposes referred to in the Act, which are plainly public purposes and which are expressly stated to be for the benefit of the nation.

There is no choice given to the trustees, as was the case in *Re Macduff*, *Macduff* v. *Macduff* (4), in *Blair* v. *Duncan* (5), in *Perring* v. *Trail* (6), or in *Kendall* v. *Granger* (7), and other cases that have been cited.

For these reasons it seems to me the objects and purposes of this society are plainly within the judgment of the House of Lords in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), and are charitable, and essentially so within the meaning and intention of a large number of authorities which exist on the subject. I therefore declare that the objects and purposes of this National Trust are charitable within the legal meaning of that term.

[In the case of the 238 acres of land in the parish of Wichen, in the county of Cambridge, devised by George Henry Verrall in 1911 to the National Trust, and as to which there had been no extension of time granted or any resolution passed under s. 21 (2), a retention order was made on the plaintiff's request, the Official Trustee of Charity Lands offering no opposition.]

Solicitors: *Horne & Birkett*; *Treasury Solicitor.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

NATIONAL PARK BANK OF NEW YORK *v.* BERGGREN & CO.

[King's Bench Division (Pickford, J.), February 23, March 6, 1914]

[Reported 110 L.T. 907; 30 T.L.R. 387; 19 Com. Cas. 234]

Bill of Exchange—"Holder in due course"—Bill not accepted when negotiated to holder—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 27.

A bill of exchange does not require acceptance in order to make it "complete and regular on the face of it," and, therefore, where a bill has been negotiated to a holder before acceptance the holder is a holder in due course within s. 27 of the Bills of Exchange Act, 1882, and can sue on the bill.

R. v. *Kinnear* (1) (1838), 2 Mood & R. 117, applied.

Notes. As to the necessity of acceptance of a bill of exchange, see 3 Halsbury's Laws (3rd Edn.) 167, 193; and for cases see 6 Digest (Repl.) 52. For the Bills of Exchange Act, 1882, see 2 Halsbury's Statutes (2nd Edn.) 505.

Cases referred to:

(1) *R.* v. *Kinnear* (1838), 2 Mood. & R. 117, N.P.; 6 Digest (Repl.) 52. *461.*

(2) *Davis* v. *Clarke* (1844), 6 Q.B. 16; 13 L.J.Q.B. 305; 3 L.T.O.S. 159; 8 Jur. 688; 115 E.R. 6; 6 Digest (Repl.) 54, *477.*

(3) *Gray* v. *Milner* (1819), 8 Taunt. 739; 3 Moore, C.P. 90; 129 E.R. 571; 6 Digest (Repl.) 53, *468.*

Action tried by Pickford, J., in the Commercial Court.

The plaintiffs claimed from the defendants the sum of £296 13s. 11d. as acceptors of a bill of exchange for £290 5s. 2d. dated April 6, 1913, drawn by the Pensacola

Tar and Turpentine Co. upon the defendants in payment of some turpentine sold by the Pensacola company to the defendants, payable thirty days after sight to the order of the First National Bank, Pensacola, and endorsed to the plaintiffs, the plaintiffs claiming to be holders for value of the bill. The bill was discounted by the Pensacola Tar and Turpentine Co. and passed on to their bankers, the First National Bank, Pensacola, whose agents in New York were C. Schumacher & Co. On May 9, 1913, the bill was purchased by the plaintiffs from Schumacher & Co. for $1407.38. At the time the bill was bought by the plaintiffs it had not been accepted, and was in fact accepted by the defendants on May 20. The defendants desired to accept the bill subject to their approving the goods, but the plaintiffs' representatives in London refused to take such a qualified acceptance. Subsequently the defendants refused to meet the bill on the grounds that the consideration for the bill had failed and that they had a counter-claim for the amount of the bill. On July 24, 1913, Schumacher & Co. requested the plaintiffs to send the bill in to them, and said they would pay its face value, and cable charges and expenses. This was not done, and a correspondence subsequently took place between the plaintiffs, the first National Bank of Pensacola, and the Pensacola Tar and Turpentine Co., which resulted in an agreement that the plaintiffs should sue the defendants in their own name, the Pensacola company undertaking to pay all expenses and also the amount of the bill if the plaintiffs failed in their action. The object of this arrangement was that the defendants should not set up against the plaintiffs the defences which might have been open to them as against the Pensacola company.

Morton Smith for the defendants.
Harold Murphy for the plaintiffs.

PICKFORD, J. [after stating the facts, continued]: It was said that the plaintiffs are not holders for value in due course. A holder in due course can sue the acceptor of the bill free from the rights of the acceptor against the drawer. The Bills of Exchange Act, 1882, s. 29 (1), provides that

> "a holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions—namely: (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it,"

and by s. 38 a holder of a bill may sue in his own name, and

> "where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable to the bill."

It was contended on behalf of the defendants that the plaintiffs are not holders in due course, because at the time the bill was negotiated to them it had not been accepted, and, therefore, was not complete, and that, therefore, the plaintiffs are not entitled as holders in due course to sue the defendants as acceptors of the bill free from the rights which the defendants may have against the drawers of the bill. That contention, which puzzled me for some time, was based upon a misapprehension as to the nature of a bill of exchange. A bill of exchange is defined in s. 3 (1) of the Act as

> "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a period or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer."

The section, therefore, requires that a person shall draw the bill, and it shall be directed to some particular person, with a direction to that person as to the person

to whom he shall pay the bill; but the section does not require that the person to whom the bill shall be addressed shall have accepted it. It, therefore, seems to me clear that this bill when taken by the plaintiffs was a complete bill, notwithstanding that it had not, at that time, been accepted. That is not new law, because PATTISON, J., held in *R.* v. *Kinnear* (1) that an instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time, "without acceptance," was a bill of exchange, notwithstanding that the bill said that acceptance was not required. That was a criminal case, and therefore the definition of a bill of exchange would be applied very strictly. The same judge expressed the same view in the course of the argument in *Davis* v. *Clarke* (2), where he said that in *Gray* v. *Milner* (3) it was not a complete bill till the defendants accepted it, but here, being addressed to John Hart, it was a perfect bill. In my opinion, therefore, the defendants' first point fails.

The second point taken on behalf of the defendants is that, in consequence of the agreement between the plaintiffs and the drawers of the bill, the plaintiffs must be taken as suing merely as trustees for the sellers, the drawers of the bill, and that, therefore, the defendants are entitled to set up as against the plaintiffs the same defences as they would be entitled to set up against the sellers. The short answer to that point is that the plaintiffs are not suing as trustees for the drawers. A trustee would have to account for the money he recovered, but the plaintiffs are entitled to keep the money they recovered and are not bound to account to the drawers. The drawers only guaranteed to indemnify the plaintiffs against expenses and to pay the amount of the bill, if the plaintiffs sued the defendants instead of suing them. It is merely the case of a man having a just cause of action against two persons, one of whom says to him, "sue the other and if you do I will indemnify you against the costs, and if you do not succeed in your action I will pay you." That does not prevent the man bringing his action against the other and succeeding. Therefore that point fails also, and there must be judgment for the plaintiffs with costs.

Solicitors : *Travers-Smith, Braithwaite & Co.*; *Michael Abrahams, Sons & Co.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

NIGHTINGALE AND OTHERS *v.* PARSONS

[COURT OF APPEAL (Lord Reading, C.J., Kennedy and Swinfen Eady, L.JJ.), March 6, 1914]

[Reported [1914] 2 K.B. 621; 83 L.J.K.B. 742; 110 L.T. 806]

Estate Agent—Commission—Effective cause of sale—Sale by owner to purchaser introduced by agents as a tenant three years previously.

The defendant gave instructions to the plaintiffs, estate agents, to obtain a tenant for his house at a yearly rent, or, alternatively, a purchaser. The plaintiffs obtained a tenant who took the house for three years, and the plaintiffs were paid their commission in respect of that matter. At the end of the three years and without any further intervention on the part of the plaintiffs, the defendant sold the house to the tenant's wife. The plaintiffs claimed commission on the sale.

Held: the proper test to be applied was that laid down by COLLINS, M.R., in *Millar, Son & Co.* v. *Radford* (1), namely, that "it was necessary to show that the introduction was an efficient cause in bringing about . . . the sale"; it had been found as a fact that the introduction by the plaintiffs was not the effective cause of the sale; and, therefore, the commission was not payable.

Notes. Referred to: *Howard Houlder & Partners, Ltd.* v. *Manx Isles Steamship Co., Ltd.*, [1922] All E.R.Rep. 579; *Dennis Reed, Ltd.* v. *Goody*, [1950] 1 All E.R. 919.

As to estate agent's commission, see 1 HALSBURY'S LAWS (3rd Edn.) 198–199; and for cases see 1 DIGEST (Repl.) 556 et seq.

Cases referred to:

(1) *Millar, Son & Co.* v. *Radford* (1903), 19 T.L.R. 575, C.A.; 1 Digest (Repl.) 579, *1852*.

(2) *Walker, Fraser and Steele* v. *Fraser's Trustees*, 1910 S.C. 222; 47 S.L.R. 187; 2 S.L.T. 453; 1 Digest (Repl.) 570, **1301*.

Also referred to in argument:

Gillow & Co. v. *Lord Aberdare* (1892), 9 T.L.R. 12, C.A.; 1 Digest (Repl.) 581, *1857*.

Appeal from a decision of the Divisional Court (RIDLEY and AVORY, JJ.), reversing a decision of the county court judge sitting at Kingston in favour of the defendant in an action brought by the plaintiffs, who were house agents, claiming £44 10s. as balance of commission alleged to be due on the sale of the defendant's house.

Compston, K.C., and *Merlin* for the defendant.

J. I. Macpherson (*Colam, K.C.*, with him) for the plaintiffs.

LORD READING, C.J.—This is an appeal from the decision of a Divisional Court ordering a new trial of an action in a County Court. The action was by the plaintiffs to recover commission on the sale of a house. It appeared that a house agent, named Terry, in 1908 received instructions from the defendant to find a person who would either take a lease of, or buy, his house. Terry since that date has assigned his business to one Thompson, who in turn assigned it to Nightingale and Phillips. They are all joined as plaintiffs, and so no question as to parties is raised. The mandate Terry received from the defendant was to let the house at a rent of £120 a year, or alternatively to sell it for £2,500. That, however, does not mean that no commisssion at all would be payable if the house were let or sold through the agency of Terry for a lower sum. In fact, in September, 1908, Terry succeeded in letting the house to a tenant, a Mr. Sounes, at a rent of £110 a year for three years, with an option to the tenant to continue the tenancy for a total term of five or seven years, and Terry was paid commission upon that letting. At the end of the three years the tenant said that he would not continue the tenancy

unless the defendant made certain additions to the house. The defendant refused, and thereupon the question of purchasing the house arose, and Mrs. Soumes bought it from the defendant for the sum of £1,900. The plaintiffs claim commission in respect of that sale. It is not suggested that there was any active intervention by Terry, or any one of the plaintiffs, after the original letting in 1908. The facts are not in dispute. Terry had brought about the original letting, and nothing further was done by him. Mr. Soumes refused at that time to purchase the house. In my opinion the proper test in an action by a house agent to recover commission is that laid down by COLLINS, M.R., in *Millar Son & Co.* v. *Radford* (1), which apparently was concurred in by MATHEW and COZENS-HARDY, L.JJ.—namely, whether "the introduction was an efficient cause in bringing about the letting or the sale." In the present case the county court judge has found that "though the plaintiff introduced the property to Mr. and Mrs. Soumes, that introduction was not in my view the effective cause of the subsequent sale." That is a finding that the plaintiffs have not established that which is essential to their claim. The county court judge having found that fact, upon evidence which entitles him so to find, it is not open to the Divisional Court or to this court to interfere with that finding. It is not necessary to say whether we should have come to the same conclusion upon the evidence, though, speaking for myself, I think that I should have arrived at the same conclusion as the county court judge. In *Walker, Fraser and Steele* v. *Fraser's Trustees* (2) the test applied seems to me to have been really the same, although the language used by the judges may have been different. In my opinion the county court judge has applied the right principle of law, and has come to a conclusion of fact fatal to the plaintiffs' claim. The appeal must be allowed and the judgment of the county court judge destored.

KENNEDY, L.J.—I entirely agree with what my Lord has said, and I propose to add very little. The county court judge has found as a fact that, though the plaintiff Terry introduced the property to Mr. and Mrs. Soumes, that introduction was not the effective cause of the subsequent sale. We cannot review that finding of fact unless we come to the conclusion that there is no evidence to support it. There is here ample evidence, and that really disposes of the case.

SWINFEN EADY, L.J.—I am of the same opinion. The county court judge has found a certain fact, and there is really no dispute upon it. Terry, who was called for the plaintiffs, said that the defendant instructed him in 1908 "to find a tenant or purchaser"; that he "succeeded in letting, but failed to sell"; that he was paid commission on the letting, and the matter was closed so far as he was concerned. The county court judge has found that the introduction of the property by Terry to Mr. and Mrs. Soumes was not "the effective cause of the subsequent sale." To my mind the evidence upon that is all one way, but, be that as it may, we are bound by the finding of fact of the county court judge. In *Millar, Son & Co.* v. *Radford* (1), COLLINS, M.R., laid down the test applicable to this class of case. The facts in that case are practically identical with those in the present case. The defendant there employed the plaintiffs to find a purchaser or, failing a purchaser, a tenant for a certain property. The plaintiffs failed to find a purchaser, but found a tenant, and were paid commission in respect of the letting. After the tenant had been in possession for about fifteen months he purchased the property from the defendant. The plaintiffs thereupon claimed commission on the sale, but the court held that they were not entitled to it. In delivering judgment COLLINS, M.R., said (19 T.L.R. at p. 576):

> "The claim of house agents to be entitled to commission in circumstances like the present is a claim which is often made and is likely to continue to be made. It is, therefore, important to point out that the right to commission does not arise out of the mere fact that agents have introduced a tenant or a purchaser. It is not sufficient to show that the introduction was a causa sine qua non. It is necessary to show that the introduction was an efficient cause in bringing

about the letting or the sale. Here the plaintiffs failed to establish what is a condition precedent to their right to commission—viz., that they brought about the sale. It is open to the defendant in an action like this to say either that, though the plaintiffs effected a sale, they were not his agents, or that, though they were his agents, they had not effected the sale. If the defendant proved either the one or the other, the plaintiffs failed to make out their case."

Every word of that is applicable to the present case. The plaintiff Terry did not effect the sale, though he did effect the original letting. The sale was not brought about by him in any effective way.

Appeal allowed.

Solicitors: *Hamlins, Grammar & Hamlins*; *R. Barnes.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

R. *v.* BOYLE AND MERCHANT

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Lord Coleridge and Sankey, JJ.) May 4, 11, 1914]

[Reported [1914] 3 K.B. 339; 83 L.J.K.B. 1801; 111 L.T. 638; 78 J.P. 390; 30 T.L.R. 521; 58 Sol. Jo. 673; 24 Cox, C.C. 406; 10 Cr. App. Rep. 180]

Criminal Law—Demanding money with menaces—Threat to injure property—Threat to attack company in newspaper—Larceny Act, 1861 (24 & 25 *Vict.*, *c.* 96), *s.* 45.

By s. 45 of the Larceny Act, 1861, [see now s. 30 of the Larceny Act, 1916,]: "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or any other valuable thing of any person, with intent to steal the same, shall be guilty of felony . . ."

When a man, with intent to steal, threatens to commit acts calculated to injure the property or character of another, e.g., to publish in a periodical attacks on a company in which the prosecutor is interested, it is a menace within the meaning of the section.

Criminal Law—Evidence—Similar transaction—Previous transaction substantially similar to that charged.

The ground upon which evidence of similar transactions is admissible is that it is relevant on the question of the real intent of the accused in doing the act charged. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient.

Notes. Section 45 of the Larceny Act, 1861, has been replaced in almost identical terms by s. 30 of the Larceny Act, 1916.

Considered: *Perkins* v. *Jeffery*, ante p. 172; *R.* v. *Wyatt* (1921), 91 L.J.K.B. 402. Referred to: *R.* v. *Armstrong*, [1922] All E.R.Rep. 153; *R.* v. *Porter* (1935), 25 Cr. App. Rep. 59; *Thorne* v. *Motor Trade Association*, [1937] 3 All E.R. 157.

As to demanding with menaces, see 10 HALSBURY'S LAWS (3rd Edn.) 797 et seq.; and for cases see 15 DIGEST (Repl.) 1122 et seq. As to evidence of similar facts, see 15 HALSBURY'S LAWS (3rd Edn.) 291–293; and for cases see 22 DIGEST (Repl.) 66 et seq.

Cases referred to:

(1) *R.* v. *Walton and Ogden* (1863), Le. & Ca. 288; 1 New Rep. 374; 32 L.J.M.C. 79; 7 L.T. 754; 27 J.P. 165; 9 Jur.N.S. 259; 11 W.R. 348; 9 Cox, C.C. 268, C.C.R.; 15 Digest (Repl.) 1119, *11,138*.

(2) *R.* v. *Tomlinson*, [1895] 1 Q.B. 706; 64 L.J.M.C. 97; 72 L.T. 155; 43 W.R. 544; 11 T.L.R. 212; 39 Sol. Jo. 247; 18 Cox, C.C. 75; 15 R. 207, C.C.R.; 15 Digest (Repl.) 1123, *11,200*.

(3) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

(4) *R.* v. *Ollis*, [1900] 2 Q.B. 758; 69 L.J.Q.B. 918; 83 L.T. 251; 64 J.P. 518; 49 W.R. 76; 16 T.L.R. 477; 44 Sol. Jo. 593; 19 Cox, C.C. 554, C.C.R.; 14 Digest (Repl.) 422, *4104*.

(5) *R.* v. *Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, *4091*.

(6) *R.* v. *Rhodes*, [1899] 1 Q.B. 77; 68 L.J.Q.B. 83; 79 L.T. 360; 62 J.P. 774; 47 W.R. 121; 15 T.L.R. 37; 43 Sol. Jo. 45; 19 Cox, C.C. 182, C.C.R.; 15 Digest (Repl.) 1177, *11,889*.

(7) *R.* v. *Ellis*, [1910] 2 K.B. 746; 79 L.J.K.B. 841; 102 L.T. 922; 74 J.P. 388; 26 T.L.R. 535; 22 Cox, C.C. 330; 5 Cr. App. Rep. 41, C.C.A.; 14 Digest (Repl.) 408, *3975*.

(8) *R.* v. *Mason* (1914), 111 L.T. 336; 78 J.P. 389; 24 Cox, C.C. 305; 10 Cr. App. Rep. 169, C.C.A.; 14 Digest (Repl.) 441, *4284*.

Also referred to in argument:

Harman's Case (1620), 2 Roll. Rep. 154; 1 Hale, P.C. 534; 81 E.R. 721; 15 Digest (Repl.) 1118, *11,112*.

R. v. *Jones* (*alias Evans*) (1776), 2 East, P.C. 714; 1 Leach, 139, C.C.R.; 15 Digest (Repl.) 1119, *11,150*.

R. v. *Donnally* (1779), 1 Leach, 193; 2 East, P.C. 713, 715; 15 Digest (Repl.) 1118, *11;113*.

R. v. *Hickman* (1784), 2 East, P.C. 728; 1 Leach, 278, C.C.R.; 15 Digest (Repl.) 1119, *11,152*.

R. v. *Southerton* (1805), 6 East, 126; 2 Smith, K.B. 305; 102 E.R. 1235; 15 Digest (Repl.) 1121, *11,179*.

R. v. *McGrath* (1869), L.R. 1 C.C.R. 205; 39 L.J.M.C. 7; 21 L.T. 543; 34 J.P. 86; 18 W.R. 119; 11 Cox, C.C. 347, C.C.R.; 15 Digest (Repl.) 1047, *10,314*.

R. v. *Robertson* (1864), Le. & Ca. 483; 34 L.J.M.C. 35; 11 L.T. 387; 28 J.P. 821; 11 Jur.N.S. 96; 13 W.R. 101; 10 Cox, C.C. 9, C.C.R.; 15 Digest (Repl.) 1047, *10,313*.

Appeals against conviction at the Central Criminal Court of demanding money with menaces, and threatening to publish libels with intent to extort money.

Foote, K.C., and *Paul Stomm* for the appellant Boyle.

The appellant Merchant in person.

R. D. Muir, Cecil Whiteley and *Leycester Muir* for the Crown.

Cur. adv. vult.

May 11, 1914. The following judgment of the court was read by

LORD READING, C.J.—The appellants were indicted with another person under s. 45 of the Larceny Act, 1861, [now s. 30 of the Larceny Act, 1916], which makes it a felony to demand money with menaces, or by force, with intent to steal the same. After a lengthy trial the accused were convicted, Boyle being sentenced to five years' penal servitude and Marchant to eighteen months' imprisonment without hard labour. Both appellants appeal against their conviction upon two grounds: (i) That the facts, as proved, do not constitute the offence charged against them; (ii) that evidence was wrongfully admitted by the learned judge at the trial

With regard to the first point, the facts may be shortly stated as follows. The prosecutor, one Richard Whieldon Barnett, was chairman of a company known as the Roumanian Consolidated Oilfields, Ltd., which had an issued capital of over a million sterling. That company had been the subject of attacks in a paper known as "Rubber and Oil" upon July 28 and Aug. 20, 1913. In the following November the appellants threatened to continue the attacks upon the company. They represented that they had done very well from the market standpoint out of an attack upon a rival company, and that they thought a similar attack on the Roumanian Consolidated Oilfields company would easily reduce the market price of the shares by 5s. per £1 share. They demanded from Mr. Barnett the payment of a considerable sum of money and the delivery to them of a large number of shares as the price of their silence.

It was contended by counsel for the appellants that these facts did not bring the conduct of the prisoners within the words of s. 45 of the Larceny Act, 1861, [now s. 30 of the Larceny Act, 1916]. The answer to this contention depends upon the meaning to be attributed to the word "menaces" as used in that section. A number of old statutes and cases were cited to us with the object of establishing that a menace must either be a threat of physical violence or a threat of injury to character, and it was said that the threat used by the appellants did not come within either of these categories, inasmuch as it amounted, at most, to a threat to depreciate the market value of the property of the shareholders of the company by adverse criticism or comment, which would reduce the price obtainable in the market for shares in the company, but would not and could not affect the intrinsic value of the property of the company or its shareholders. We do not think that the meaning of the word "menaces" in the section is so restricted. Whatever may have been the view in earlier days under the older statutes and decisions, a wider meaning has been given to the word by later decisions, beginning with *R.* v. *Walton and Ogden* (1), decided by a very strong court more than fifty years ago. That case was argued before Erle, C.J., Blackburn and Keating, JJ., Wilde, B., and Mellor, J., on an indictment under the same section of the statute now under review. In delivering the considered judgment of that court Wilde, B., laid down what we think is the true test. He said:

> "Where, then, is the proper limit to the operation of this section? It is to be found in the words 'with intent to steal.' Nothing is said about 'violence' in conjunction with menaces, still less of violence to the person, as distinct from violence to property. There is no express limit except in the words 'with intent to steal.' "

He then proceeds to discuss the incidents attending the demand of money or property which are necessary to constitute stealing. In the result he arrives at the conclusion that, if a man is induced to part with his money or property through fear or alarm, he is no longer a free agent and is no longer capable of parting with the property with his consent. If the threat was of a character to produce in an ordinary man such a degree of fear or alarm as would

> "unsettle his mind . . . and take away from his acts that element of free voluntary action which alone constitutes consent"

and was made with that intent, it would constitute the offence under the section now under consideration notwithstanding that the threat was not of physical violence or of injury to character.

A similar view was taken of the meaning of the word as used in the previous section (s. 44) of the Larceny Act, 1861, by the Court for Crown Cases Reserved in *R.* v. *Tomlinson* (2). Lord Russell of Killowen, C.J., delivered a judgment wherein he held that the word "menaces" must be construed in a wide sense, and,

moreover, that it was not confined to a threat of injury to the person or property of the person threatened. Some of the expressions used by WILLS, J., in that case may have gone too far, but we agree with him that the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind should receive a liberal construction in practice. We think it would be unwise to attempt to lay down any exhaustive definition of the words of the section. The degree of fear or alarm which a threat may be calculated to produce upon the mind of the person on whom it is intended to operate may vary in different cases and in different circumstances. A threat to injure a man's property may be more serious to him and have greater effect upon his mind than a threat of physical violence. When there is evidence of such a threat as is calculated to operate upon the mind of a person of ordinarily firm mind, and the jury have been properly directed, it is for them to determine whether in fact the conduct of the accused has brought them within the section, and whether in the particular case the "menace" is established. If the threat is of such a character that it is not calculated to deprive any person of reasonably sound and ordinarily firm mind of the free and voluntary action of his mind it would not be a menace within the meaning of the section. In our judgment, when a man, with intent to steal, threatens either to do violence to the person of another, or to commit acts calculated to injure the property or character of another, it is a menace within the meaning of the section. Although in this case there has been some criticism of part of the direction of the learned judge upon this point, we think that in substance, and viewing the summing up as a whole, his direction to the jury was in accordance with the views that we have expressed, and therefore any complaint of misdirection fails. In the judgment of this court there was ample evidence fit for the consideration of the jury at the close of the case for the prosecution that the appellants were guilty of the offence charged. The learned judge was right in not stopping the case at that stage, and eventually was right in submitting the case to the jury. The court is of opinion that the jury, upon a direction by the judge which we hold to have been proper and adequate, were entitled to find that the conduct of the appellants had brought them within the section, and the appeal on the first point therefore fails.

With regard to the second point, the facts may be stated as follows. It was complained, in respect of the charge that the payment of the money, £600, had been demanded in gold so as to conceal the names of the recipients and the transaction generally, that evidence had been admitted to prove that in the previous May a transaction of a character in all substantial respects similar to that charged had taken place, as a result of which one Newberry had paid over a sum of £80 in gold to a representative of the paper "Rubber and Oil" and of the appellants. It was contended that such evidence was not admissible in law, and that, having been admitted, it seriously prejudiced the appellants, and therefore the conviction should be quashed. We are of opinion that the contention is wrong, and that the evidence was properly admitted. The learned counsel for the prosecution anticipated that a defence would be set up that the paper "Rubber and Oil" was conducted in good faith and as a legitimate journalistic enterprise, and that the conduct of the accused, in relation thereto, was inconsistent with any criminal intent, whereas the case for the prosecution was that, upon the the true state of the facts, such a defence was wholly unfounded and untrue. That his anticipation was justified was shown by the cross-examination of the witnesses for the Crown. The law regulating the admission of such evidence was authoritatively laid down by LORD HERSCHELL, L.C., in *Makin* v. *A.-G. for New South Wales* (3) ([1894] A.C. at p. 65) in the following passage:

"In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from

difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line, and to decide whether a particular piece of evidence is on the one side or the other."

No doubt differences of judicial opinion have arisen with regard to the application of this principle in subsequent cases: see *R.* v. *Ollis* (4) and *R.* v. *Bond* (5). In the latter case the prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial evidence was tendered on behalf of the prosecution to show that some nine months previously the prisoner had used similar instruments upon another woman with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to show that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, and the prisoner was convicted. We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible: see *R.* v. *Rhodes* (6), per Lord Russell of Killowen, C.J., and *R.* v. *Ellis* (7). In the recent case of *R.* v. *Mason* (8) this court followed the decision in *R.* v. *Rhodes* (6), and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible in order to rebut the defence set up.

It would serve no useful purpose to discuss in detail the relevant facts in this particular case. It is sufficient to say that the case for the prosecution was that the paper "Rubber and Oil" was carried on by the appellants for the purpose of making and enforcing such demands for money as were made in this case, and that it was not carried on as a legitimate journalistic enterprise, and that various devices were resorted to for the purpose of concealing the connection of the appellants with the operations of this paper; whereas one of the defences was that "Rubber and Oil" was a financial newspaper existing for the purpose of dealing with undertakings connected with rubber and oil, and that one of its legitimate functions was to comment upon and criticise the affairs of the company in question and its management by the chairman. Again, the case for the prosecution was that Carter in demanding the payment of the money, and in gold, was acting as the agent of the appellants, whereas the defence was a denial of this fact. Carter had acted as the agent of Boyle in demanding the £80 from Newberry in gold. It became of distinct importance to determine which of these views was correct, and we are of opinion that, upon the above-mentioned principles of law, evidence was admissible of the circumstances of the payment of the £80 in gold and of Carter's having acted as agent for the appellants in the matters relating

thereto, as such evidence tended to rebut the defences of the accused. We are not attempting in this case to lay down any new principles of law. We are merely applying well-established principles to the particular facts of this case. For these reasons we are of opinion that the appeal fails, and that the convictions must be affirmed.

Appeal dismissed.

Solicitors: *H. Wilson & Co.*; *Director of Public Prosecutions.*

[Reported by R. F. Blakiston, Esq., *Barrister-at-Law.*]

LLEWELLYN *v.* KASINTOE RUBBER ESTATES, LTD.

[Court of Appeal (Swinfen Eady, and Pickford, L.JJ.), July 23, 1914]

[Reported [1914] 2 Ch. 670; 84 L.J.Ch. 70; 112 L.T. 676; 30 T.L.R. 683; 58 Sol. Jo. 808; 21 Mans. 349]

Company—Winding-up—Reconstruction of company—Dissent—Rights of executor of deceased member—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 192.

Notwithstanding that the executors of a deceased member of a company have not caused themselves to be registered as the owners of his shares, they have the same right to dissent from a scheme for the reconstruction of the company under s. 192 of the Companies (Consolidation) Act, 1908 [s. 287 of Companies Act, 1948], and to restrain the liquidator from carrying that scheme into effect without purchasing the deceased member's interest as the deceased member himself would have had if he had been still living. A provision in the articles of association of the company that executors are prohibited from exercising any of the rights and privileges of a member unless and until they shall have elected to be, and shall have been, registered as the holders of his shares, is confined to the exercise of the rights and privileges on their own behalf, and not on behalf of the estate of the deceased member.

Notes. As to dissent from a sale of a company's property, see 6 Halsbury's Laws (3rd Edn.) 781, 782; and for cases see 10 Digest (Repl.) 1099. For Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *James* v. *Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456; 65 L.J.Ch. 284; 74 L.T. 1; 44 W.R. 372; 12 T.L.R. 176; 40 Sol. Jo. 238, C.A.; 9 Digest (Repl.) 148, *870*.

(2) *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate, Ltd.*, [1899] 2 Ch. 80; 68 L.J.Ch. 429; 80 L.T. 739; 47 W.R. 564; 15 T.L.R. 366; 43 Sol. Jo. 494; 6 Mans. 430, C.A.; 10 Digest (Repl.) 1094, *7565*.

Also referred to in argument:

Payne v. *Cork Co., Ltd.*, [1900] 1 Ch. 308; 82 L.T. 44; 48 W.R. 325; 16 T.L.R. 135; sub nom. *Paine* v. *Cork Co.*, 69 L.J.Ch. 156; 7 Mans. 225; 10 Digest (Repl.) 1048, *7266*.

Re Bowling and Welby's Contract, [1895] 1 Ch. 663; 64 L.J.Ch. 427; 72 L.T. 411; 43 W.R. 417; 39 Sol. Jo. 345; 2 Mans. 257; 12 R. 218, C.A.; 10 Digest (Repl.) 903, *6135*.

Re Agriculturist Cattle Insurance Co., Baird's Case (1870), 5 Ch. App. 725; 23 L.T. 424; 18 W.R. 1094, L.J.; 9 Digest (Repl.) 421, *2726*.

Re Cheshire Banking Co., Duff's Executors' Case (1886), 32 Ch.D. 301; 54 L.T. 558; 2 T.L.R. 440, C.A.; 9 Digest (Repl.) 270, *1703*.

Re Peveril Gold Mines, Ltd., [1898] 1 Ch. 122; 67 L.J.Ch. 77; 77 L.T. 505; 46 W.R. 198; 14 T.L.R. 86; 42 Sol. Jo. 96; 4 Mans. 398, C.A.; 10 Digest (Repl.) 875, *5773*.

Appeal from a decision of ASTBURY, J., on a summons taken out by the plaintiffs for an injunction directed to the liquidator of the defendant company.

The defendant company was incorporated on Mar. 5, 1910, with a capital of £120,000 in £1 shares. A. B. Lambe, who died on July 26, 1910, was at his death the registered owner of 5,000 £1 shares in the company. The executors of A. B. Lambe gave notice of his death to the company, and the probate of his will was entered upon the register of the company, but they did not cause themselves to be registered as owners of the shares. On Sept. 30, 1910, a final call of 2s. 6d. a share was made by the directors, and that was paid by the executors out of the estate of A. B. Lambe. At extraordinary general meetings of the company, held on Dec. 4 and 19, 1913, special resolutions were passed and confirmed that the company should be voluntarily wound-up for the purpose of reconstruction according to an approved scheme, and a liquidator was appointed with power to carry out the scheme. The scheme was for a sale of the assets of the company to a new company in consideration of the issue to the shareholders of the old company of shares in the new company, not fully-paid, which it was admitted could only be carried out under s. 192 of the Companies (Consolidation) Act, 1908 [see now s. 287 of Companies Act, 1948]. Notices of these meetings were sent to the executors, but they did not vote at either of the meetings. On Dec. 20, 1913, the executors gave notice to the liquidator of the company that they dissented from the special resolution confirmed on Dec. 19, and required him either to refrain from carrying that resolution into effect or to purchase the shares held by them as executors of A. B. Lambe at a price to be determined under s. 192 (3) of the Companies (Consolidation) Act, 1908 [s. 287 (3) of Act of 1948]. The liquidator gave notice to the executors that he refused to act upon their notice to him of Dec. 20 on the ground that they were not "members" of the company, and were, therefore, precluded by art. 37 of the company's articles from exercising any of the rights and privileges of members since they had failed to have themselves registered as members. The executors now moved for an injunction to restrain the liquidator in the terms of their notice to him of Dec. 20, 1913. On June 19, 1914, the motion came on to be heard before ASTBURY, J., who held that the expression "member" in s. 192 of the Act of 1908 included the estate of a deceased member and there was nothing in the articles of the company which prevented him giving effect to that view. Accordingly, he granted the injunction sought by the executors. The liquidator appealed.

Sir Charles Macnaghten, K.C., and *F. Whinney* for the liquidator.
Gore-Browne, K.C., and *Eric Gore-Browne* for the executors.

SWINFEN EADY, L.J.—This is an appeal from an order of ASTBURY, J., restraining the defendant company and the liquidator from acting upon or carrying into effect the special resolutions proposed and carried at two extraordinary meetings of the company, and carrying out the agreement therein mentioned unless they should in the meantime have purchased the interest of the plaintiffs in the company pursuant to s. 192 of the Companies (Consolidation) Act, 1908. The point is quite a short one, and the facts are not in dispute. A gentleman named Lambe was a shareholder in the company holding 5,000 £1 shares. He died in July, 1910. At the date of his death these shares were partly paid, 17s. 6d. being paid, and after his death there was an additional call of 2s. 6d. per share, amounting on these 5,000 shares to £625. This was paid by the plaintiffs, who were the executors of the deceased, and the shares were then fully paid. The plaintiffs, the executors, duly proved the will of the

deceased and lodged the probate for registration with the defendant company. They never, however, became shareholders themselves in the company or members of the company or asked to be registered in their own names, but were content to leave these fully-paid shares in the name of the deceased with a note of the probate in the books of the company. In 1913 the company was minded to pass resolutions for a winding-up with a view to reconstruction. On Nov. 1 notices were sent round, and in December two extraordinary meetings were held, at which the special resolutions were duly passed and confirmed. On Dec. 20, the day after the second resolution was passed, the plaintiffs, as executors of the deceased, served notice of dissent under s. 192. There is no question as to the form of the notice, which was proper under the statute, and required the liquidator either to abstain from carrying the resolution into effect or to purchase their interest at a price to be determined by agreement or by arbitration. The contention is that the plaintiffs, being only executors of a deceased member, were not entitled to serve notice under s. 192. Accordingly the defendant company treated the notice as invalid, and the executors thereupon started this action to restrain the company from acting upon the resolutions. ASTBURY, J., granted an injunction as asked, and the liquidator of the defendant company now appeals.

The question raised is: Are the plaintiffs, as executors, entitled to this injunction, which depends on the question whether they have the right to dissent. It is beyond dispute that the word "member" used in the statute of 1908 and in the articles of association of this company is used sometimes as referring to a member on the register, and also sometimes as including and extending to a deceased member and the estate of a deceased member. It is beyond dispute that the word bears from time to time one or both of those meanings, and now one and now the other. The question is, therefore: Does it in s. 192 (3) include the estate of a deceased member? Section 192 (1) provides that, on a company transferring its property on a winding-up, the liquidator may receive, in consideration or part consideration for such transfer or sale, shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company, or may enter into an arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company. In sub-s. (1) it is clear that the words "members of the transferor company" do include a deceased member's estate as well as a living member. "Distribution among the members," &c., extends to the estates of deceased members—that is not disputed. Then sub-s. (2) provides that any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company. This obviously extends to deceased members' estates, which are bound by a sale pursuant to the section; such a sale is to be binding on the living as well as on the dead members. Then there is sub-s. (3). It would be strange, in a section which provides for distribution of proceeds of sale among members, including deceased members, and for deceased members being bound by such sales, if, where there is provision for the raising of objections to such sales, or requiring the interest of the dissentient member to be purchased, then this provision is not to extend to deceased members and the estates of deceased members. It is said in this case that the subsection can only refer to living members because it provides for the member not voting for the resolutions, and it is said that unless there is a living member there is no right to attend meetings and vote. The answer to that is, as regards the estate of a deceased member, that the executors could not vote because they have no right to attend the meetings.

On the question whether in such a case executors have a right to require their interest to be purchased, I think some light is thrown upon the way in which this section should be interpreted by *James* v. *Buena Ventura Nitrate Grounds Syndicate, Ltd.* (1), where the question was whether a deceased member was

entitled to participate in new shares which were being created. RIGBY, L.J., says ([1896] 1 Ch. at p. 466):

> "Speaking generally, the executors of a deceased member of a limited company as representing his estate are entitled to all the profits and advantages attaching to the shares belonging to their testator, and subject to all the incidental liabilities, although in terms such profits, advantages, and liabilities would seem to attach to members only."

The provision of sub-s. (3) is an advantage attaching to the shares, enabling a request to be made to the liquidator to purchase the shares at a price to be determined by agreement or arbitration. Section 192 (1), therefore, in my opinion, extends to deceased members and enables a request to be made to purchase the interest of dissentient members, and is to be applied as well to deceased as to living members.

Then it is said, if this is so, the plaintiffs are excluded by art. 37. The short answer is, if they have a statutory right, they could not be excluded by the articles of association. In *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate, Ltd.* (2), where it was alleged that certain provisions in the articles of association amounted to an "agreement" so as to exclude a member from statutory rights, and it was held otherwise, LORD LINDLEY, M.R., said ([1899] 2 Ch. at p. 90):

> "Any contrary interpretation of that section would come to this, that the company could by the articles of association made beforehand—before there was any dispute with a dissentient member—bind all the members, and deprive them of the benefits conferred on them in the event of their becoming dissentient members under s. 162. I do not think that this can be done by the articles of association."

If the company could not by the articles of association exclude all the members from the rights conferred by the section, it will not be open to them to exclude any class of members who might be dissentient. But I do not think that that is the true construction of art. 37. That article provides:

> "A person entitled to a share in consequence of the death or bankruptcy of a member shall not be entitled to . . . attend or vote at meetings of the company, or . . . exercise any of the rights and privileges of membership unless and until he shall have elected to be and shall have been registered as the holder of the share."

The true construction of that article is that such a person may not exercise many of the ordinary privileges of membership such as requisitioning a meeting, or exercise the power of a member in forming one of a quorum or claim in respect of the shares held to qualify as a director. The article would exclude him from such rights, but would not preclude him from receiving every advantage to which the shares entitled him. He would be entitled thus to receive dividends, bonuses, and the like, and, as it was an advantage attaching to the shares, he would be entitled to requisition the liquidator either to buy out his interest or to abstain from carrying the resolutions into effect. For these reasons the appeal fails and must be dismissed.

PICKFORD, L.J.—I agree.

Appeal dismissed.

Solicitors: *Stephenson, Harwood, Henderson, Witt & Mackintosh*; *M. A. Orgill.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

CLEGG *v.* METCALFE AND OTHERS

[CHANCERY DIVISION (Sargant, J.), March 12, 13, 18, 1914]

[Reported [1914] 1 Ch. 808; 83 L.J.Ch. 743; 111 L.T. 124; 78 J.P. 251; 30 T.L.R. 410; 58 Sol. Jo. 516; 12 L.G.R. 606]

Burial—Burial ground—Extension of churchyard—Interment within one hundred yards of dwelling-house—Right of owner of dwelling-house to object—Burial Act, 1855 (18 *& 19 Vict., c.* 128), *s.* 9—*Consecration of Churchyards Act*, 1867 (30 *& 31 Vict., c.* 133), *s.* 1.

The Burial Act, 1855, s. 9, which provides that "no ground not already used as or appropriated for a cemetery shall be used for burials under the [Burial Act, 1852] or this Act, or either of them, within the distance of one hundred yards from any dwelling-house, without" the consent in writing of the owner, lessee or occupier thereof, does not give the owner of such a dwelling-house a separate individual right to object to and prohibit the user of the ground for burials without his consent in writing where there has been a consecrated extension of a burial ground under the Consecration of Churchyards Act, 1867, s. 1, even though the consecrated extension is within an area in which an Order in Council has been made enacting that no new burial ground shall be opened without the previous approval of the Local Government Board.

Greenwood v. *Wadsworth* (1) (1873), L.R. 16 Eq. 288, not followed.

Per **Curiam:** No separate or individual right to object to and prohibit the user of a consecrated extension of a burial ground which is within an area in which an Order in Council has been made enacting that no new burial ground shall be opened without the previous approval of the Local Government Board is given to the owner of a dwelling-house within a hundred yards except in the case of land appropriated or used as a burial ground or as addition to a burial ground under the Burial Acts.

Notes. As to the provision of burial grounds, see 4 HALSBURY'S LAWS (3rd Edn.) 53 et seq.; and for cases see 7 DIGEST (Repl.) 570 et seq. For the Burial Act, 1855, s. 9, see 2 HALSBURY'S STATUTES (2nd Edn.) 732; and for the Consecration of Churchyards Act, 1867, s. 1, see 7 HALSBURY'S STATUTES (2nd Edn.) 812.

Cases referred to:

(1) *Greenwood* v. *Wadsworth* (1873), L.R. 16 Eq. 288; 43 L.J.Ch. 78; 29 L.T. 88; 38 J.P. 116; 21 W.R. 722; 7 Digest (Repl.) 581, *296*.

(2) *Lord Cowley* v. *Byas* (1877), 5 Ch.D. 944; 37 L.T. 238; 41 J.P. 804; 26 W.R. 1, C.A.; 7 Digest (Repl.) 581, *297*.

Also referred to in argument:

Re Baroness Bateman and Parker's Contract, [1899] 1 Ch. 599; 68 L.J.Ch. 330; 80 L.T. 469; 63 J.P. 345; 47 W.R. 516; 43 Sol. Jo. 314; 7 Digest (Repl.) 557, *81*.

Action.

The plaintiff brought this action against the vicar and churchwardens of Mytholmroyd claiming an injunction to restrain the defendants from using for burials an extension of the churchyard which was within one hundred yards of dwelling-houses owned by him without his consent in writing.

The facts are set out in the judgment.

Mark L. Romer, K.C., and *J. Brooke Little* for the plaintiff.

Ernest Charles, K.C., and *F. H. L. Errington* for the defendants.

Cur. adv. vult.

Mar. 18, 1914. **SARGANT, J.**—In this action the plaintiff, as the owner of three dwelling-houses in Church Street, in the district parish of Mytholmroyd, in the county of York, and as occupier of one of these dwelling-houses, seeks to

prohibit the defendants, as the vicar and churchwardens of the said district parish, from using or allowing to be used for burials an addition which has been recently made to the churchyard of the said district parish, and which is situated within a distance of 100 yards of the plaintiff's dwelling-houses.

The right to the prohibition is based on s. 9 of the Burial Act, 1855, but, in order to thoroughly understand that section, it is necessary also to refer to certain prior legislation. The first of these Acts is the Burial Act, 1852, which related exclusively to the metropolis as therein defined. By s. 2 of that Act, power was given to prescribe by Order in Council that burials should be discontinued, either wholly, or with any exception or qualification, in any part or parts of the metropolis, or in any burial ground or places of burial in the metropolis. By s. 9, it was enacted that no new burial ground or cemetery (parochial or non-parochial) should be provided or used in the metropolis or within two miles of any part thereof without the previous approval of one of the principal Secretaries of State. By ss. 10 to 24, provision was made for the formation of burial boards for the parishes in which the places of burial should appear to the ratepayers insufficient or dangerous to health (whether any Order in Council in relation to any burial ground in such parish had or had not been made), and, by s. 25, which is the vital section for the present purpose, it was enacted as follows:

> "Every burial board shall, with all convenient speed, proceed to provide a burial ground for the parish or parishes for which they are appointed to act, and to make arrangements for facilitating interments therein; and in providing such burial ground the board shall have reference to the convenience of access thereto from the parish or parishes for which the same is provided; and any such burial ground may be provided either within or without the limits of the parish, or all or any of the parishes, for which the same is provided; but no ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act, nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house."

The Burial Act, 1853, enabled the application to other populous parts of the country of provisions similar to those of the Act of 1852. By s. 1 of the Act, an Order in Council might prescribe that no new burial ground should be opened in any city or town, or within any other limits, without the previous approval of one of the principal Secretaries of State, or (as the case might require) that burials in any city or town, or within any limits, or in any burial grounds or places of burial, should be discontinued, either wholly or subject to any exceptions or qualifications. And by s. 7 of the Act, the provisions contained in ss. 10 to 42 inclusive, and in certain other sections of the Burial Act, 1852, were extended to extra-metropolitan parishes. By the Burial Act, 1854, s. 12, it was provided that s. 25 of the Act of 1852 was not to apply either to burial grounds provided under that Act or to burial grounds provided under the Act of 1853, and in lieu thereof it was enacted as follows, namely,

> "So much of the said Act of the fifteenth and sixteenth years of Her Majesty as enacts that 'no ground (not already used as or appropriated for a cemetery) shall be appropriated as a burial ground or as an addition to a burial ground under that Act nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house,' shall not extend or be applicable to or in respect of any burial grounds which have been or may be provided under the said Act of the last session and this Act, or either of them, or to or in respect of any addition which has been or may be so provided to any burial ground; but no ground not already used as or appropriated for a cemetery shall be appropriated under the said Act of the last session and this Act, or either of them, as a burial ground, or as an addition to a burial ground, nearer than one hundred yards to any dwelling-house, without such consent as aforesaid."

The Burial Act, 1855, made further additions to and amendments of the provisions of the Burial Acts of the three preceding years, and, by s. 9 of that Act, it was provided as follows:

> "So much of the said Act of the fifteenth and sixteenth years of Her Majesty as enacts that 'no ground (not already used as or appropriated for a cemetery) shall be appropriated as a burial ground, or as an addition to a burial ground, under that Act nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house,' shall be repealed; but no ground not already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of one hundred yards from any dwelling-house, without such consent as aforesaid."

It was held in *Lord Cowley* v. *Byas* (2) that this section in effect repealed s. 12 of the Burial Act, 1854, and since then this latter section, as well as the earlier part of s. 9 of the Burial Act, 1885, has been repealed by the Statute Law Revision Act, 1892. The latter part of s. 9 of the Burial Act, 1855, has, therefore, been left as the only applicable legislation for the present purpose.

The facts of the present case are, except on one point, simple and undisputed. The district parish of Mytholmroyd was, by Order in Council dated Feb. 25, 1846, and made under the New Parishes Act, 1843, formed as a separate district for ecclesiastical purposes out of the ancient parish of Halifax, which was a parish of very great size, comprising some twenty-three townships forming one unit of administration for civil purposes, and also comprising as regards ecclesiastical purposes a large number of chapelries. It is clear from the provisions of the Act in question and the terms of the Order in Council that there was not, at the time, any actual church or chapel in the area constituted as the district parish of Mytholmroyd, but I understand that it is part of the common case of the parties that a church was soon afterwards built and consecrated as the parish church of the district parish in question; that such church had attached to it a churchyard which became the churchyard of the district parish, and that, from that time forward, the position has been the same, so far as ecclesiastical purposes are concerned, as if the church and churchyard had been those of an ancient parish comprising the district marked out by the Order in Council. In December, 1908, about a third of an acre of land adjoining the existing churchyard of the district parish was acquired by the vicar and churchwardens as and for an addition to and extension of the churchyard, and, under the Consecration of Churchyards Act, 1867, this piece of land was duly conveyed for the purpose in January, 1910, and consecrated in February, 1910. The whole of this land is within a hundred yards of the plaintiff's houses. The plaintiff did in fact at one time consent to that portion of the extension which was nearest to his houses being used for burials, but that portion has now, as I understand, been filled, and the defendants are now allowing and claiming the right to allow burials in parts of the rest of the extension as to which the plaintiff has not given any such consent. It is not pleaded or seriously urged that, as to the remainder of the extension, the plaintiff's rights have been prejudiced by the consent previously given by him, and, accordingly, I have to determine a bare question of law—namely, whether the prohibitory words of s. 9 of the Burial Act, 1855, extend to and comprise extensions of churchyards such as this, which are made independently of the provisions of the Burial Acts in question.

For this purpose, something may perhaps turn on a question of fact, as to which there has been some controversy between the parties—namely, whether the district parish of Mytholmroyd is within the area comprised in the Order in Council of Feb. 3, 1858—that is, whether it was a part of the parish of Halifax within the meaning of that order. It is said on behalf of the defendants that, inasmuch as the unit for civil purposes was not the ancient parish but one or other of the twenty-three townships, and inasmuch also as the district parish had become

completely severed from the parish of Halifax for ecclesiastical purposes, the district was in no sense within the parish of Halifax; and a distinction is taken between this district and certain other districts, mentioned in the Order in Council and its amending orders as parts of the parish of Halifax, on the ground that those districts only had chapels of ease built for them, and had not been completely severed from the mother parish for ecclesiastical purposes. But, on the whole, I think that this argument is too refined, and does not really give any intelligible meaning to the phrase "parish of Halifax." It seems to me that the order and its amending orders are dealing with the whole of the area of the ancient parish of Halifax, and that it would be over-minute and really capricious to give to the language of what is obviously an order relating to matters of sanitation a meaning which would make the application, or non-application, of the order to depend on whether any district had been wholly or only partially divorced from the ancient parish for ecclesiastical purposes. I have, accordingly, to deal with a case in which the place of burial in question is within an area in which an Order in Council has been made enacting that no new burial ground shall be opened without the previous approval of the Local Government Board, and I have to determine whether, in such a case, an owner of buildings within a hundred yards has (altogether apart from, and independent of, the giving or withholding of the official consent) a separate individual right to object to and prohibit the user of the ground for burials without his consent in writing.

On the mere construction of the Acts in question, and apart from authority, I have come to a clear and definite conclusion that no such separate or individual right is given except in the case of land appropriated or used as a burial ground or an addition to a burial ground under the Acts themselves. Section 25 of the Burial Act, 1852, s. 12 of the Burial Act, 1854, and s. 9 of the Burial Act, 1855, all contained express words limiting their operation to burial grounds either appropriated or used under the Acts in question. And further, in the original section in which the words occur, namely, s. 25 of the Burial Act, 1852, the words are preceded by the word "but," and are obviously by way of qualification of, or limitation on, the large powers of forming burial grounds which are given to burial boards formed under that Act.

The Act in general was not an Act enabling burials, but an Act restraining burials, and the only part of the Act to which a prohibitory right of this kind would in any way be antagonistic is that part of the Act which gives powers for the formation of new burial grounds by new corporations under the Act in lieu of the burial grounds, the construction and user whereof were prohibited by the Act. Further, in the case of cemeteries constructed by companies for profit, a similar restriction was already common and had been provided for by s. 10 of the Cemeteries Clauses Act, 1847. Accordingly, I can see no reason why, in the case of other burial places, and particularly in the case of churchyards or additions to churchyards, the legislature should have given the owners of buildings a new and independent statutory right to restrain the opening of burial grounds which might be opened under the general law and did not offend against the common law as to nuisance. On the other hand, I can see very good reason why the legislature, when constituting new corporations whose duty was to provide burial grounds and giving them any wide general powers for the purpose both inside and outside their own parish, should give the owners of buildings a clear and definite right to restrain their operations within due limits.

Unfortunately—and this is the only reason why I reserved judgment in this case—there is authority to the contrary of the above view in the decision of MALINS, V.-C., in *Greenwood* v. *Wadsworth* (1). For, although that case dealt only with a burial ground provided by a particular religious sect, and not with an addition to, or extension of, a churchyard, the decision was given on the ground that the prohibition in question is a general prohibition and is not limited to burial grounds appropriated or used under the Burial Acts. When, however, the report is carefully examined, it appears that the decision is a most unsatisfactory one; that in

it mistakes have been made in stating the material sections of the Acts, including s. 25 of the Act of 1852; and that it is only in the last sentence of the judgment that any reference is made to the words limiting the prohibition to burial grounds under the Burial Acts. And, further, the decision has been treated as wrong in the only or principal text-book on the subject—namely, BROOKE LITTLE'S LAW OF BURIALS (3rd Edn.), p. 208—and in the article on the subject in HALSBURY'S LAWS OF ENGLAND. I think, therefore, that I should not be bound to follow the decision of MALINS, V.-C., even if I were dealing with the exceptional case of such a burial ground as was dealt with by the learned Vice-Chancellor, and that I am even more clearly free when the question is one with regard to the somewhat different and far more common case of an addition to a churchyard. The decision is not one of that class on which titles depend, or which, for that or other like reasons, have their authority strengthened by the lapse of time. It has, indeed, been urged by counsel for the plaintiff that the decision in *Greenwood* v. *Wadsworth* (1) was approved or recognised by the Court of Appeal in *Lord Cowley* v. *Byas* (2). I cannot take this view. The successful appellants in that case had plenty of other material for questioning the decision of BACON, V.-C., in the court below, and, indeed, were stopped in the course of their argument. It was entirely unnecessary for them to question, or indeed consider, in any way the decision in *Greenwood* v. *Wadsworth* (1), which, indeed, does not appear even to have been cited to them.

Accordingly, I feel at liberty, and indeed bound, to deal with the matter on the footing of my own interpretation of the legislation in question, and I give judgment for the defendants with costs.

Solicitors: *Robbins, Olivey & Lake*, for *Longbotham & Sons*, Halifax; *Few & Co.*, for *Dixons, Horne & Coles*, Wakefield.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re DUNN. CARTER *v.* BARRETT

[CHANCERY DIVISION (Astbury, J.), November 17, 1915]

[Reported [1916] 1 Ch. 97; 85 L.J.Ch. 168; 113 L.T. 1206; 60 Sol. Jo. 175]

Will—Joint tenancy or tenancy in common—Gift of share of person dying without children to next-of-kin absolutely—Advancement clause—Class taking original share by substitution.

An advancement clause which is applicable to the members of a class prima facie entitled to an original share by substitution as joint tenants is a sufficient indication that the testator intended to cut down the joint tenancy and that the members are to take as tenants in common.

Notes. Distinguished: *Re Ward*, [1920] 1 Ch. 334.

As to construction of concurrent gifts in a will—joint tenancy and tenancy in common, see 34 HALSBURY'S LAWS (2nd Edn.) 354 et seq.; and for cases see 44 DIGEST 977 et seq.

Cases referred to:

(1) *L'Estrange* v. *L'Estrange*, [1902] 1 I.R. 372; 44 Digest 608, 4354*i*.

(2) *Taggart* v. *Taggart* (1803), 1 Sch. & Lef. 84; 17 Digest (Repl.) 265, [illegible]

Adjourned Summons.

By her will, dated Sept. 18, 1872, the testatrix, Frances Dunn, gave all her estate to her trustees, upon trust for sale and conversion, and in the event, which

happened, of her daughter, Frances Harriet, marrying she directed them to hold one-fifth of the annual income upon trust for such daughter for her sole and separate use for life independently of any husband, and after her decease upon trust for her children as she should by deed or will appoint, and in default of appointment upon trust for her children in equal shares, and if any such child or children should die leaving issue such issue should stand in loco parentis, and in case Frances Harriet died unmarried or having married, without leaving issue her surviving, her share was to be held upon the trusts of the shares of the four other children of the testatrix. The testatrix also directed that the residue of the income not thereby bequeathed to or for the benefit of her daughter Frances Harriet was to be held upon trust for her four other children, Emily Perkins, Henry Treffrey Dunn, Edith Hume, and Ellen Maria Carter in equal shares during their respective lives, and after the death of any or either of them the share of each of them so dying upon trust for his or her children as he or she should by deed or will appoint and in default of appointment for his or her children equally, and if any such child should die leaving issue such issue should stand in loco parentis, and if any or either of the four last-mentioned children died without leaving a child or children, "the share or shares of him or her so dying as well original as accrued shall go to his or her next-of-kin absolutely and in the case of any daughter exclusive of her husband."

The testatrix also declared:

> "that in case at any time 'any person or persons entitled to a benefit' under her will should be a minor or minors it should be lawful for the trustees at their discretion to apply the whole or any part of the income to which such minor or minors might be entitled in possession or expectancy for their respective maintenance and education, and also at the like discretion to apply the whole or part of the capital fund to which any such minor or minors should be so entitled as aforesaid for his or their advancement in the world or otherwise for his or their benefit."

The testatrix died on Dec. 12, 1900, and her four daughters all survived her, but Frances Harriet alone was living at the date of the summons, she having married before the death of the testatrix and had three children now living. Henry Treffrey Dunn, son of the testatrix, died in February, 1899, a bachelor and intestate.

Emily Perkins died on July 29, 1903, without having exercised the power of appointment given her, and left three children, the defendants Mabel Robinson, Hilda Gale Pedrick, and Harold Price Perkins; of these, Mabel Robinson and Harold Price Perkins had no children, but Hilda Gale Pedrick had one son, an infant, the defendant Francis Gale Pedrick. Edith Hume died on June 21, 1913, without children, and by her will gave her husband, the defendant Thomas Oliver Hume, the interest of all her money wherever it might be invested and everything belonging to her for his use during his life and on his death for her three sisters absolutely. Ellen Maria Carter died on July 27, 1913, leaving two children, and by her will appointed the defendants Thomas Oliver Hume and Albert Charles Macintosh executors, and directed that her interest in the capital and income coming to her as her share under the will of the testatrix should be divided between her two children. Reginald Henry Carter died on Feb. 7, 1911, and Thomas Oliver Hume, the surviving trustee, appointed Reginald Carter, the plaintiff, a new trustee of the will of the testatrix.

The plaintiff, Reginald Carter, as an executor of the will, issued this summons on June 10, 1915, to determine (inter alia) whether by reason of the death of Henry Treffrey Dunn, son of the testatrix, a bachelor in her lifetime, the share in the residuary estate given on trust for his benefit devolved on his four sisters as his next-of-kin absolutely, and, if so, whether as joint tenants or tenants in common. On the construction of the will the court held that the share of Henry Treffrey Dunn originally devolved on his four sisters absolutely as his nearest blood

relations, treating him as having survived the testatrix. The question whether the four sisters took as joint tenants or tenants in common was then argued.

A. Adams for the plaintiff, Reginald Carter.

G. M. T. Hildyard for the defendants, Mabel Robinson and Hilda Gale Pedrick

W. E. Vernon for the defendant, Harold Price Perkins.

W. H. Draper for the defendant, Albert Charles Macintosh.

P. S. Stokes for the defendants, Frances Gale Pedrick, an infant, and Thomas Oliver Hume.

D. D. Robertson for the defendant, Frances Harriet Barrett.

ASTBURY, J. (after stating the facts and reading the material parts of the will prior to the advancement clause), said: I have already decided that in the case of the son, Henry Treffrey Dunn, who died a bachelor in his mother's lifetime, the share given in trust for him in the testatrix's residuary estate devolved on his four sisters absolutely as his nearest relations in blood at the date of his mother's death, and the question is whether that class took as joint tenants or tenants in common. If the will had stopped there, they would clearly take as joint tenants, but the will contained an advancement clause. [His Lordship read the clause.] That clause expressly applies to "any person entitled to a benefit" under the will. In *Taggart* v. *Taggart* (1) Lord Redasdale said (1 Sch. & Lef. at p. 88):

> "Joint tenancy as a provision for the children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of their portions for their advancement as the joint tenancy cannot be severed."

Though not directly applicable to the present case, that passage shows the inconvenience of construing a class gift as a joint tenancy, if the testator intended the power of advancement to apply to the members of the class. If, therefore, the power of advancement applies to the class taking the benefit of Henry Treffrey Dunn's share by substitution, as I think it clearly does, the question is whether there is sufficient to enable me to say there is a tenancy in common. In *L'Estrange* v. *L'Estrange* (1) the testator merely devised the residue of his property to trustees for the benefit of his six children, with power to his trustees to advance such sums as they might think fit for their education and advancement. That was a general power and did not refer in terms to the portion or share to which any child would be entitled. After reading the power of advancement, Lord Ashbourne, L.C., said ([1902] 1 Ir. R. at p. 468):

> "The question is, Does the use of these words indicate an intention on the part of the testator to cut down the joint tenancy to a tenancy in common? It is one of those clauses of which, when read for the first time, one may not see the full effect, or ascertain how far the words will go; but when read more closely it is clear that the words confer a power, not of maintenance, but of advancement. If a sum, perhaps of a considerable amount, were advanced for one child, it would be right to debit that sum against his or her share, and that debit could not be worked out if these children were joint tenants, and could not be done unless they were tenants in common."

He then held that the advancement clause was a sufficient indication that the children were to take as tenants in common. And I think that in the same way here the advancement clause enables me to say that the benefit that accrued to Henry Treffrey Dunn's nearest blood relations owing to his death in the testatrix's lifetime went to them as tenants in common. And I declare that they take as tenants in common and not as joint tenants.

Order accordingly.

Solicitors: *Bell, Brodrick & Gray*, for *Macintosh, Thomas & Co.*, Cardiff; *Willis & Willis*, for *A. Lionel Lake*, Gloucester.

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

PAINE *v.* BEVAN AND BEVAN

[KING'S BENCH DIVISION (Bailhache, J.), March 12, 1914]

[Reported 110 L.T. 933; 30 T.L.R. 395]

Bill of Exchange—Cheque—Holder bonâ fide, but not for value—Cheque signed in blank—Completion by servant in excess of authority—Liability of drawer—Estoppel.

The plaintiff, a stockbroker, employed a confidential clerk. On settling days on the Stock Exchange it was the plaintiff's practice to sign a number of blank cheques and to hand them over to the clerk, giving him authority to fill in the names of persons with whom the plaintiff did business and whose accounts he wished to settle, and the amount of the sums due to them. The authority of the clerk was absolutely limited to this. The clerk had entered into betting transactions with the defendants and had incurred certain debts. To pay these debts he wrongfully filled in seven of the blank cheques with the name of the defendants, who took them in good faith, and certain sums which he owed them from time to time. The plaintiff sued the defendants for damages for the conversion of the cheques and their proceeds.

Held: when the holder of a negotiable instrument is not a holder for value, the drawer of the instrument is not estopped from saying as against such holder that the body of the instrument has been wrongfully filled up, and, therefore, the plaintiff was entitled to succeed.

Notes. Referred to: *Wilson and Meeson* v. *Pickering*, [1946] 1 All E.R. 394. As to the effect of filling in a bill of exchange in excess of authority, see 3 HALSBURY'S LAWS (3rd Edn.) 167; and for cases, see 6 DIGEST (Repl.) 68 et seq.

Case referred to:

(1) *Lloyds Bank, Ltd.* v. *Cooke*, [1907] 1 K.B. 794; 76 L.J.K.B. 666; 96 L.T. 715; 23 T.L.R. 429, C.A.; 6 Digest (Repl.) 69, *609*.

Also referred to in argument:

Thomson v. *Clydesdale Bank, Ltd.*, [1893] A.C. 282; 62 L.J.P.C. 91; 69 L.T. 156; 1 R. 255, H.L.; 3 Digest (Repl.) 203, *425*.

Action by the plaintiff, Reginald Stuart Paine, a stockbroker, against the defendants, who were bookmakers, claiming that the defendants had deprived him of certain cheques and converted them to their own use, and, alternatively, £247 9s. as the proceeds of the conversion. The defendants denied the conversion and pleaded that the plaintiff was estopped from denying that he authorised and was a party to the making of the payments to the defendants for the purposes for which they were made. It was admitted that the cheques were signed with the authority of the plaintiff, and that the defendants took the cheques in good faith and without notice of any fraud.

Barrington Ward for the plaintiff.
E. A. Harney for the defendants.

BAILHACHE, J.—In this case Mr. Paine, a stockbroker, brings an action against Messrs. Bevan and Bevan, who are bookmakers, to recover the sum of £247 9s., being the proceeds of seven cheques drawn by the plaintiff which came into the hands of Bevan and Bevan, apparently drawn in the favour of Bevan and Bevan, cashed by Bevan and Bevan, and Bevan and Bevan retained the proceeds to the extent I have mentioned.

Mr. Paine had a confidential clerk named Edwards, and on settling days on the Stock Exchange it was the practice of Mr. Paine to draw a sufficient number of blank cheques to meet payments which had to be made, and to hand these cheques already signed by him, or other persons having authority to sign his name, to this

Edwards, whose duty it was then to fill in the cheques with the names of the persons whose accounts Mr. Paine was desirous of settling, and to hand the cheques to those persons chiefly, of course, stockbrokers and stockholders, and clients who had balances to draw. Unfortunately Edwards got into the habit of betting, and, among others, he made bets with Messrs. Bevan and Bevan, and in his betting transactions with them he contracted debts to the amount of £247 9s., and he paid these debts with some of the cheques which Mr. Paine had entrusted to him for the purpose of paying the usual accounts that stockbrokers have to pay on settling days. Edwards filled in the name of Messrs. Bevan and Bevan on the face of the cheques, and he filled in on the counterfoils some other name, generally that of some person with whom Mr. Paine was in the habit of having some small account. He filled in the counterfoils with quite small sums, and made corresponding entries in the cash book, so that anybody looking at the cash book would merely see certain small items about which there was nothing to cause suspicion, and in fact they did so escape Mr. Paine's observation. When the returned cheques came back from the bank Edwards took care that they did not come under the eyes of Mr. Paine. These transactions were in June, July, and August, 1913, and it was not until September of that year that in consequence of something Edwards said Mr. Paine got suspicious, examined his pass-book, and discovered that these frauds had been practised upon him. He made a claim against Bevan and Bevan for the money the following month. A prosecution was instituted against Edwards in November, and Edwards was convicted and sentenced. It is not denied that Bevan and Bevan had this money, but they say that these cheques were cheques which were perfectly regular in form. They were drawn to their order and they made no inquiries as they saw no reason to do so. They took them without inquiry and in good faith, and counsel for the plaintiff in the course of his argument has not suggested that, suspicious though the facts may have been, there was anything in the circumstances to prevent Messrs. Bevan and Bevan saying that they took the cheques in good faith.

Messrs. Bevan and Bevan say: "We are the holders of these cheques. We are not holders in due course because we cannot say we gave value for the cheques," and they say, I think quite rightly, that a betting debt is not like a butcher's debt or a grocer's debt, as in the case of a betting debt there has been no valuable consideration at all, and they take the same position as if they had been donees of these cheques and as if the cheques had been given them by Edwards for no value. And they say that a donee of a cheque is a holder of a cheque not a holder in due course, but a holder who may deal with the cheque without fear of any consequences. He may transfer the cheque, if it is an order cheque by indorsement, or if it is a bearer cheque by delivery, to a transferee who gives value and then becomes a holder in due course, and he can convey to the transferee a perfect title to such a cheque. That no doubt is true. But whether a holder who does that renders himself liable to account for conversion is another matter. Counsel for the defendant argued his case in a way that interested me a great deal and advanced certain propositions which were new to me. He relied greatly on *Lloyds Bank, Ltd.* v. *Cooke* (1), and on the decision that in that case there was an estoppel at common law under circumstances which are not materially distinguishable from those before me now. He put the case in this way. He says that a man who signs a cheque and hands it to a person to deal with gives authority to that person to put in as payee any name he pleases and to fill up the cheque for any amount that he pleases, and that when that person deals with the cheque and hands it to a third person, the drawer of the cheque, having enabled the person to whom he intrusted it to fill in any name or any amount he pleased, is estopped from saying as against the holder of that cheque that the cheque has been wrongly filled up. I do not think that is the case at all where the holder of the cheque is a holder who has not given value for the cheque. And as counsel for the defendant admits that a commission agent who takes a cheque under these circumstances is in no

better position than a donee, I do not think the doctrine of estoppel applies. It seems to me that the donee of a cheque gets no better title to the cheque than that of the person who gives it him, and although it is true that a donee may by indorsing a cheque confer a good title, yet it does not show that a holder of a cheque who is not a holder for value though a holder in good faith can prevent himself from being liable for an action for conversion if he deals wrongfully with the cheque. It seems to me that in this case Bevan and Bevan's title to the cheque was no better than that of Edwards. I quite agree that for a decision in favour of the holder of a negotiable instrument and for him to acquire a better title than the last holder there must be not only good faith but also value. In this case Messrs. Bevan and Bevan did not indorse these cheques except so far as they indorsed them for the purpose of passing them through their banking account. Their bankers collected the money which remains in their hands, and in my judgment they have been guilty of the conversion of these cheques and are accountable for the money which they have received in respect of them. I must, therefore, give judgment for the plaintiff for the amount of his claim with costs.

Judgment for the plaintiff.

Solicitors: *Corbould-Ellis & Mitchell*; *Weldon & Edwards.*

[*Reported by* G. F. L. Bridgman, Esq., *Barrister-at-Law.*]

CEDAR RAPIDS MANUFACTURING AND POWER CO. *v.* LACOSTE

[Privy Council (Lord Dunedin, Lord Atkinson and Lord Shaw), December 16, 17, 1913, February 3, 1914]

[Reported [1914] A.C. 569; 83 L.J.P.C. 162; 110 L.T. 873; 30 T.L.R. 293; 6 W.W.R. 62; 16 D.L.R. 168]

Compulsory Purchase—Compensation—Expropriation of land—Development of water power under statutory powers—Value to owners.

Under a Canadian statute, the appellants were authorised to develop water power in and adjacent to a part of a river which included some rapids, and to expropriate lands actually required for that development. They also obtained the right to construct works in the bed of the river and to abstract water. The respondents owned two islands situate in the rapids, and rights, including water rights, over a promontory at the foot. The appellants gave notice of expropriation to the respondents in respect of their properties.

Held: in assessing the compensation payable to the respondents, the proper basis was the amount for which the properties would have been sold without the appellants, with their acquired powers, being in existence, but with the possibility of the appellants or some other company obtaining those powers.

Re Lucas and Chesterfield Gas and Water Board (1), [1909] 1 K.B. 16, approved.

Notes. Followed: *R.* v. *Trudel and Paquin* (1914), 19 D.L.R. 270; *Green* v. *C.N.R.* (1915), 8 S.L.R. 53; *C.N.R. Co.* v. *Billings* (1916), 31 D.L.R. 687; *Secord* v. *Edmonton* (1916), 10 Alta. L.R. 463. Considered: *Re Ont. and Minn. Power Co., Ltd. and Ft. Francis* (1916), 35 O.L.R. 459. Followed: *Fraser* v. *Fraserville* (1917), 34 D.L.R. 211. Applied: *Re New Westminster Harbour Commissions Act*, [1929] 41 B.C.R. 1. Considered: *Re Canadian Steamship Lines, Ltd. and Toronto*

Terminal Railways Co. (1930), 65 O.L.R. 494. Followed: *Re Forbes and Toronto* (1930), 65 O.L.R. 34; *Cross* v. *Gatineau Power Co.*, [1936] 4 D.L.R. 145. Considered: *Re Major Oil Investments and King*, [1942] 3 W.W.R. 140; *R.* v. *Elgin Realty Co.*, [1943] 1 D.L.R. 497; *C.N.R.* v. *Harricana Gold Mines*, [1943] S.C.R. 382. Followed: *R.* v. *W. D. Morris Realty* [1943] Ex.C.R. 140. Considered: *Northumberland Ferries* v. *R.*, [1945] 3 D.L.R. 145. Followed: *R.* v. *Edwards*, [1946] Ex.C.R. 311.

As to the measure of compensation for compulsory acquisition, see 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and for cases see 11 DIGEST (Repl.) 126 et seq.

Case referred to:

(1) *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; 77 L.J.K.B. 1009; 99 L.T. 767; 72 J.P. 437; 24 T.L.R. 858; 52 Sol. Jo. 173; 6 L.G.R. 1106, C.A.; 11 Digest (Repl.) 133, *182*.

Also referred to in argument:

Gillespie v. *R.* (1909), 12 Exch. C.R. 406; 11 Digest (Repl.) 134, **182*.

R. v. *Paradis*, *R.* v. *Beaulieu* (1888), 16 S.C.R. 716; 38 Digest (Repl.) 288, **76*.

Lemoine v. *City of Montreal* (1894), 23 S.C.R. 390.

Mussen v. *Canada Atlantic Railway* (1894), April 26, P.C., unreported.

Montreal and St. Lawrence Light and Power Co. v. *Robert*, [1906] A.C. 196; 75 L.J.P.C. 33; 94 L.T. 229; 13 Mans. 184, P.C.; 21 Digest 297, *1067*.

Appeal by special leave from three judgments of the Superior Court of Quebec (43 Que. Sup. Ct. 410), dated Feb. 19, 1913, increasing the amount payable under two awards of arbitrators and setting aside a third award.

The appellants were a company incorporated by a statute of the Parliament of Canada in 1904, empowered to construct and develop water powers in or adjacent to the river St. Lawrence in the parish of St. Joseph of Soulanges in the Province of Quebec, and to take by way of expropriation lands within the parish actually required for such development. With a view to such development, the appellants served notices of expropriation on the respondents, who, as executors of the estate de Beaujeu, were proprietors of the subjects to which such notices applied. These subjects were three in number, to wit (i) the Ile aux Vaches, (ii) the Ile Bédard, and (iii) reserved rights over the Pointe du Moulin. For these subjects the appellants by the notices offered to pay respectively $2,800, $200, and $1,700, and named an arbitrator in the event of these sums not being accepted. The respondents did not accept these sums, and named on their part an arbitrator. The third arbitrator, or umpire, was named according to law by the judges of the Superior Court. The three arbitrators, after visiting the properties, heard witnesses and received documents, and finally, by a majority, consisting of the arbitrator appointed by the appellants and the arbitrator appointed by the judge of the Superior Court, awarded as compensation the sums offered by the appellants. The third arbitrator appointed by the respondents dissented, and intimated that he would have been prepared to award the sums of $62,000, $34,000, and $80,000 respectively. Against the findings for $2,800 for the Ile aux Vaches and $1,700 for the reserved rights at Pointe du Moulin, there lay, under the Canadian law, an appeal on the merits to the Superior Court of Quebec; and an appeal was taken by the respondents. Against the finding for the Ile Bédard, owing to the award being less than $600, no appeal lay. But a direct action in the Superior Court to set aside the award in toto, was brought by the respondents. The appeals and the direct action were heard together before DAVIDSON, C.J. He allowed the appeals and substituted for the sums awarded the sums proposed to be awarded by the dissenting arbitrator. In the case of the Ile Bédard he set aside the award and directed a new arbitration.

The Ile aux Vaches was an island situated to the north of the medium filum of the St. Lawrence River, at a point about forty miles above Montreal, of the extent of 28½ arpents—an arpent representing slightly more than one acre. Ile Bédard

was a smaller island also to the north of the medium filum, having an area of 3½ acres, and situated 7,600 ft. down the river from the Ile aux Vaches. Further down again, and 700 ft. from the Ile Bédard, came the Pointe du Moulin, which was a point jutting out into the river to such an extent that approximately a straight line drawn from the southern side of the Ile aux Vaches through the Ile Bédard would cut the point in question. The whole of the riverain land at the Pointe du Moulin originally belonged to the respondents' predecessors. They sold all the lands at the Pointe du Moulin, subject to a reservation in the following terms:

> "Le vendeur, ès qualité, se réserve—1°. Un chemin de vingt quatre pieds de largeur sur toute la profondeur du susdit terrain depuis le chemin de la Reine jusqu 'au Fleuve St. Laurent. 2°. Un emplacement sur la susdite terre suffisamment grand pour la construction d'un moulin, d'une manufacture ou de toutes autres bâtisses propres à des fins industrielles. Ces deux réserves sont faites à perpétuité et l'acquéreur, ses hoirs et ayants cause seront obligés de payer toutes taxes municipales ou scolaires qui à l'avenir seront imposées sur les terrains ci-dessus réservés, sans pouvoir prétendre à aucune indemnité ou compensation. Le vendeur ès qualité aura le droit de prendre possession des réserves susmentionnées quand il le jugera à propos, et, de plus, il se réserve tous les débris de l'ancien moulin et le droit de les enlever en aucun temps sans que son passage à cet effet sur la terre susvendue soit considéré comme l'ouverture de l'exercice de la réserve en premier lieu mentionnée d'un chemin, &c. L'acquéreur, ses hoirs et ayants cause n'auront aucunement le droit de se servir des pouvoirs d'eau qui se trouvent sur le bord de la grève du St. Laurent dans le voisinage de la terre susvendue ou sur icelle, le vendeur ès qualité, en faisant, par les présentes, une réserve expresse."

The river being a navigable river, the bed belonged, according to the law of Canada, to the Crown, and no riparian owner could construct works in the bed without the consent of the Crown. The river at this place was in rapid. The total fall measured from the top of the Ile aux Vaches down to the lowest point of the Pointe du Moulin was about 28 ft. The scheme of the appellants' works was to construct a dyke in the bed of the river from Ile aux Vaches to Ile Bédard, and then on to the lowest point of the Pointe du Moulin. That would impound the whole waters of the river to the north of the dyke. To be able to do this they obtained, by agreement with the Dominion Government, a right to erect the works and to abstract the water. They further proposed to submerge, by cutting away, all jutting-out portions of the Pointe du Moulin till the last jutting-out piece, on which they were to erect their power-station, thus providing for an uninterrupted flow of the river towards their power-house, and availing themselves of the total fall of 28 ft.

Sir R. Finlay, K.C., Mignault, K.C. (of the Canadian Bar), and *Geoffrey Lawrence* for the appellants.

Sir Edward Clarke, K.C., Macmaster, K.C., Sir A. Lacoste, K.C., and *A. Lacoste* (the three latter of the Canadian Bar) for the respondents.

LORD DUNEDIN stated the facts and continued.—The law of Canada as regards the principles on which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in *Re Lucas and Chesterfield Gas and Water Board* (1), where VAUGHAN WILLIAMS and FLETCHER MOULTON, L.JJ., deal with the whole subject exhaustively and accurately.

For the present purpose it may be sufficient to state two brief propositions: (i) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker; (ii) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value

alone of such advantages that falls to be determined. Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as was pointed out by FLETCHER MOULTON, L.J., in the case cited, is really rather an unfortunate expression), the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground, which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which made the undertaking as a whole a realised possibility.

Applying these principles, it is, in the opinion of their Lordships, impossible to support the judgment appealed against. The greater part of the judgment of the learned Chief Justice (DAVIDSON, C.J.) is concerned with demonstrating that the arbitrators in the award they had given had gone on evidence which went to agricultural value alone (using that term as including the water power of the mill used as an ordinary mill). In this criticism so far their Lordships think the learned Chief Justice was right. But when he comes to fix the value to be substituted for that given by the majority of the arbitrators, he accepts the figures given by the dissenting arbitrator and confessedly bases them on the evidence given by the witnesses for the respondents (appellants before him). Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realised undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

It would be tedious to quote too much of the evidence, but the following may be taken as samples: Exhibit A10 is a report from Isham Randolph, engineer. He was examined as a witness, and his evidence is really only a development and amplification of his report. His qualifications as an engineer are undoubted, and his opinion on engineering matters worthy of the greatest respect. But you need go no further than the first sentence to see how completely he has misunderstood the legal position:

> "I consider that as component parts of a hydro-electric power development having head works at Ile aux Vaches and power plant on the point indicated . . . the said Ile aux Vaches and the said point of land have very great value, and should make the owners participants in the earnings of the development, or else they should receive in advance a compensation based approximately upon the net earnings of the power development in the ratio of the head controlled by these two properties to the total head capable of being developed."

Arthur Surveyer, another engineering witness, deals separately with the different subjects. As to Ile aux Vaches, he deals with it thus: First, he says, if the island were not there and there were shoal water, it would cost $39,000 to build a dam, which would represent part of the island. Second, when that was done there would be a loss of 1·7 ft. of head, as compared with the present works, which would mean a loss to the company of an annual rent of $1,050, which, capitalised at five per cent., comes to $21,000. Third, he says, the protective value of the island to the works below it is absolute. To ensure the same result, if the island were not there, by means of an insurance, you would have to pay underwriters a premium, which, capitalised, amounts to $17,000; and, fourth, he estimates that the smooth water below it, which the presence of the Ile aux Vaches ensures, amounts to a saving during the construction of the works below it of $6,000. Adding these sums together, he puts the value of the Ile aux Vaches at $83,000.

It is difficult to conceive evidence more honeycombed by fallacy than this.

Besides the general fallacy already mentioned, it appropriates to an island the proprietorship of which carries with it no rights over the bed of the river, and no connection with the property on the bank opposite it, the whole value of the "head" of water which is ex adverso of it. It measures the value of the island by the cost of an opus manufactum, which might be made if the island was not there; and, lastly, it values both temporarily and permanently the "protective" action of the island, totally forgetful that the works might be stopped one foot short of the island, no part of the island taken, and yet the protective value would be there all the same. Dealing with the reserved rights at the Pointe, he bases his calculation on loss of profits to the taking company, and also forgets that the power to cut away the protruding parts of the other portions of the Pointe, which alone makes possible the unrestricted flow, is a power that flows from the government contract and the taking of the riparian lands, and has nothing to do with the reserved water rights of these claimants.

Mr. Robertson, another engineer, when asked as to the Ile aux Vaches, gave the following evidence: "Q. You were valuing it at the value it would possess for the Cedars Rapids Manufacturing Company?—A. Yes, that in my opinion would be the value to them." Further quotation is unnecessary. All the witnesses persist in looking at the three subjects as forming parts of a completed whole, and they estimate their value as proportional parts of that whole whose value they calculate by what it will bring in by way of profit to the undertakers. Their Lordships may quote the words of VAUGHAN WILLIAMS, L.J., in the case cited as applicable to this case ([1909] 1 K.B. at p. 28):

> "the element which the arbitrator may take into consideration is not the fact that the land has in fact been taken, and that the probability [i.e., of purchasers requiring the land for such purposes] has been realised by the promoters having obtained compulsory powers to take the land in question, but only the value of the probability as it existed before these promoters had obtained their powers . . . it appears that the umpire has treated the probability and the realised probability as identical for the purposes of valuation, he has gone on a wrong basis and that we ought to send the award back to him."

Indeed, the mistake goes further in this case even than in that. For in that case there was only one subject. Here there are three subjects detached, and the value which the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and for the enhanced value of which result the claimants have no right to be compensated.

The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the appellants being in existence with their acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers? It is on account of the latter consideration that their Lordships, while unable to accept the judgments, under appeal, are also unable to restore the judgment of the arbitrators. Unfortunately, the appellants led no evidence except as to bare agricultural value. Now, with regard to the Ile aux Vaches and the reserved water rights, it seems possible that there may be some value over and above the bare value. If the situation be naturally favourable to the establishment of power works like those of the appellants, then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given cannot, after the event, be taken into account. And also with regard to the reserved water rights there must be no confusion made. It is not that the water power of the appellants will be derived from the reserved water rights, but it is that a water power like that of the

appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents. These considerations, however, point to the possibility of something more being given for the subjects than the bare value; or, in other words, that, if they had been put up to auction as beforesaid, there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realised scheme. As regards the Ile Bédard, the Board is, however, satisfied that, on the materials placed before them, the arbitrators' conclusion was reasonable, and that the case as now presented does not leave any substantial ground for thinking that any enhancement for the possible reasons indicated would occur. This case, accordingly, ought to be ended now.

Their Lordships will, therefore, advise His Majesty to direct that, with regard to the Ile Bédard, the judgment complained of be reversed with costs in the court below to the appellants; and that, with regard to the Ile aux Vaches and the reserved power and mill site, the judgment complained of be set aside, and the court directed to remit the matter to the arbitrators to hear evidence and make an award in accordance with the principles herein set forth, no costs being allowed to either party in the arbitration already held or in the court below; and, further, that neither party ought to have costs before this Board.

Solicitors: *Lawrence Jones & Co.*; *Blake & Redden.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

Note. In 1927 an appeal was made against the revised arbitration award. The case first went to the Supreme Court of Canada ([1927] 2 D.L.R. 83), which refused jurisdiction, and then to the Privy Council ([1928] 2 D.L.R. 1), when the award recommended in 1914 was itself upheld.

KELLY *v.* NATIONAL SOCIETY OF OPERATIVE PRINTERS' ASSISTANTS

[Court of Appeal (Swinfen Eady, Phillimore and Bankes, L.JJ.), June 30, July 1, 5, 31, 1915]

[Reported 84 L.J.K.B. 2236; 113 L.T. 1055; 31 T.L.R. 632; 59 Sol. Jo. 716]

Trade Union—Expulsion of member—Wrongful expulsion—Action by member for injunction and damages—Trade Union Act, 1871 (34 & 35 *Vict.*, *c.* 31), *s.* 4.

Trade Union—Expulsion—Legality—"Misconduct calculated to damage character and reputation" of union—Member working in spare time at different trade—Printer on night duty working during day for carrier—Action by member against union—Competency—Claim for declaration that purported expulsion void and injunction.

The plaintiff, a printer's assistant and a member of the defendant trade union, was employed in the machine room of a newspaper printing office from 10.30 p.m. to 6.30 a.m. During the day time he worked for several hours each day for a firm of carriers, unknown to his employers at the printing office and to the officials of the union. On this becoming known to the union a resolution was passed for his expulsion. The resolution purported to be made under r. 26 (15) of the rules of the union which provided that "members

guilty of misconduct calculated to damage the character and reputation of the society, in other respects than are specially mentioned in these rules, shall be dealt with at the discretion of their branch committee." The rules made express provision for the expulsion of members guilty of certain specific offences, but the act of misconduct alleged against the plaintiff was not specifically mentioned in the rules. In an action by the plaintiff for a declaration that his purported expulsion was void and for an injunction, the defendant union contended that the action was "instituted with the object of directly enforcing [an] agreement for the application of the funds of a trade union" in one of the ways specified in the Trade Union Act, 1871, s. 4 (3), and so was not maintainable.

Held: r. 26 (15) conferred no power to expel and so the plaintiff was wrongfully expelled; the action was merely to compel the trade union to accept and keep the plaintiff as a member, and would not directly enforce any agreement for the application of the union funds, and so was not barred by s. 4; and, therefore, the plaintiff was entitled to a declaration that the resolution expelling him was ultra vires and void, and an injunction restraining the trade union from enforcing it.

Notes. This decision was overruled, in so far as it held that a trade union member cannot claim damages against the union for wrongful expulsion, by the House of Lords in *Bonsor* v. *Musicians Union*, [1955] 3 All E.R. 518. It remains good law on the points covered by the headnote, to which this report is accordingly confined.

Explained and applied: *R.* v. *Cheshire County Court Judge, Ex parte Malone*, [1921] All E.R.Rep. Referred to: *Braithwaite* v. *Amalgamated Society of Carpenters, Cabinet Makers and Joiners*, [1921] 2 Ch. 399; *Upton* v. *Farmer* (1930), 142 L.T. 526.

As to injunctions restraining a trade union from expelling a member, see 32 HALSBURY'S LAWS (2nd Edn.) 481, 482, para. 770; for cases see 43 DIGEST 98–101; and for the Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

Cases referred to:

(1) *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K.B. 901; 78 L.J.K.B. 616; sub nom. *Gosney* v. *Bristol, West of England and South Wales Operatives' Trade and Provident Society*, 100 L.T. 669; 25 T.L.R. 370; 53 Sol. Jo. 341, C.A.; 43 Digest 92, *962*.

(2) *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 27 T.L.R. 289, C.A.; 43 Digest 93, *972*.

(3) *Dawkins* v. *Antrobus* (1879), 41 L.T. 490; affirmed (1881), 17 Ch.D. 615; 44 L.T. 557; 29 W.R. 511, C.A.; 8 Digest (Repl.) 652, *21*.

(4) *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252; 59 L.J.Q.B. 76; 62 L.T. 309; 54 J.P. 484; 38 W.R. 261; 6 T.L.R. 121, C.A.; 43 Digest 91, *950*.

(5) *Chamberlain's Wharf, Ltd.* v. *Smith*, [1900] 2 Ch. 605; 69 L.J.Ch. 783; 83 L.T. 238; 49 W.R. 91; 16 T.L.R. 514; 44 Sol. Jo. 643, C.A.; 43 Digest 99, *1036*.

(6) *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506; 79 L.J.K.B. 507; 102 L.T. 119; 26 T.L.R. 228; 54 Sol. Jo. 213, C.A.; affirmed [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 28 T.L.R. 276; 56 Sol. Jo. 342, H.L.; 43 Digest 94, *987*.

(7) *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431, H.L.; 43 Digest 107, *1127*.

(8) *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 26 T.L.R. 177; 54 Sol. Jo. 215, H.L.; 43 Digest 93, *963*.

(9) *Inderwick* v. *Snell* (1850), 2 Mac. & G. 216; 2 H. & Tw. 412; 19 L.J.Ch. 542; 14 Jur. 727; 42 E.R. 83; 9 Digest (Repl.) 617, *4109*.

(10) *Russell* v. *Russell* (1880), 14 Ch.D. 471; 49 L.J.Ch. 268; 42 L.T. 112; 28 Digest (Repl.) 610, *1711*.

(11) *Innes* v. *Wylie* (1844), 1 Car. & Kir. 257; 8 J.P. 280, N.P.; 8 Digest (Repl.) 655, *33*.

(12) *Forbes* v. *Eden* (1867), L.R. 1 Sc. & Div. 568, H.L.; 8 Digest (Repl.) 651, 9.

(13) *Baird* v. *Wells* (1890), 44 Ch.D. 661; 59 L.J.Ch. 673; 63 L.T. 312; 39 W.R. 61; 6 T.L.R. 229, C.A.; 8 Digest (Repl.) 658, *46*.

(14) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 127, *1295*.

Appeal by the defendants, a registered trade union, from a decision of the Divisional Court (HORRIDGE and ROWLATT, JJ.), reported 112 L.T. 399, affirming the decision of a county court judge.

By the Trade Union Act, 1871, s. 4:

"Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely: (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed; (2) any agreement for the payment by any person of any subscription or penalty to a trade union; (3) any agreement for the application of the funds of a trade union (a) to provide benefits to members, or (b) to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union, or (c) to discharge any fine imposed upon any person by sentence of a court of justice; or (4) any agreements made between one trade union and another; or (5) any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Holman Gregory, K.C., Harold Morris and *Tristram Bercsford* appeared for the trade union.

Rigby Swift, K.C., Clifford Penney and *G. F. L. Bridgman* appeared for the plaintiff.

Cur. adv. vult.

July 31. The following judgments were read.

SWINFEN EADY, L.J.—The plaintiff is a printer's assistant (a reel hand), and he complains that his expulsion from the defendant society was invalid, and he asks for a declaration to that effect and an injunction restraining the defendants from enforcing such expulsion, and for damages. The action was brought in the Clerkenwell County Court, where the plaintiff obtained the declaration and injunction he sought and judgment for £68 damages. On appeal by the defendants to the Divisional Court the judges were divided in opinion. HORRIDGE, J., was of opinion that the appeal should be allowed and judgment entered for the defendants. ROWLATT, J., was of opinion that the appeal should be dismissed. The appeal thus failed, and the defendants appeal to this court.

The plaintiff was employed as a reel hand in the office of the "Daily Mail," his hours of work being from 10.30 p.m. to 6.30 a.m.; at the latter hour he went home and to bed. Rising in the afternoon, he worked for Messrs. Sutton, the carriers, from 2.30 p.m. to 6.30 p.m. on five or six days a week. His wages at the "Daily Mail" were £1 14s. per week, and at Messrs. Sutton 2s. 9d. a day. Before Jan. 6, 1913, he had worked for the "Daily Mail" for a considerable period.

and during the whole part of that time had also worked for Messrs. Sutton. He is forty-three years of age. He said that he did not find the work of a reel hand heavy; he has two children, and a wife who is unfortunately a cripple; and for their sake and to provide for them he said that he worked as he did. Mr. McIntyre, the overseer of the machine department at the "Daily Mail," said that the plaintiff was a good average workman, and that he had noticed no deterioration in his work. There was no evidence nor any suggestion that the plaintiff was tired at any time during his work, or not in a fit and proper condition to perform his work properly. On Jan. 8, 1913, the plaintiff attended a meeting of the London branch committee of the society, when he was suspended from membership of the society pending further inquiry, the charge against him being "conduct detrimental to the interest of the society." This referred, and referred only, to his working at Messrs. Sutton, as well as for the "Daily Mail." On Mar. 19, 1913, a further meeting of the committee was held. The entry in their minutes is as follows:

> "This member was charged, on Jan. 8, 1913, with working five or six half-days per week in addition to his regular night's work at the "Daily Mail." Having admitted a portion of the charge against him (that of working at Messrs. Sutton), the committee, considering he had acted in a manner detrimental to the character and reputation of the society, apart from the fact that he had worked some hours each week in excess of the limit allowed by our rules, decided to suspend him from membership pending further inquiries."

The plaintiff, in answer to questions put to him, said that it was the fact that he was working for Messrs. Sutton, the carriers, but he had not done any excess or overtime work at the trade (i.e., in the printing trade). The resolution then passed by the branch committee was as follows:

> "In the opinion of this committee the action of Mr. Kelly in performing day work in addition to his regular work of six nights each week at the "Daily Mail" was detrimental to the safety of other members who had to work with him, and is also an act of misconduct calculated to damage the character and reputation of this society; and, acting under r. 26, cl. 15, we now expel him from membership."

The plaintiff contends that having regard to the rules, and the facts about which there is no dispute, the society is not entitled to expel him. The executive council confirmed what the branch committee had done. The plaintiff then instituted these proceedings, as soon as his impoverished condition enabled him to do so, the result of expelling him from the society and depriving him of his union ticket having been that he could no longer work in union printing shops, and that there was no work available at the one or two non-union newspaper offices in London. He ultimately obtained employment as a porter with Messrs. Hobbs, Hart & Co. at 26s. 6d. a week as a whole-time employee, and thus had to relinquish his half-time employment with Messrs. Sutton.

The questions raised by this appeal are whether the defendants are a society which would have been illegal but for the Trade Union Act, 1871, and if so, whether the plaintiff can obtain either an injunction or damages against it. If a legal remedy is open to him, the further question arises, to what relief (if any) is the plaintiff entitled upon the facts of the case? I concur in the view expressed by both the learned judges in the Divisional Court, that the society would have been an illegal association at common law, that certain of the rules to which they particularly referred were in general and unreasonable restraint of trade and involved the authorisation and direction of strikes, the withdrawal of the members from their work, the prevention of members working for any employer whose employees were on strike, whether such employees were members of the society or not, and although the employer was willing to pay full trade wages, the restriction of the hours of labour preventing the members from selling their labour as they pleased. These

rules effected a restraint of trade which is unreasonable, oppressive, and destructive of individual liberty, and the consequence is to taint the whole constitution of the society and to make it an illegal society at common law: see *Gosney* v. *Bristol Trade and Provident Society* (1), per FLETCHER MOULTON, L.J. ([1909] 1 K.B. at p. 919). The next question is whether the injunction was properly granted. The plaintiff by his claim for an injunction is not seeking to enforce directly any of the several agreements specified in the Trade Union Act, 1871. His claim is that he has been wrongfully deprived of the status and position of a member of the society by persons purporting to act pursuant to the society's rules, but not in fact doing so: see *Osborne* v. *Amalgamated Society of Railway Servants* (2).

A power to expel will not be implied; it must be found in the rules, and in plain and unambiguous language. Indeed, there is no inherent power in any club or society to alter its rules so as to introduce such a power. In *Dawkins* v. *Antrobus* (3) JESSEL, M.R., said that he was unaware of the existence of such a power, and was surprised to hear such a proposition put forward. He said (17 Ch.D. at pp. 620, 621):

> "There is no more inherent power in the members of a club to alter their rules so as to expel one of its members against the wishes of the minority, than there is in the members of any society or partnership which is founded on a contract, that written contract, of course, expressing the terms on which the members associate together; and it is intolerable to imagine that the majority should in such a case claim an inherent power of expelling the minority. I say that because that has been a matter pressed upon me as if capable of argument. I think it is not."

It is necessary to examine the rules of the society in order to determine whether the power of expulsion, which the branch committee purported to exercise, in fact existed. The rules contain provisions for imposing fines for various offences ranging from 6d. to £10. And in certain cases power is given to the branch committee to expel. Thus r. 26, cl. 7, enables a branch committee to expel a member making an accusation of dishonesty against another member, without in the opinion of the branch committee, sufficient foundation; cl. 9 in like manner enables the branch committee to expel a member resorting to any dishonest or dishonourable practice which may tend to prove detrimental to the interests of the society; and under cll. 11 and 12 the branch committee has the same power in the case of a member assisting any employer whose workpeople may be on strike, or transferring his card of membership. Rule 29 deals with working overtime, and, having regard to the various clauses of the rule, obviously deals only with overtime, at the trade or business of operative printer's assistant. A member infringing the provision against working overtime in cl. 2 is liable to a fine of 20s. for the first offence, and the power of the committee to expel for it only arises on a second offence. Where a member obtains any benefit by misrepresentation, the branch committee under r. 21, cl. 8, may suspend, but to the executive committee is given the right to expel. Certain minor offences are subject to small fines. Thus, under r. 16, cl. 22, if a committeeman is absent from a branch committee meeting without a satisfactory reason, he may be fined 6d.; by cl. 8 if the branch committee chairman is absent he may be fined 1s. Any member absenting himself from chapel meetings may, at the wish of his chapel, be summoned "before the branch committee and be dealt with": (r. 5, cl. 10). Again, a member duly elected refusing to hold the office of father of chapel "shall be dealt with by the branch committee" (r. 5, cl. 5). By r. 5 (1) every firm shall have a "chapel," to which every member must belong. The word "chapel" is thus used in the sense of a lodge or union of the workmen in a printing office, taking its title probably from the name of "chapel" given to a printer's workshop, and which has been said to have been so applied because Caxton set up his press in a chapel at Westminster. It appears from the instances which I have given that the phrase "be dealt with by the

branch committee" is applied in the rules to certain minor matters analogous to those for which a fine of 6d. or 1s. is deemed sufficient, and, in my opinion, having regard to the construction of the rules as a whole, these words as used in r. 26 (15) do not give to the branch committee by implication a power to expel. Moreover in the present case there was no evidence of any misconduct on the part of the plaintiff, and certainly not of "misconduct calculated to damage the character and reputation of the society." The minute of the branch committee of Mar. 19, 1913, shows that a charge was preferred against the plaintiffs of having "worked some hours each week in excess of the limit allowed by our rules." Now the only limit is contained in r. 29, which relates to overtime in the trade. Mr. Isaacs, the general secretary, said that the plaintiff was told that he was summoned to give an explanation as to working at other work, "in excess of limit allowed by rules," and in cross-examination he said that the only offence which the plaintiff had committed was working at Sutton's, and that r. 29 (2) applied with other rules. Bispham also said that r. 29 (2) was first mentioned, and that if in the minutes of the meeting on Mar. 19, 1913, the rules had been mentioned, they would have been r. 26 (15) and r. 29 (2). The result is that the plaintiff has been expelled under a rule which gave no power to expel, and for an offence which he never committed, and is entitled to the injunction. There remains the question of damages. [HIS LORDSHIP considered this, came to the conclusion, since overruled as noted ante p. 577, that damages were not recoverable, and concluded:] For these reasons I am of opinion that the judgment of the Divisional Court must be varied, and so much of the judgment of the county court as adjudged that the defendants respectively should pay £68 damages be discharged. With this variation the appeal is dismissed, but this variation ought not to affect the incidence of costs, as the injunction was the important matter. The defendants must pay the costs of the appeal.

PHILLIMORE, L.J.—The defendant society is a registered trade union coming under the Trade Union Acts, 1871 and 1876. Under s. 16 of the latter statute it does not matter whether or not the trade union would, but for the earlier statute, be deemed an unlawful combination by reason of some one or more of its purposes being in restraint of trade. Either way the restrictive provisions of s. 4 of the principal act apply to it, and no legal proceedings can be instituted with the object of directly enforcing or recovering damages for the breach of any of the agreements referred to in that section. But if it be of importance to determine whether the society is a trade union having purposes in restraint of trade, I am of opinion, agreeing in this respect with the learned county court judge, and with the learned judges in the Divisional Court, that the society is such a trade union. The rules upon which I particularly found my judgment are r. 20, the whole chapter, r. 26 (6) and (11), and r. 29, to which I may add all the rules giving discretionary power to the executive bodies, and particularly r. 91 (6). I may add that the very proceedings complained of were proceedings to enforce a restraint of trade. In this connection I have read and considered *Swaine* v. *Wilson* (4), *Chamberlain's Wharf, Ltd.* v. *Smith* (5), *Gosney* v. *Bristol Trade and Provident Society* (1), *Osborne* v. *Amalgamated Society of Railway Servants* (2), and that which is the last case of authority on the subject, *Russell* v. *Amalgamated Society of Carpenters and Joiners* (6).

The next point for consideration is whether, notwithstanding that the trade union has these purposes, it and its trustees can be sued and declarations and an injunction such as were granted by the county court judge obtained against it. That a trade union can be sued in and by its registered name, and that, if the trustees in whom the property of the society is legally vested be added as parties, an order can be made for the payment by them out of the funds of the union of all costs and any damages legally recoverable, was settled by the House of Lords in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (14)

and that for certain purposes an injunction can be obtained at the suit of a member was also settled by the House of Lords in *South Yorkshire Miners' Association* v. *Howden* (7) and in *Amalgamated Society of Railway Servants* v. *Osborne* (8). Whether or not one of the purposes for which an injunction can be obtained is to prevent the expulsion of a member from the union and to ensure his restoration to membership has been a matter of great doubt; but the Court of Appeal in *Osborne* v. *Amalgamated Society of Railway Servants* (2) held that an action for a declaration that a resolution of the society purporting to expel the plaintiff was void, and for an injunction restraining the defendants from acting upon it, could be maintained, notwithstanding s. 4 of the Trade Union Act, 1871. The court held that it was not a legal proceeding instituted with the object of directly enforcing any agreement for the application of the funds of the trade union to provide benefits to members. FLETCHER MOULTON, L.J. ([1911] 1 Ch. at p. 559) gives—as I think—the governing reason for this decision. The suit would not directly enforce any agreement for the application of funds for the plaintiff's benefit, or even help him to enforce such an agreement in any future proceeding, and judgment, if obtained by the plaintiff, would merely compel the society or trade union to accept and keep him as a member. The executive can refuse to give to any member, notwithstanding his apparent title, any share in the funds of the union. Putting it in another way, as it seems to me, the only effect of such a judgment is to put the authorities of a trade union in an awkward and perhaps morally unjustifiable position, that of refusing to give to one of their members those benefits to which primâ facie under the rules he is entitled, not because they think that he, being a member, is disentitled, but because they wrongfully think that he is not a member. This declaration is binding upon us, and I think carries with it the plaintiff's right to have an enquiry made by the proper judicial tribunal whether he has been lawfully expelled, and if the enquiry result in his favour, to such a reinstatement as the declaration and injunction sought for in this case will give him.

Thirdly, comes the question on the construction of the rules. The expulsion of the plaintiff was carried out by a resolution of the branch committee purporting to be made under r. 26 (15):

> "Members guilty of misconduct calculated to damage the character and reputation of the society in other respects than are specially mentioned in these rules shall be dealt with at the discretion of their branch committee."

It is said on his behalf that he was not brought and could not be brought within that rule. He was not guilty, nay, there was no evidence that he was guilty of misconduct, still less of "misconduct calculated to damage the character and reputation of the society." Now the learned county court judge has not found that the proceedings of the committee were mala fide, so that objection to them is out of the way. This being so it has been contended that we cannot inquire into the evidence, and this is substantially the conclusion of HORRIDGE, J. There is force in the contention that the agreement between the parties to these rules, i.e., the several members of the trade union, is that the domestic forum with its hierarchy of appellate tribunals is to judge conclusively between the parties, and that fraud, mala fides, or the absence of such essentials of natural justice as hearing before condemning, being out of the way the conclusion of the domestic tribunal or tribunals is final. It was attempted on the contrary to liken this case to cases where the jurisdiction of inferior legal tribunals or courts of limited jurisdiction comes into question. It was said that if there is some statutory condition precedent to the exercise of jurisdiction the inferior or limited tribunal must no doubt in the first place decide for itself that the statutory condition precedent has been fulfilled before it goes on to determine the issue before it, but that in such preliminary decision the inferior or limited tribunal cannot give itself jurisdiction, and that it is open to the High Court of Justice to hold notwithstanding the

the necessary statutory condition precedent has not been fulfilled, and to prohibit further proceedings by writ of prohibition, or to quash the decision by certiorari, or in some cases to disregard it on application for a writ of habeas corpus. All this is quite true, but here we are not dealing with jurisdiction in the true sense, something imposed upon the subject by the supreme power of the realm, but with a construction of conventions between subjects. I find it unnecessary to decide between these two contentions because I arrive at a conclusion favourable to the plaintiff on another ground which was taken in the case, though not very obtrusively, in the county court, and which was brought pointedly to the attention of counsel in the course of the argument before us. A power of expulsion, as the learned county court judge said, is not inherent in a voluntary association. It must be conferred by the rules and must be exercised in conformity with the rules. The penalty in r. 26 (15), is that the member shall be dealt with at the discretion of the branch committee. Similar expressions appear at other places in the rules. See, for instance, r. 5 (5) (9) and (10), and r. 16 (23), where it would seem unreasonable that the rules contemplated expulsion. Powers to suspend and expel appear in several of the rules. There are also powers to fine, and in certain cases the penalty may be vacation of any office or place upon the council. The branch secretary may, by r. 16 (13), for certain offences be expelled or fined at the discretion of the executive council. Rule 26 is the general rule as to punishments, and it is under sub-r. (15) of this rule, as already stated, that the plaintiff was expelled. Sub-rule (4) authorises fines. Sub-rule (5) authorises suspension. Sub-rule (6) authorises expulsion, the language being: "Any member shall cease to belong to the society and shall forfeit all money he has paid thereto." Under sub-rr. (7) (9) and (12) powers of expulsion are given in express words, but there is an alternative punishment. Sub-rule (11) gives power to expel if so determined. Under r. 29, which deals with a case germane to the present, sub-r. (2) and (4), the power of expulsion is given for a second offence, the first offence being punishable by a fine. With this express language so frequently occurring I do not think it possible to construe the words "dealt with at the discretion of their branch committee" as giving a power to expel; and if one may pay some regard to the particular charge it would seem fairly clear that it was never intended to make such an offence of a higher order than one under r. 29. I may further refer to para. (b) of sub-r. (6) of r. 26, which, I think, makes the rules sufficiently elastic. By this paragraph, disobedience to any order authorised to be given by the governing or executive council becomes a matter for expulsion.

Upon the whole, I conclude that there was no power under r. 26 (15), to expel; and it is the more favourable view for the society to take it that the branch committee acted as they purported to act under this rule. If, as the learned county court judge seems to have thought, they were really acting under r. 29 (2), the punishment of expulsion can only be for a second offence. Here I differ from HORRIDGE, J. The result is that the judgment of the county court judge, so far as it granted declarations, an injunction and costs, ought to stand, and the appeal from his judgment having been dismissed by the Divisional Court, owing to the two judges in that court disagreeing, was so far rightly dismissed, and equally the appeal to us so far fails.

There remains the question of damages. [HIS LORDSHIP considered this question, the decision whereon has since been overruled as noted ante p. 577, and concluded:] The judgment was wrong in awarding damages, and the appeal to that extent should succeed.

BANKES, L.J.—This is an appeal from a Divisional Court consisting of HORRIDGE and ROWLATT, JJ. The learned judges differed in opinion, and as a result the decision of the county court judge in favour of the plaintiff stood. The plaintiff's claim was for a declaration that he had been improperly expelled from the defendant society, and for an injunction and for damages. The learned county

court judge granted the declaration and the injunction asked for, and awarded the plaintiff £68 damages with costs, to be paid out of the funds of the society.

A number of points have been raised, the first of which is whether the defendant society is an illegal society on the ground that its object is in unreasonable restraint of trade. The answer to that question must depend on a consideration of its purposes as manifested in its rules: see per LORD MACNAGHTEN, *Russell* v. *Amalgamated Society of Carpenters and Joiners* (6), [1912] A.C. at p. 430. The test is whether the real objects of the society or one of the real objects of the society is to unduly fetter trade: see *Swaine* v. *Wilson* (4). If it is, then the society is an illegal society, even though it may have some legitimate objects and many unobjectionable rules. The rules of the defendant society contemplate the possibility of strikes. Rule 20 deals with them under the head of Trade Movements, and the intervention of the society is provided for. This in itself is clearly legitimate, but I find in r. 26 (11) that it is made an offence punishable by compulsion for any member to assist any employer whose workpeople may be on strike, even though the full wage be offered and the persons on strike do not belong to the society. This alone, in my opinion, is sufficient to stamp this society as an illegal one, on the ground that its object is in reference to trade disputes in general, that none of its members shall be allowed to assist any employer whose workmen are on strike.

That being so, the next question is whether the plaintiff's claim comes within s. 4 of the Trades Union Act, 1871, as being a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the agreements specified in the sub-sections to that section. In my opinion the claim for a declaration and for an injunction does not do so, and I content myself on this point with referring to the judgment of COZENS-HARDY, M.R., *in Osborne* v. *Amalgamated Society of Railway Servants* (2) as supporting the conclusion at which I have arrived.

The next point is one raised in this court and not argued in the Divisional Court, and that is, that the society being a voluntary society, this court will not interfere with the action of the branch committee or of the executive council, provided they acted bonâ fide, and he referred to *Inderwick* v. *Snell* (9) and *Dawkins* v. *Antrobus* (3). I think that the foundation of the rule underlying the decisions in these and similar cases is to be found in a passage in the judgment of JAMES, L.J., in the latter case, where he says (17 Ch.D. at p. 628):

> "We have no right to sit as a Court of Appeal on the decision of the members of a club duly assembled."

There is, however, a great distinction between the functions of a Court of Appeal and a court of prohibition, and there are a number of cases in the books where the court has interfered to stay proceedings by the members of a voluntary association where the proceedings are without authority or contrary to natural justice. *Russell* v. *Russell* (10) is a good illustration of the class of case in which the court will not interfere. That was a case of a partnership, but the remarks of JESSEL, M.R., are appropriate. He says in his judgment that under the terms of the agreement between the parties the one partner was given a power to put an end to the partnership, a power which he might exercise at his will and pleasure capriciously or not capriciously, as he thought fit. The Master of the Rolls draws attention to the particular language of the clause in a way which has a bearing on the present case. He says it is not "If the conduct of the said H. Russell shall not be satisfactory," but "If the business shall not be managed and conducted to the satisfaction of W. A. Russell." In my opinion, the decisions in *Inderwick* v. *Snell* (9) and *Dawkins* v. *Antrobus* (3) are based on the same principle as *Russell* v. *Russell* (10). On the other hand, for statements of the law as to the grounds upon which the court will interfere I refer to *Innes* v. *Wylie* (11), where LORD DENMAN said that a party might complain that his expulsion from a voluntary

society was contrary to the general principles of law; *Forbes* v. *Eden* (12), where the Lord Chancellor said that possession of a particular status, meaning by that term the capacity to perform certain functions and to hold certain offices, is a thing which the law will recognise as a patrimonial interest, and that no one can be deprived of its possession by the unauthorised and illegal act of another without having a legal remedy; *Baird* v. *Wells* (13), where STIRLING, J., in laying down the rules as to what questions the court can entertain, states the first to be whether the rules of the club have been observed; *Dawkins* v. *Antrobus* (3), where JESSEL, M.R., puts the point in this way. He says the law says, and rightly says, that in all these things people must act bonâ fide. Bonâ fide means that they shall act with some cause, or, as the law phrases it, with reasonable and probable cause. The rule to be deduced from these cases is, I think, this—that when the rules of a voluntary association leave the question of whether the conduct of a member does or does not, in the opinion of the members or a selected number of the members, warrant expulsion, the court will never interfere, however much they may disagree with the decision come to. Nor, again, will the court interfere in cases where, although the conduct justifying expulsion is precisely defined in the rules, there is any evidence that the member complained of has been guilty of the particular offence named in the rule. The case, however, is different where there is no evidence of the particular offence having been committed, or where the body complained of have acted in violation of or in defiance of the rules.

This makes it necessary in the present case to consider what the conduct of the plaintiff was that was complained of, and whether it afforded any evidence of any offence against the rules of the society, or any ground justifying expulsion under those rules. The facts as to this case can be stated very shortly. [HIS LORDSHIP stated them, and continued:] The expulsion is stated to be under r. 26, cl. 15, and by that decision the society must stand or fall. The rules which appear to have been referred to, besides the one last mentioned, are r. 29, cl. 2, and r. 26, cl. 9. The first of these deals with overtime, and it is agreed by the counsel for both parties that the rule only applies to overtime worked in the trade, and has no application to the plaintiff's alleged offence. The latter rule provides for the case of a member resorting to any dishonest or dishonourable practice which may tend to prove directly or indirectly detrimental to the interests of the society. On a point to which I shall refer later, it is to be noticed that the punishments are a fine or expulsion under the latter rule and a fine for first offence and expulsion for a second offence under the overtime rule. The branch committee appears to have craved both rules in aid, though they did not act upon them, and they must, one would think, have realised that neither rule applied to the plaintiff's case. The rule under which they acted is in these terms: [HIS LORDSHIP then read r. 26, cl. 15, which is printed ante, p. 582.]

The first question to decide is whether the rule can be said to define the offence. As was done by the Master of the Rolls in the case of *Russell* v. *Russell* (10), I draw a great distinction between the language actually used and what might have been used—between "misconduct calculated to damage the character and reputation of the society" and conduct which in the opinion of the branch committee might be calculated to have that effect. I think the rule when it speaks of misconduct means misconduct and misconduct of a kind calculated to damage the character and reputation of the society. Was there any evidence of any such misconduct, or of any misconduct at all? There was no evidence whatever that the plaintiff was in fact rendered less efficient, or less safe to work with, by reason of his employment during the day; and, in my opinion, there was no evidence whatever bringing the plaintiff within the operation of the rule. What he did may be obnoxious to the principles of trade unionism or of some trade unionists, but there is nothing in the rules themselves or apart from the rules rendering it misconduct. A further point was taken that the rule does not in any event justify expulsion. I feel some doubt about this; but bearing in mind the long accepted rule of law that there is

no inherent or implied power of expulsion in a voluntary association such as this, and having regard to the language used with reference to punishments throughout the rules, I do not think that such vague language as "to be dealt with at the discretion of their branch committee" ought to be read as including such a serious punishment as expulsion. I think that it is a sound rule of construction to lay down that where a power of expulsion is intended to be given it must be stated in so many words.

There only remains for consideration the plaintiff's claim for damages. [His Lordship considered this claim and came to the conclusion, since overruled as noted ante p. 577, that it was not maintainable.]

Appeal against the grant of the declaration and injunction dismissed.

Solicitors: *Shaen, Roscoe, Massey & Co.*; *R. Wilberforce Allen.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

PEAKE *v.* CARTER

[Court of Appeal (Swinfen Eady and Pickford, L.JJ.), November 22, 23, December 10, 1915]

[Reported [1916] 1 K.B. 652; 85 L.J.K.B. 761; 114 L.T. 273]

Interpleader—Claim under title not proved—Right of claimant to rely on title found—Proof of interest in goods—Partnership interest.

In interpleader proceedings a claimant who has claimed under a title which he has failed to prove is not thereby precluded from relying on the title found.

Where a claim is laid to goods which have been seized by the sheriff in execution of a judgment it is not incumbent on the claimant in interpleader proceedings to prove that the goods are his absolute property. It is sufficient if he shows such a title to or an interest in the goods that the sheriff ought not to have seized them.

Per Pickford, L.J.: Interpleader proceedings can be taken to decide whether a claim to a partnership interest is well founded.

Notes. As to the application for relief by way of interpleader, see 22 Halsbury's Laws (3rd Edn.) 466 et seq.; and for cases see 29 Digest 475 et seq.

Cases referred to:

(1) *Flude, Ltd.* v. *Goldberg*, [1915] 2 K.B. 157; 84 L.J.K.B. 511; 59 Sol. Jo. 333; [1915] W.N. 37; reversed [1916] 1 K.B. 662, n.; 85 L.J.K.B. 219; 113 L.T. 846; 59 Sol. Jo. 691, C.A.; 29 Digest 476, *255*.

(2) *Holmes* v. *Mentze* (1835), 4 Ad. v. El. 127; 4 Dowl. 300; 1 Mar. & W. 606; 5 Nev. & M.K.B. 563; 5 L.J.K.B. 62; 111 E.R. 735; 29 Digest 470, *184*.

(3) *Dibb* v. *Brooke & Sons*, [1894] 2 Q.B. 338; 63 L.J.Q.B. 665; 71 L.T. 234; 42 W.R. 495; 38 Sol. Jo. 493; 1 Mans. 245; 10 R. 352, D.C.; 5 Digest (Repl.) 887, *7385*.

(4) *Carne* v. *Brice* (1840), 7 M. & W. 183; 8 Dowl. 884; H. & W. 23; 10 L.J.Ex. 28; 4 Jur. 1115; 151 E.R. 731; 29 Digest 490, *411*.

(5) *Gadsden* v. *Barrow* (1854), 9 Exch. 514; 2 C.L.R. 1063; 23 L.J.Ex. 134; 2 W.R. 241; 156 E.R. 220; 29 Digest 486, *371*.

(6) *Edwards* v. *English* (1857), 7 E. & B. 564; 26 L.J.Q.B. 193; 29 L.T.O.S. 89; 3 Jur. N.S. 934; 5 W.R. 507; 119 E.R. 1355; 29 Digest 487, *372*.

(7) *Richards* v. *Jenkins* (1886), 17 Q.B.D. 544; 55 L.J.Q.B. 435; 55 L.T. 397; 34 W.R. 739; 2 T.L.R. 819, D.C.; on appeal (1887), 18 Q.B.D. 451; 56 L.J.Q.B. 293; 56 L.T. 591; 35 W.R. 355; 3 T.L.R. 425, C.A.; 29 Digest 487, *378*.

(8) *Green* v. *Stevens* (1857), 2 H. & N. 146; 5 W.R. 497; 157 E.R. 61; 29 Digest 474, *225*.

(9) *Schroeder* v. *Hanrott* (1873), 28 L.T. 704; 29 Digest 474, *229*.

(10) *Price* v. *Plummer* (1877), 26 W.R. 45; reversed sub nom. *Plummer* v. *Price* (1878), 39 L.T. 657, C.A.; 29 Digest 487, *377*, *381*.

(11) *Hockey* v. *Evans* (1887), 18 Q.B.D. 390; 56 L.J.Q.B. 253; 56 L.T. 179; 35 W.R. 265; 3 T.L.R. 319, C.A.; 29 Digest 476, *254*.

(12) *Webster* v. *Delafield* (1849), 7 C.B. 187; 6 Dow. & L. 597; 18 L.J.C.P. 186; 13 Jur. 635; 137 E.R. 76; 29 Digest 481, *309*.

Also referred to in argument:

Anon., [1875] W.N. 204; 1 Char. Cham. Cas. 32; Bitt. Prac. Cas. 22; 29 Digest 470, *185*.

Wells v. *Hughes*, [1907] 2 K.B. 845; 76 L.J.K.B. 1125; 97 L.T. 469; 23 T.L.R. 733, C.A.; 29 Digest 507, *589*.

Appeal by the claimant from a decision of ROWLATT, J., on an interpleader issue, tried without a jury.

ROWLATT, J., held, without hearing the defendant, that he was bound by the decision of the Court of Appeal in *Flude, Ltd.* v. *Goldberg* (1) to hold that the claimant had not established his claim, and gave judgment for the execution creditor. The claimant appealed.

P. H. Pridham-Wippell for the claimant.

H. St. John Field for the execution creditor.

Cur. adv. vult.

Dec. 10. The following judgments were read.

SWINFEN EADY, L.J., read the following judgment.—Joseph Carter, having on Mar. 8, 1915, obtained judgment against George Richard Bellamy, issued execution, and the sheriff of Devonshire seized certain goods consisting of mining machinery. These goods were claimed by Sydney Charles Peake, and the ordinary issue was directed to try the question whether the goods seized by the sheriff were at the time of the seizure the property of Sydney Charles Peak as against Joseph Carter. The issue came before ROWLATT, J., for trial without a jury. The notice of claim given on behalf of Peake to the sheriff states that the whole of the machinery and tin-dressing plant (being the goods seized in execution at the suit of Carter) are the property of Peake. The judge, after hearing the evidence of the claimant, acceded to the contention of the execution creditor that the claimant had not established his claim, and without calling on the execution creditor for any evidence gave judgment for him. It is from this judgment that Peake, the claimant, appeals.

It appears from correspondence in evidence that Bellamy negotiated for, and ultimately made an offer to purchase, a lease of china clay for £500 and a royalty of 6d. a ton on all clay sold, a lease of the Dimson tin mine and some plant belonging thereto for £2,000, and some tin-dressing plant and machinery at Rumleigh for £350. Bellamy apparently had not of his own the means requisite for carrying his proposal into effect; so he obtained money from Peake, part of which Peake in his turn borrowed from one Spender. As between Peake and Bellamy the correspondence shows that Peake was to find the money, that the machinery at Rumleigh was to be the joint property of Bellamy and Peake until taken over by a company intended to be formed, which was to purchase it for £700, and after repaying the £350 provided by Peake for its purchase the balance of £350 profit was to belong as to one half to Bellamy and the other half to Peake. Accordingly an agreement in writing was entered into between George Palmer, the vendor, of

the one part, and Bellamy and Peake (therein called "the purchasers") of the other part. It is dated July 18, 1914, but was signed by the purchasers on July 23, and by the vendor on July 31. It provides for the purchasers buying the china clay lease, the Dimson mine, and the Rumleigh machinery on the terms I have mentioned. The sum of £50 is acknowledged as a deposit. This sum is apportioned by allotting £5 in respect of the £350 payable for the Rumleigh machinery and £45 between the other two items. The sum of £350, being the balance of the purchase money for the Rumleigh machinery, was to be paid on July 14, 1914 (then a past date), and on such payment being made "the purchasers" were to be entitled to the plant and machinery. The payment was made on or about July 14, and the Rumleigh machinery thus became the property of the purchasers, Bellamy and Peake. As between these co-adventurers, the terms on which they acquired it were that out of any proceeds of sale Peake was to be first repaid the £350 which he had provided for the joint adventure, and any surplus proceeds were to belong to the two parties in equal moieties. It appears that Peake did find the whole £350, and that, as between him and Bellamy, Peake paid for the whole cost of the machinery. Peake also subsequently found money for dismantling it. It was intended to move it from Rumleigh to Dimson. Palmer was not satisfied with Bellamy's offer to purchase, but had required a more substantial purchaser, and that was how Peake came in.

These are the proper inferences of fact to be drawn from the evidence adduced on behalf of the claimant, subject, of course, to being displaced by any evidence which Carter might call. Thus the legal position is that this machinery, which are the goods the subject of the interpleader, is the joint property of Bellamy and Peake, and the latter is entitled to be first repaid out of the proceeds of sale the sum of £350, and any surplus proceeds will belong to Bellamy and Peake equally. Upon this state of facts Peake has established that the goods are his as against the execution creditor—that is to say, that he has such an interest in the goods that they cannot be taken in execution by the sheriff. By s. 23 (1) of the Partnership Act, 1890, it is provided that a writ of execution shall not issue against partnership property, except on a judgment against the firm. Under sub-s. (2) any judgment creditor of a partner may obtain a charging order on that partner's interest in the partnership property. Previous to this enactment the sheriff under a judgment against a partner could seize and sell the interest of the partner in a partnership. Such a seizure was not adverse to the other partners; the sheriff only purported to deal with the share and interest of the partner who was the execution debtor, and it was for this reason that it was held that interpleader proceedings do not lie where the debtor's partner gives notice to the sheriff that the goods are partnership property, and alleges that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects. The sheriff's duty was to sell the share, though he might not have been able to ascertain the amount of actual interest: *Holmes* v. *Mentze* (2). If the execution creditor disputed that any particular chattels were in fact partnership property and alleged that they were the sole property of the execution debtor, the ordinary interpleader issue would be directed to try this question: *Holmes* v. *Mentze* (2); *Dibb* v. *Brooke & Sons* (3).

Under the present law, seeing that the sheriff is no longer entitled to seize in execution the share of a partner in a partnership, if on such a seizure a claim is made that the property is partnership property and this is not disputed, an order should be made at chambers for the sheriff to withdraw. If the execution creditor disputes the partnership with regard to particular chattels and claims that they are the sole property of the execution debtor, the other partner may maintain the claim of the partnership to the chattels upon an interpleader issue, and such a dispute will be the proper subject of an interpleader. If on the other hand the other partner maintains that certain chattels are his own property and do not belong to the partnership, this question does not properly fall to be determined

on a sheriff's interpleader, as in neither case would the sheriff be right in seizing them under a judgment against the debtor partner. The dispute should be decided by an inquiry directed under s. 23 (2) of the Partnership Act, 1890, to ascertain the particulars of the partnership assets and of the debtor's share and interest therein.

In interpleader proceedings it has not been the practice of the court to treat the exact form of the issue as material, as "the issue is only a proceeding directed for the purpose of informing the conscience of the court": (per PARKE, B., *Carne* v. *Brice* (4) (7 M. & W. at p. 187). See also *Gadsden* v. *Barrow* (5) (9 Ex. at p. 517), per ALDERSON, B.; *Edwards* v. *English* (6) (7 E. & B. at p. 568), per LORD CAMPBELL, C.J.; *Richards* v. *Jenkins* (7) (17 Q.B.D. at p. 547), per WILLS, J. The form used in the present case is the usual and proper form where the goods at the time of seizure are in the judgment debtor's possession, as the question is not whether the goods or money are the property of the claimant or the execution debtor simply. Upon an issue directed in the form in the present case it is not incumbent upon a claimant to prove that the goods are his absolute property. It is sufficient if he show such a title to or interest in the goods that the sheriff ought not to have seized them.

In *Green* v. *Stevens* (8) the claimant, Mary Green, was not the owner of the goods; they belonged to a man named Williams, but he, not wishing her name to appear, allowed Green to let them as owner to the execution debtor. On a motion for a new trial of the interpleader issue it was urged that Mary Green, the claimant, not being in actual possession, was bound to show a title to the property in herself. But POLLOCK, C.B., intervening, said (2 H. & N. at pp. 146, 147):

> "The issue in the present case is, not whether the goods were the property of Mary Green absolutely, but whether they were hers as against the defendant. My impression is, that this form of issue has been adopted for the express purpose of enabling any person lawfully entitled to possession to sustain his claim."

And BRAMWELL, B., intervening, said (ibid. at p. 147):

> "Is not the question whether the claimant has such a title as would enable her to maintain an action against the sheriff?"

And in giving judgment, BRAMWELL, B., said (ibid. at pp. 147, 148):

> "In an interpleader issue the plaintiff must make out his title, but he may do so by showing that he has such a right to the goods that they cannot be taken from him by the execution creditor. In the present case the judge appears to have said that it was not necessary to show that the goods were absolutely the property of the claimant, if they were hers in any sense. I think that this was a just remark, and that if a claimant has any sort of title, it must be taken that he has a right to defend it until the contrary is shown. If it is shown that he has a lawful title to the possession that is enough."

Schroeder v. *Hanrott* (9) is to the same effect. BOVILL, C.J., said (28 L.T. at p. 704):

> "The issue is not whether the property abstractedly considered is in the plaintiff, but as to whether the plaintiff has a right to the goods as against the defendant."

Again, *Plummer* v. *Price* (10) was a decision of the Court of Appeal, reversing the Common Plea Division. A claimant in an interpleader issue claimed all the goods seized, and succeeded as to the bulk of them but failed as to the rest; it was held that the claimant had succeeded in substance. BRAMWELL, L.J., said (39 L.T. at p. 658):

> "I am clearly of opinion that the form of the issue is of no consequence, because it is directed for the purpose of informing the conscience of the court. The issue is not decided against the claimant if he claims all the goods and it

turns out that he is only entitled to some of them, but it is to be taken distributively, and it means, are these goods, or part of them, and if so, what part, the property of the claimant?"

The practice in interpleader is well settled, and I have dwelt upon it because the judge, in deciding against the claimant in the present case, thought himself bound to do so, owing to the decision in *Flude, Ltd.* v. *Goldberg* (1). This view was erroneous. That decision of the Court of Appeal proceeded upon the facts of that particular case, and does not disturb the general rule that a claimant, having claimed under a title which he failed to prove, is not thereby precluded from relying on the title found. In *Flude, Ltd.* v. *Goldberg* (1) the claimant had filed particulars of his claim under the County Court Rules (1903–1914) Ord. 27, r. 5, by which a claimant is required to lodge particulars of the ground of his claim. He stated that

"the grounds of my claim are that the said goods and chattels were purchased by me out of my own proper moneys, or upon my own proper credit, from the following firms,"

whose names he proceeded to state. The partnership was strenuously denied by Isaacs, the claimant, both in his affidavit and in his evidence at the trial, while it was the execution creditor who insisted on the partnership, and that the goods were partnership goods and not that the goods were the sole property of Goldberg. This was the dispute between the parties. No application was made to amend the particulars, and the case proceeded at the trial on the claim as thus appearing on the record. It was under these circumstances that the Court of Appeal decided that the county court judge was right, having regard to the facts of the case, the course of the trial before him, and the conduction of the claimant, in keeping him to the record as it stood and as if limited by his particulars, and in holding that he had failed in his claim. Isaacs persisting in his claim to be sole owner of the goods, the question was left by the judge to the jury, "Were the goods in question the goods of Maurice Isaacs alone?" and the jury answered "No." This answer disposed of the claim. There was no application for leave to amend, and no application to the judge to put the question to the jury whether the goods in question were the goods of the claimant as against the execution creditor. The case must be regarded as having turned on the particular facts. Another instance of a claimant having been held bound by the particulars of his claim is *Hockey* v. *Evans* (11).

In the present case the claimant, although alleging that the goods seized are his absolute property, has exhibited a copy of the agreement of July 18, 1914, to which I have before referred, showing the purchase by himself and Bellamy jointly. It may be that in substance all the beneficial interest in the chattels belonged to him, as he found all the money to buy them, and they are said not to be worth or to have realised the amount of his lien. But technically the goods belong to the adventurers jointly. In my opinion the learned judge was wrong in deciding that he was bound by the case of *Flude* v. *Goldberg* (1) to hold that there was no case for the defendant to answer. The claimant has proved a primâ facie case that the sheriff was wrong in making the seizure. The judgment must be set aside and a new trial had. Any costs paid to be repaid. The appellant to have the costs of this appeal. The costs of the former trial and of the new trial to abide the event.

PICKFORD, L.J.—In this case certain machinery has been seized by the sheriff of Devonshire to satisfy a judgment obtained by Carter against one Bellamy. Peake claimed the said goods, and an interpleader issue was directed to try the question. The issue was in the usual form—i.e., whether the said goods were at the time of the seizure the property of Peake against Carter. In support of his claim Peake swore an affidavit in which he claimed the goods as his absolute property. In a later part of the affidavit he sets out the way in which he alleges

the goods became his absolute property and exhibits the agreement under which he alleges that he purchased them. Primâ facie, this agreement and the other facts make a case of these goods being bought jointly by Bellamy and Peake for the purpose of a joint adventure and of Peake having provided all the purchase money. This money was borrowed by Peake, but that is immaterial; he alone was liable to the lender, and as between him and Bellamy the case was the same as if it had been his own money. In taking the accounts of the partnership Bellamy would not be entitled to any share until the lien of Peake upon the partnership assets had been satisfied. I say this is the primâ facie case, because it is said that it can be disproved by evidence which, owing to the course which the case took at the trial, was not heard.

The issue came on for trial before ROWLATT, J., and at the end of the plaintiff's case counsel for the defendant, the execution creditor, submitted that there was no case because the plaintiff had in his affidavit claimed the goods as his absolute property, and when that case failed in proof could not set up a claim as partner. In support of this contention he relied on the case of *Flude, Ltd.* v. *Goldberg* (1). ROWLATT, J., held that he was bound by that case to uphold the defendant's contention, and gave judgment accordingly. The learned judge had not the advantage of a full report of the case; if he had had, I think he would not have felt himself bound by it. It turned entirely upon the peculiar circumstances of that particular case. Something turned upon the nature of the proceedings in the county court and the County Court Rules, but the main ground of the decision was that the conduct of the claimant in that case had been such that he ought not to be allowed to set up a case other than that on which he made his claim in the first instance. This is apparent from the remarks of BANKES, L.J. The learned Lord Justice said ([1916] 1 K.B. at p. 664): "It is just one of those cases where a claimant ought to be bound by his particulars," and it is clear that he was speaking with reference to the special facts of the case. The case did not decide that in all cases the claimant must prove the exact interest which he has alleged in his claim. The affidavit is not a pleading, and the issue is not whether the claimant has proved that all he there swore is correct; it is whether the goods are his property as against the execution creditor, and to succeed in that issue it is sufficient for him to prove such an interest as will make it wrongful as against him that the goods should be seized to satisfy the debt due from the execution debtor. An interest as partner is in my opinion such an interest. Since the Partnership Act, 1890, partnership property cannot be seized to satisfy the debt of one partner; all that can be done is to make an order charging the partner's interest in the partnership property with payment of the amount of the judgment debt, and the share can only be ascertained after satisfying all the partnership liens and other claims.

The claimant must state proper materials to enable the judgment creditor to form a correct judgment of the nature of the claim: see per MAULE, J., in *Webster* v. *Delafield* (12) (7 C.B. at p. 191); 17 HALSBURY'S LAWS (1st Edn.) 597 [see now (3rd Edn.) vol. 22, p. 472], but it is nowhere decided that if he makes an incorrect statement or draws a wrong inference from those facts his claim must be dismissed. The decision of the Divisional Court in *Flude, Ltd.* v. *Goldberg* (1) established the contrary, and was only reversed on the special circumstances of the case. There may be cases in which the claimant may be prohibited from making any alteration in his claim because it is unjust to the execution creditor by reason of his being misled as for other reasons, as in *Flude, Ltd.* v. *Goldberg* (1); see also *Hockey* v. *Evans* (11). But in this case nothing of the kind exists. All the facts upon which the claimant relies are set out in the affidavit and exhibits, and all that can be said is that the claimant has stated a wrong conclusion from the facts, i.e., that the goods were his absolute property, and that he incorrectly stated that Bellamy had assisted him in the negotiations instead of stating that he was his partner. If the execution creditor had been willing to admit the partnership,

some question as to costs might have arisen; but he is not so willing, he wishe to contest the fact of the partnership and to attempt to prove that the goods wer the absolute property of Bellamy. The execution creditor has been in no way misled, and there is no reason why the claimant should not have the advantag whatever it may be, of the legal result arising from the facts which he has stated

A further point was taken before us, i.e., that interpleader proceedings cann be taken and an issue cannot be granted where the claim is in respect of a partner ship. This is stated to be the case in some text-books, and the authority upon which it is so stated is *Holmes* v. *Mentze* (2). This case does not support the proposition According to the procedure then in force a rule was obtained calling on the claimant and the execution creditor to state their claims. The claimant alleged a partner ship; the execution creditor did nothing and did not contest it. The court dis charged the rule on the ground that there was no adverse claim, but on the case coming before it again on another point PATTESON, J., said that if on the first occasion the partnership had been contested the case would have been within the Interpleader Act, 1831, and the rule would have been granted. It is therefore n authority that even at that date a claim of partnership could not have been the subject of interpleader proceedings. But at that time there was power to seize goods for one partner's debt, and the result of proving a partnership was not that the sheriff was obliged to withdraw, but that he could only sell the partner's interest and not the absolute property in the goods. Since the Partnership Act, 1890, the partnership goods cannot be seized for a partner's debt, and therefore to prove an interest as partner is to prove that the seizure was wrongful as against the claimant and the sheriff must withdraw. A proper way of deciding whether the claim to such an interest is well founded is, in my opinion, by interpleader proceedings, and I can see no reason in principle or authority why such proceedings do not apply to such a claim. I think the order of ROWLATT, J., must be set aside, and as the execution creditor wishes to deny the existence of the partnership, there must be a new trial.

Appeal allowed. New trial ordered.

Solicitors: *H. W. Newton*, for *W. T. Watkins*, Tiverton; *H. Dobell*, for *J. P. Dobell*, Plymouth.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LONDON AND NORTHERN ESTATES CO. *v.* SCHLESINGER

ING'S BENCH DIVISION (Avory and Lush, JJ.), November 2, 1915]

[Reported [1916] 1 K.B. 20; 85 L.J.K.B. 369; 114 L.T. 74; 32 T.L.R. 78; 60 Sol. Jo. 223]

ien—Enemy—Tenant of premises within prohibited district—Alien not allowed to reside therein—Liability for rent.

In April, 1914, the landlords let to the tenant, an Austrian, a flat at W. for a term of three years. Under the agreement, the tenant was not to assign or underlet the premises without the consent of the landlords, such consent not to be unreasonably withheld. War broke out between Great Britain and Germany in August, 1914, and the tenant became an alien enemy. By an Order in Council, alien enemies were prohibited from residing in certain areas, of which W. was one. The tenant declined to pay the rent due for the flat after the date of the order.

Held: the right to personal occupation was not the foundation of the contract; as there were other rights left to the tenant, the agreement was not put an end to by the Order; and the tenant was, accordingly, liable for the rent.

Notes. Applied: *Whitehall Court, Ltd.* v. *Ettlinger*, [1918–19] All E.R.Rep. 29. Considered: *Swift* v. *Macbean*, [1942] 1 All E.R. 126. Referred to: *Mattley* v. *Curling*, [1922] 2 A.C. 18; *Denny, Mott and Dickson, Ltd.* v. *James B. Fraser & Co.*, [1944] A.C. 265; *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.* [1945] 1 All E.R. 252.

As to suspension of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 551 et seq.; and for cases see 31 DIGEST (Repl.) 272 et seq.

Cases referred to:

(1) *Krell* v. *Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, *3327*.

Also referred to in argument:

Taylor v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

Jackson v. *Union Marine Insurance Co., Ltd.* (1873), L.R. 8 C.P. 572; 42 L.J.C.P. 284; 22 W.R. 79; affirmed (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 12 Digest (Repl.) 438, *3339*.

Newby v. *Sharpe* (1878), 8 Ch.D. 39; 47 L.J.Ch. 617; 38 L.T. 583; 26 W.R. 685 C.A.; 31 Digest (Repl.) 274, *4065*.

Grimsdick v. *Sweetman*, [1909] 2 K.B. 740; 78 L.J.K.B. 1162; 101 L.T. 278; 73 J.P. 450; 25 T.L.R. 750; 53 Sol. Jo. 717, D.C.; 31 Digest (Repl.) 109, *2516*.

Howell v. *Richards* (1809), 11 East, 633; 103 E.R. 1150; 40 Digest (Repl.) 368, *2949*.

Appeal from the Mayor's Court.

By an agreement dated April 19, 1914, the plaintiffs let to the defendant, an Austrian, a flat at Westcliff-on-Sea for a term of three years from Mar. 25, 1914, at a rent of £110 per year. The agreement contained covenants that the tenant would occupy the flat only as a private dwelling, and that he would not assign or underlet the premises without first obtaining the consent in writing of the landlords, which consent was not to be unreasonably withheld. There was also a covenant for quiet enjoyment. In 1914, war broke out and the tenant became an alien enemy. The Aliens Restriction (Consolidation) Order, 1914, made in

pursuance of the Aliens Restriction Act, 1914, provided by s. 18 (1), that

> "An alien enemy shall not enter, or reside or continue to reside, either temporarily or permanently, in any of the areas specified in the Second Schedule to this order (in this order referred to as prohibited areas) unless provided with a permit issued by the registration officer of the district, subject to the general or special instructions of the Secretary of State."

The municipal borough of Southend, in which Westcliff-on-Sea was included, had been declared a prohibited area. And by s. 28:

> "If any person aids or abets any person in any contravention of this order, or knowingly harbours any person whom he knows or has reasonable ground for supposing to have acted in contravention of this order, he shall be deemed himself to have acted in contravention of this order."

The defendant had failed to obtain the permit necessary to enable him to continue to reside on the premises; he, therefore, declined to pay the rent after the date of the order. The plaintiffs brought this action to recover one quarter's rent of the flat due on Mar. 25, 1915. The Common Serjeant gave judgment for the landlords, and the tenant appealed.

T. W. H. Inskip, K.C., and *C. Wertheimer* for the tenant.
J. B. Matthews, K.C., and *P. M. Beachcroft* for the landlords.

AVORY, J.—The question raised in this case is of particular interest at the present time. The agreement for the tenancy of the flat was made with an Austrian, who is now an alien enemy. After the agreement had been entered into, by reason of the Aliens Restriction Act, 1914, and of the Aliens Restriction (Consolidation) Order, 1914, it became unlawful for the tenant to reside either temporarily or permanently in the flat. It also became unlawful for any person to aid or abet the tenant in residing there either temporarily or permanently. The question, therefore, which we have to decide is whether that statute or the order has put an end to this agreement for tenancy so as to discharge the tenant from his obligation to pay the rent. The lucid argument of counsel for the tenant is based on the proposition that here is an Act of State which has put an end to this agreement, for he says that it was a term of that agreement that one of the parties to it should reside in the premises, and that the Act of Parliament has made it impossible for him to do so. I am content to adopt the words of the learned Common Serjeant in giving judgment in this case. He said:

> "By the lease the defendant had a right to the personal occupation of the premises, and the right to assign or sublet them to another person in the absence of any reasonable ground for objection. This latter right was of value and might even enable the defendant to let the premises at a profit to himself, and this right was not affected by the Aliens Restriction Order. That order and the statute under which it was made did not avoid the lease, or make it illegal for an alien enemy to hold a lease of land in a prohibited area. This being so the lease is not extinguished nor is the defendant's title as tenant under it put an end to, although his personal enjoyment of the premises under it is prohibited."

I doubt whether anything usefully can be added to that judgment, and I will only say this, that the right to sublet is only one of the rights left to the tenant, notwithstanding that he himself is prohibited from residing here. For if he has a family, or friends, there is nothing in the Aliens Restriction Act or the order to prevent him from letting his children or his friends reside there. In my opinion, therefore, the lease was not put an end to by this order, or by the statute under which it was made, and the appeal must be dismissed.

LUSH, J.—I agree. Even if we ought to regard the agreement as a contract merely, and not as a lease, in my opinion, counsel for the tenant's argument fails. In order to succeed, he would have to prove that his personal residence in the flat was, in the words of VAUGHAN WILLIAMS, L.J., in *Krell* v. *Henry* (1), "the foundation of the contract," and that the performance of the contract was prevented, because, by virtue of this Act and order, he was prevented personally from residing in the flat. In my opinion, it cannot be said that his personal residence was the foundation of the contract. The contract to take the flat—treating the lease as a contract and nothing more—was, no doubt, entered into by the tenant for the purpose of occupation by him, but that is not the interpretation of the words "foundation of the contract" as used in *Krell* v. *Henry* (1), where the parties contracted for one purpose only—namely, that the rooms were only to be occupied by the defendant in order to witness the Coronation procession, and, in the event of there being no such procession, he was not to have any right to occupy them at all. Here, the personal occupation was not the sole consideration for which the tenant agreed to pay the rent; he obtained the right to assign or sublet to other people, and, if he had chosen to have been out of possession during the whole of the term, the contract would not have been affected.

With regard to the second point, that performance of the contract was rendered impossible by the order, that clearly is not so if the contract could be performed by his assigning or subletting.

There is a third answer to the tenant's contention. It is not correct to speak of this agreement as a contract only. A term of years was created by the lease, which vested in the tenant, and was not affected by the statute or the order; that term of years constitutes a chattel interest which still continues to vest in the tenant, and has not been terminated by the order. For these reasons, I am of opinion that the judgment of the learned Common Serjeant was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Oppenheimer, Blandford & Co.*; *H. Kempson Reeves.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

MASKELL *v.* HORNER

Court of Appeal (Lord Reading, C.J., Buckley and Pickford, L.JJ.), January 22, March 3, 4, 24, 1915]

[Reported [1915] 3 K.B. 106; 84 L.J.K.B. 1752; 113 L.T. 126; 79 J.P. 406; 31 T.L.R. 332; 59 Sol. Jo. 429; 13 L.G.R. 808]

Money Had and Received—Payment under pressure—Seizure or threat of seizure of goods—Recovery of sums paid.

From 1900 until 1912 the plaintiff carried on business as a dealer in a market, and throughout this period the defendant demanded and received payment from him of market tolls on goods sold. Disputes arose between the plaintiff and the defendant as to these tolls from time to time, and on these occasions the defendant seized or threatened to seize the plaintiff's goods for non-payment. The plaintiff on the advice of his solicitor then paid the tolls under protest. It was decided by the Court of Appeal in 1913 that the defendant was not entitled to demand tolls from the dealers in the market, and the plaintiff

sued the defendant in an action for money had and received to recover the sums he had paid.

Held: as the plaintiff had never made the payments voluntarily, but had only paid under the pressure of actual or threatened seizure of his goods, he was entitled to recover the amount of those payments which he had made during the previous six years.

Per LORD READING, C.J., and PICKFORD, L.J.: The mere fact of payment under protest would not have been sufficient to entitle the plaintiff to succeed.

Notes. Considered: *Brocklebank* v. *R.*, [1924] 1 K.B. 647; *Morgan* v. *Ashcroft* [1937] 3 All E.R. 92. Referred: *Spanish Government* v. *North of England Steamship Co.* (1938), 54 T.L.R. 852; *United Australia, Ltd.* v. *Barclays Bank, Ltd.* [1940] 4 All E.R. 20; *Sawyer* v. *Windsor Brace, Ltd.*, [1942] 2 All E.R. 669; *Diplock's Estate, Diplock* v. *Wintle*, [1947] 1 All E.R. 522; *South of Scotland Electricity Board* v. *British Oxygen Co., Ltd. (No. 2), South of Scotland Electricity Board* v. *British Oxygen Cases, Ltd.* [1959] 2 All E.R. 225.

As to recovery of money paid under compulsion, see 8 HALSBURY'S LAWS (3rd Edn.) 240, 241; and for cases see 12 DIGEST (Repl.) 624 et seq.

Cases referred to:

(1) *A.-G.* v. *Horner (No. 2)*, [1913] 2 Ch. 140; 82 L.J.Ch. 339; 108 L.T. 60; 77 J.P. 257; 29 T.L.R. 451; 57 Sol. Jo. 498; 11 L.G.R. 784, C.A.; 33 Digest 533, *103*.

(2) *Atlee* v. *Backhouse* (1838), 3 M. & W. 633; 1 Horn. & H. 135; 7 L.J.Ex. 25; 150 E.R. 1298; 12 Digest (Repl.) 616, *4766*.

(3) *Valpy* v. *Manley* (1845), 1 C.B. 594; 14 L.J.C.P. 204; 5 L.T.O.S. 94; 9 Jur. 452; 135 E.R. 673; 12 Digest (Repl.) 625, *4824*.

(4) *Parker* v. *Great Western Rail. Co.* (1844), 7 Man. & G. 253; 3 Ry. & Can. Ca. 563; 7 Scott, N.R. 835; 13 L.J.C.P. 105; 2 L.T.O.S. 420; 8 Jur. 194; 135 E.R. 107; 8 Digest (Repl.) 196, *1255*.

(5) *Great Western Rail. Co.* v. *Sutton* (1869), L.R. 4 H.L. 226; 38 L.J.Ex. 17; 22 L.T. 43; 33 J.P. 820; 18 W.R. 92, H.L.; 8 Digest (Repl.) 199, *1264*.

(6) *Lancashire and Yorkshire Rail. Co.* v. *Gidlow* (1875), L.R. 7 H.L. 517; L.J.Q.B. 625; 32 L.T. 573; 24 W.R. 144, H.L.; 8 Digest (Repl.) 175, *1134*.

(7) *Brisbane* v. *Dacres* (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest 159, *54*.

(8) *Brown* v. *M'Kinally* (1795), 1 Esp. 279, N.P.; 12 Digest (Repl.) 623, *4807*.

(9) *Knibbs* v. *Hall* (1794), 1 Esp. 84; 170 E.R. 287, N.P.; 40 Digest (Repl.) 41, *74*.

(10) *Lindon* v. *Hooper* (1776), 1 Cowp. 414; 98 E.R. 1160; 18 Digest (Repl.) 44, *1886*.

(11) *Gulliver* v. *Cosens* (1845), 1 C.B. 788; 14 L.J.C.P. 215; 5 L.T.O.S. 199; 9 Jur. 666; 135 E.R. 753; 18 Digest 444, *1882*.

Appeal from a decision of ROWLATT, J. ([1915] 3 K.B. 106), in an action brought by the plaintiff against the defendant for money had and received. ROWLATT, J. gave judgment for the defendant and held that to recover money paid under mistake of fact the plaintiff has to prove a mistake, not merely as to his liability but as to the fact on which the liability depended, and that to recover money paid under protest there must have been an involuntary payment in order to avoid some immediate inconvenience, and notice must have been given that the person paying did not intend to surrender his rights. The plaintiff appealed.

Schwabe, K.C., and *G. A. H. Branson* for the plaintiff.

Upjohn, K.C., and *Lord Tiverton* for the defendant.

Cur. adv. vult.

Mar. 24, 1915. The following judgments were read.

LORD READING, C.J.—From 1900 to 1912 the plaintiff carried on business in Spitalfields Market as a dealer in produce, and the defendant throughout that period demanded and received payment by the plaintiff of market tolls or

ld by the plaintiff in the market. It was decided by the Court of Appeal in
-G. v. *Horner* (*No. 2*) (1) that the defendant Horner was not entitled to demand
lls from the sellers, and it follows from this decision which has not been and could
t be challenged in this court, that the plaintiff was never under legal obligation
pay tolls to the defendant. The plaintiff, having, during this period of years,
id a number of small sums of money as market tolls to the defendant, now sues
recover these sums as money had and received by the defendant to the use of
e plaintiff. The action came for trial before Rowlatt, J., who decided in favour
the defendant, and the plaintiff appeals to this court for a reversal of this
dgment.

The question is whether the plaintiff made these payments in such circum-
ances as entitle him to recover them from the defendant in an action at law for
oney had and received. The claim is put on two grounds: (i) That the plaintiff
id the sums under a mistake of fact; (ii) that he paid them, not voluntarily, but
nder the pressure of seizure of his goods. I will deal first with the claim under
mistake of fact. It is an essential condition of the plaintiff's right to recover
nder this head that he should establish that he paid the money in the belief that
fact was true which was untrue. That fact is that at the time of the payments
ne defendant was entitled to exact market tolls from the plaintiff. When the
emand was first made the plaintiff at once consulted his solicitor, and, acting
pon the advice given to him, made the first payment and all subsequent payments
nder protest. Rowlatt, J., has found upon this and other evidence before him
nat the plaintiff did not make these payments under the impression that the
efendant was entitled to demand them from him. Upon an examination of the
vidence I have arrived at the same conclusion. I am satisfied that he did not pay
n the belief that he was liable to the defendant, but because he found that other
ellers in the market had paid and were paying these tolls to the defendant and
ecause he was, at least, in doubt as to his liability to pay these tolls and did not
ish to be involved in litigation with the defendant. Therefore, even assuming
nat such mistake was one of fact and not of law, the plaintiff cannot recover
nder this head. Able and interesting arguments were addressed to us for and
gainst the view that a mistake as to the ownership of private rights is regarded
n law as a mistake of fact. As I have come to the conclusion that the plaintiff did
ot pay under a mistake, it becomes unnecessary to decide whether such mistake
as of fact or of law. I express no opinion on the point.

Upon the second head of claim the plaintiff asserts that he paid the money, not
oluntarily, but under the pressure of actual or threatened seizure of his goods,
id that he is, therefore, entitled to recover it as money had and received. If
e facts proved support this assertion, the plaintiff would, in my opinion, be
titled to succeed in this action. If a person with knowledge of the fact pays
oney which he is not in law bound to pay, and in circumstances implying that
is paying it voluntarily to close the transaction, he cannot recover it. Such
payment is in law like a gift, and the transaction cannot be reopened. If a
rson pays money, which he is not bound to pay, under the compulsion of urgent
d pressing necessity, or of seizure, actual or threatened, of his goods, he can
over it as money had and received. The money is paid not under duress in
e strict sense of the term, as that implies duress of person, but under the pressure
seizure or detention of goods which is analogous to that of duress. Payment
der such pressure establishes that the payment is not made voluntarily to close
transaction: *Atlee* v. *Backhouse* (2), 3 M. & W. at p. 646, per Lord Abinger,
B., and ibid. at p. 650, per Parke, B. The payment is made for the purpose of
erting a threatened evil, and is made not with the intention of giving up a right,
t under immediate necessity and with the intention of preserving the right to
pute the legality of the demand: *Valpy* v. *Manley* (3), per Tindal, C.J., 1 C.B.
pp. 602 and 603. There are numerous instances in the books of successful claims
this form of action to recover money paid to relieve goods from seizure.

Other familiar instances are cases such as *Parker* v. *Great Western Rail. Co.* (4), where the money was paid to the railway company under protest in order to induce them to carry goods which they were refusing to carry except at rates in excess of those they were legally entitled to demand. These payments were made throughout a period of twelve months, always accompanied by the assertion that they were made under protest, and it was held that the plaintiffs were entitled to recover the excess payments as money had and received, on the ground that the payments were made under the compulsion of urgent and pressing necessity. This case was approved in *Great Western Rail. Co.* v. *Sutton* (5), when the judges were summoned to the House of Lords to give their opinion. WILLES, J., in stating his view of the law, said (L.R. 4 H.L. at p. 249):

> "When a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by condictio indebiti, or action for money had and received. This is every day's practice as to excess freight."

That is a clear and accurate statement in accordance with the view expressed by BLACKBURN, J., in the same case and adopted by the House of Lords. It treats such claims made in this form of action as matters of ordinary practice and beyond discussion. (See also per LORD CHELMSFORD in *Lancashire and Yorkshire Rail. Co.* v. *Gidlow* (6) (L.R. 7 H.L. at p. 527).

This principle of law is so well settled that it cannot be challenged, and I find nothing in *Brisbane* v. *Dacres* (7) to the contrary. Indeed, the general proposition of law is not disputed, but it was contended, and the learned judge found that the plaintiff had not brought himself within it, mainly because (i) the payments were not accompanied by a declaration of assertion to the defendant that the plaintiff did not intend to give up his right to recover the money, and (ii) the protests for a period of years had degenerated into a sort of grumbling acquiescence and were ineffective. I doubt whether ROWLATT, J., intended to find that there must be anything in the shape of an express notice or declaration to the defendant of the plaintiff's intention to keep alive his right to recover. It is clear, and was indeed admitted at the Bar, that no express words are necessary, and that the circumstances attending the payments and the conduct of the plaintiff when making them may be a sufficient indication to the defendant that the payments were not made with the intention of closing the transactions. I do not think that the mere fact of a payment under protest would be sufficient to entitle the plaintiff to succeed; but I think that it affords some evidence, when accompanied by other circumstances, that the payment was not voluntarily made to end the matter. At the beginning of the dispute there was a definite assertion of right by the defendant to recover the tolls, and a denial of that right by the plaintiff, followed by an actual seizure of goods of the plaintiff. The plaintiff, upon the advice of his solicitor, then made the payment under protest. Subsequently, and during the long period of years whenever the plaintiff challenged the defendant's right, there was a seizure or a threat of seizure of the plaintiff's goods. A threat intended to be followed by seizure is equivalent for this purpose to a seizure: see *Valpy* v. *Manley* (3), per CRESSWELL, J., 1 C.B. at p. 606. Disputes arose both as to the right to exact the tolls and as to the amount in particular cases. Notable instances occurred in 1902, 1903, 1905, and 1909. The disputes always ended either in seizure or a threat to seize, and the plaintiff then paid under protest. The defendant first asserted his right to recover payment of the tolls by a distress levied upon the plaintiff's goods, and, if the defendant was legally entitled to the tolls, he could enforce payment by these means.

It appears to me upon the evidence that the plaintiff throughout the whole period of years believed that if he did not pay his goods would be seized. No doubt, as time progressed, and the protests were frequently repeated, they were at last

made by the plaintiff's servants to the defendant's servants in a laughing and peculiar manner. The plaintiff had, however, given definite instructions that payments were never to be made except under protest, and these instructions were invariably followed. I cannot think that the protests lost their effectiveness by reason of the length of period during which they were persistently made, or because they were at times accompanied by a laugh or jest. The persistence during so long a period serves rather to show that the plaintiff would not acquiesce in the defendant's demands. I come to the conclusion that the plaintiff never intended to depart, and never did depart, from the course taken by him at the commencement of the dispute. In order to preserve his right to recover, it is not, in my opinion, necessary that on every occasion there should be a refusal to pay by the plaintiff followed by seizure. It was not necessary to go through this form. The circumstances of these payments and the conduct of the plaintiff throughout the period of years satisfy me that he never made the payments voluntarily, that he never intended to give up his right to recover the sums paid, and that he only paid because he knew that a refusal to pay would be immediately followed by seizure of his goods, as in fact did happen whenever he disputed the defendant's right and refused to pay. The pressure of seizure was always present to his mind, and never ceased to operate upon it whenever demand for tolls was made. I am also satisfied that the circumstances of the payments and the conduct of the plaintiff were a sufficient indication to the defendant that the plaintiff did not intend to give up his right to recover. If any assertion or declaration of his intentions was necessary, it was made to the defendant at the time and in the circumstances of the payments. Needless to say, I should not differ on inferences of fact from Rowlatt, J., if I thought these inferences depended upon the demeanour of witnesses. Where there was a conflict of evidence, Rowlatt, J., believed the plaintiff's witnesses, but he drew inferences from which I feel bound to differ.

One further point remains to be considered. Counsel for the defendant, contended that a payment of tolls under an actual or threatened seizure of goods should be treated like payment of a debt in an action or in consequence of a threat of action. There is no doubt that if a person pays in an action or under threat of action the money cannot be recovered by him, as the payment is made to avoid the litigation to determine the right to the money claimed. Such payment is not made to keep alive the right to recover it, inasmuch as the opportunity is thus afforded of contesting the demand, and payment in such circumstances is a payment to close the transaction and not to keep it open. Even if the money is paid in the action accompanied by a declaration that it is paid without prejudice to the payer's right to recover it, the payment is a voluntary payment, and the transaction is closed; *Brown* v. *M'Kinally* (8). It is argued that as unpaid tolls can be recovered by distress levied upon the goods of the person who fails to pay, the seizure is to be regarded like the issue of a writ, and therefore that a payment of tolls on seizure must be treated as a voluntary payment. I cannot agree with this contention. When goods are seized, the owner can only relieve them from seizure by payment. He has no opportunity of contesting the right to demand tolls from him except by allowing the seizure and detention of his goods to continue, or by making payment to protect them. Three cases were cited to us in support of this contention—*Knibbs* v. *Hall* (9), *Lindon* v. *Hooper* (10), and *Gulliver* v. *Josens* (11). Upon examination it will be found that they were decided in the main upon points of pleading and procedure. So far as they may be said to establish any proposition of general application, it is that where the distress levied has been for an excessive amount the appropriate remedy is by replevin and not by action for money had and received. In any event I do not think that these cases modify the broad and general principle of law stated by such eminent authorities in the cases to which I have already called attention. It is worthy of observation that Allee v. *Backhouse* (2), Lord Abinger, C.B. (3 M. & W. at p. 646) gave us as an

instance of the right to recover for money had and received the case of a party whose goods have been seized on a demand for toll and more than is due is exacted and is paid to relieve the property from seizure. The present is a case à fortiori since the right to demand tolls was in itself in dispute, apart from amount.

The result is that in my opinion this appeal succeeds, and the plaintiff is entitled to recover the sums paid by him to the defendant for tolls during the last six years immediately preceding this action, the earlier payments being barred by the Statute of Limitations. If the parties have come to terms, as I understand is the case, judgment will be entered for the plaintiff for the agreed amount, failing agreement for an account to be taken. In my judgment the appeal must be allowed with costs.

BUCKLEY, L.J.—I do not rest my decision in this case upon mistake of fact. The mistake which the plaintiff alleges is that he believed, contrary to the fact, that the defendant was legally entitled to demand tolls from him. I reserve my opinion whether such a question is a question of fact. Assuming that it is, I think, upon the evidence, that the plaintiff made payment not because he thought that he was liable to pay, but because he was not sure whether he was liable to pay or not, and he was not prepared to fight the question whether the liability in fact existed.

But the plaintiff is entitled, I think, to recover upon the ground that the payments which he made were not made voluntarily, but were made under the pressure of the defendant's threat to seize and sell his goods in default of payment, and were made not without objection, but under protest. Counsel for the defendant in his argument largely rested his case upon the judgment of GIBBS, J., in *Brisbane* v. *Dacres* (7), and contended that the learned judge meant to lay down as a general proposition that under circumstances such as those in the present case the party called upon to make payment has an option either (i) to litigate the question or (ii) to submit and pay, and that, if he does the latter, the payment is by way of gift to the person to whom he pays and closes the transaction between them. Counsel for the defendant argues that that proposition is true in law. In my opinion, it is not the fact that there exist only those two alternatives of which the person called upon to make payment must elect one, and that, if he elects to pay, his payment is by way of gift and is voluntary. To say that it is a gift and is voluntary seems to me to beg the question. He may submit (in the sense of making the payment) because the consequences to himself will be so disagreeable if he does not pay that he prefers to pay and prevent the seizure of his goods, but at the same time to reserve the right to contend that the money has been obtained from him against his will. In *Atlee* v. *Backhouse* (2), LORD ABINGER (3 M. & W. at pp. 645, 646) said that in cases where property has been unlawfully seized or unlawfully detained for the purpose of enforcing the payment of money not due,

> "the party against whom the goods have been wrongfully seized or detained, is entitled, after payment of the money, to bring an action for money had and received,"

and PARKE, B., referring to an argument by Mr. Erle, said (ibid. at p. 650):

> "There is no doubt of the proposition laid down by Mr. Erle that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, although there is some case in VINER'S ABRIDGMENT to the contrary, that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods, and it is so laid down in SHEPPARD'S TOUCHSTONE; but the ground is that it is not a voluntary payment. If my goods have been wrongfully detained and I pay money simply to obtain them again, that being paid under a species of duress or constraint may be recovered back."

The same is true, I think, when payment is made not to release goods seized, but to intercept a threat to seize them. When the defendant demanded payment of the plaintiff, the latter, if he refused payment, exposed himself to the seizure and sale, rightfully or wrongfully, of his goods. When he made payment to escape such seizure and sale, the payment was, I think, within PARKE, B.'s, words, not a voluntary payment. Further, if there be added to the above facts the further fact that the party making the payment protests that the money is being wrongfully taken from him, a further factor is added which goes to show that the payment was not voluntary.

The conclusion which I arrive at as to the facts in the present case is this: There is no question but that in September, 1900, the payment of tolls was demanded by the defendant as matter of right, that the plaintiff refused to pay, that the defendant threatened seizure and sale if he did not pay, that seizure in fact was made, and that thereupon the plaintiff paid under protest. In subsequent years, 1902, 1903, 1905, and 1909, similar threats and protests were made, but not as to tolls in general. The contest in each case was whether particular tolls demanded were for too large an amount or whether particular tolls were demandable at all for certain parcels of goods. It seems to me that the threat of 1900 remained a subsisting threat governing all the payments made, and the fact that the particular threat and protest in the later years were made as regards amount or description of goods is in no way inconsistent with a continuing threat and protest as to all classes of goods. The threat was made as regards particular goods based upon an assertion of a right as regards all goods. I am not at all impressed by the fact that the protests were said in course of time to have been regarded very much as matter of form, and to have become the subject of jesting expressions as between the collector of the defendant who came to demand payment and the servant of the plaintiff whom he saw. It is obvious, I think, that the plaintiff's attitude throughout was that he was not prepared to enter into litigation with such a person as Mr. Horner. But I do not find that he ever acquiesced in his demands with any such result as that his conduct amounted to a closing of the transaction between the two parties upon the footing that, whether the defendant was right or wrong, the plaintiff was minded to pay. The fact is that the defendant never was entitled to the tolls which the plaintiff in fact paid. Except as regard the last six years, the Statute of Limitations is a bar, but the plaintiff is, I think, entitled to recover within the period of the statute upon the ground that the payments which he made were made under what PARKE, B., in *Atlee* v. *Backhouse* (2) called a species of duress or constraint. Upon that ground I think that this appeal must be allowed, and judgment given for the plaintiff.

PICKFORD, L.J.– In this case the plaintiff sued to recover back money paid by him to the defendant for tolls. It has been determined in *A.-G.* v. *Horner* (1) that the defendant had no right to charge these tolls. The plaintiff based his claim on two grounds: (i) That he paid under a mistake of fact—that is, a mistaken belief that the defendant had a right to payment of the tolls. (ii) That the payments were made involuntarily to prevent seizure of his goods, and under protest. The two grounds seem to me inconsistent. If the plaintiff paid under the belief that the defendant had a right to the tolls, it is difficult to see why he waited for compulsion to make him pay and why he protested. But there is no reason why they should not be set up as alternative grounds of claim. I am of opinion that the plaintiff did not pay under any mistake. I think he knew that the defendant's right to the tolls was of a doubtful nature and that other persons were paying, and that he was not prepared to enter upon litigation to decide the question; but I do not think he ever was actuated in his payments by a belief that he was liable. It is not, therefore, necessary to decide whether such a mistake, if it existed, would have been a mistake of fact or of law.

The second ground of claim is that the payments were not voluntary payments, but were made under protest and to avoid seizure of the plaintiff's goods. I do not think that the mere fact that a payment is made under protest is enough to entitle the payer to recover it back, but if it be shown that it was made under circumstances which show that the payer intends to resist the claim and yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold, the money can be recovered back, and the fact of a protest is some indication that it is so made. I do not think there need be an express notice or declaration of the intention to resist if it is properly indicated by all the circumstances. Payment to avoid a seizure or (subject to a point taken by the defendant's counsel) a threatened seizure is an involuntary payment and can be recovered back: *Valpy* v. *Manley* (3). The point taken on behalf of the defendant was that as distress was the legal remedy for nonpayment of tolls, a threat to distrain was like a threat to bring an action, and a payment made in consequence of it could not be recovered back in an action for money had and received. In support of this contention *Knibbs* v. *Hall* (9), *Lindon* v. *Hooper* (10) and *Gulliver* v. *Cosens* (11) were cited. I do not think these cases support the proposition. So far as they are not decisions upon points of pleading and forms of action not now material, they only decide that in the case where there is a right to distrain, but a complaint that there was a distress for too much, replevin, and not money had and received, is the proper remedy. No case was cited to us in which it was held that money paid under a threat to distrain, when the person threatening had no right whatever to do so, could not be recovered back in such an action, and I see no principle which obliges us so to hold. It is also contrary to the dictum of LORD ABINGER in *Atlee* v. *Backhouse* (2). The case, therefore, resolves itself into a question of fact. Did the plaintiff make these payments under what has been called a quasi duress of goods—that is, to preserve them from a threatened seizure. I have had great doubts, not altogether removed, whether the plaintiff has proved that they were so paid, or whether, looking at all the circumstances, the length of time over which the transactions extended, the fact that after the first dispute the only threatened seizures were in respect not of disputes as to the general right to claim tolls, but as to matters relating to amount or other matters peculiar to the particular goods, the plaintiff had not really acquiesced in the defendant's right and allowed his protests to become merely what ROWLATT, J., calls a grumbling acquiescence. I do not, however, dissent from the conclusion arrived at by the other members of the court.

Appeal allowed.

Solicitors: *H. E. Tudor*; *E. Betteley*.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law*.

R. *v.* LEE KUN

COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Scrutton and Low, JJ.). December 6, 17, 1915]

[Reported [1916] 1 K.B. 337; 85 L.J.K.B. 515; 114 L.T. 421; 80 J.P. 166; 32 T.L.R. 225; 60 Sol. Jo. 158; 25 Cox, C.C. 304; 11 Cr. App. Rep. 293]

Criminal Law—Trial—Translation of evidence—Prisoner a foreigner ignorant of English.

When a foreigner is on trial for a criminal offence and he is ignorant of the English language and is undefended the evidence must be translated to him. If he states that he understands part of the evidence and does not wish that part translated, it need not be translated unless the judge in his discretion thinks otherwise, because the object of the translation is already achieved. If he does not understand the English language he cannot waive compliance with the rule that the evidence must be translated; he cannot dispense with that by express or implied consent. Where the foreigner accused is defended by counsel the evidence should be interpreted to him except where he or counsel on his behalf expresses a wish to dispense with the translation and the judge thinks fit to permit the omission, which he should not do unless he is of opinion, by reason of what has passed before the trial, that the accused sufficiently understands the evidence to be given and the case made against him.

Notes. Referred to: *Kashich* v. *Kashich* (1951), 116 J.P. 6.

As to trial of foreigners ignorant of English, see 10 HALSBURY'S LAWS (3rd Edn.) 20. For the Criminal Appeal Act, 1907, s. 4 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 929.

Cases referred to:

(1) *R.* v. *Berry* (1897), 104 L.T. Jo. 110; 14 Digest (Repl.) 293, *2710*.
(2) *R.* v. *Pritchard* (1836), 7 C. & P. 303; 14 Digest (Repl.) 278, *2742*.
(3) *R.* v. *Governor of Stafford Prison, Ex parte Emery*, [1909] 2 K.B. 81; 78 L.J.K.B. 629; 100 L.T. 993; 73 J.P. 284; 25 T.L.R. 440; 22 Cox, C.C. 143, D.C.; 14 Digest (Repl.) 278, *2477*.
(4) *R.* v. *Lyons* (1864), 59 Central Criminal Ct. Sess. Papers, 275.
(5) *R.* v. *Boyden* (1864), 59 Central Criminal Ct. Sess. Papers, 293.
(6) *R.* v. *Dirblanc* (1872), 76 Central Criminal Ct. Sess. Papers, 103.
(7) *R.* v. *Cargalis* (1876), 84 Central Criminal Ct. Sess. Papers, 37.
(8) *R.* v. *Kwok Leung* (1909), 4 Hong Kong, L.R. 161.

Also referred to in argument:

R. v. *Bertrand* (1867), L.R. 1 P.C. 520; 16 L.T. 752; 31 J.P. 531; 10 Cox, C.C. 618; sub nom. *A.-G. of New South Wales* v. *Bertrand*, 4 Moo. P.C.C.N.S. 460; 36 L.J.P.C. 51; 16 W.R. 9; 16 E.R. 391, P.C.; 14 Digest (Repl.) 348, *3387*.

R. v. *Moore* (1892), 61 L.J.M.C. 80; 66 L.T. 125; 56 J.P. 345; 40 W.R. 304; 8 T.L.R. 287; 36 Sol. Jo. 223; 17 Cox, C.C. 458, C.C.R.; 22 Digest (Repl.) 449, *4901*.

R. v. *Morphew* (1814), 2 M. & S. 602; 105 E.R. 506; 14 Digest (Repl.) 291, *2678*.

R. v. *Streek* (1826), 2 C. & P. 413; 14 Digest (Repl.) 347, *3373*.

Ex parte Bottomley, [1903] 2 K.B. 14; 78 L.J.K.B. 547; 100 L.T. 782; 73 J.P. 246; 25 T.L.R. 371; 22 Cox, C.C. 106, D.C.; 14 Digest (Repl.) 218, *1812*.

Appeal on a point of law against a conviction before DARLING, J., at the Central Criminal Court, of murder.

The appellant was a foreigner and had been living with the deceased woman, a prostitute. She left him and went to live with another man. On Oct. 16 the

appellant called to see the deceased at a certain house, and went with her into the back yard, where it was alleged, the murder was committed. At the trial the appellant was represented by counsel, and the evidence for the prosecution was not translated to him. The jury found the appellant guilty of wilful murder, and he was sentenced to death.

Tristram Beresford for the appellant.
A. H. Bodkin and *E. C. P. Boyd* for the Crown.

Dec. 17, 1915. **LORD READING, C.J.,** read the following judgment of the court. The appellant, Lee Kun, a Chinaman, was convicted of the murder of one Clara Thomas. He appeals to this court to quash the conviction on the ground that, being a foreigner and ignorant of the English language, he did not understand the evidence for the prosecution, which was not translated to him. His counsel contended that, notwithstanding that the appellant was represented by counsel at the trial and that no application was made for the translation of the evidence given on behalf of the Crown, the omission to have the evidence translated constituted an irregularity in the proceedings, and that in consequence the conviction should be quashed. The court is of opinion, having regard to the facts and circumstances of this case, that the appeal must be dismissed, whether or not there has been irregularity, as contended, in the proceedings on the ground that no substantial miscarriage of justice has actually occurred. If the evidence had been translated to the appellant the same verdict would have resulted.

The issue was quite simple. The case for the Crown was that the appellant inflicted the fatal wound on the deceased. For the defence the appellant gave evidence which was translated by an interpreter. At the police court proceedings the appellant was represented by a solicitor and counsel. All the evidence there given was translated to the appellant by an interpreter as and when it was written in the depositions. It is not suggested that the evidence given at the trial at the Central Criminal Court differed from that recorded in the depositions. Therefore, the appellant and his counsel before the trial of the indictment knew the case that would be presented by the Crown and the evidence to be given in support of it. At the trial the appellant was represented by the same solicitor and counsel. At the outset of the proceedings the charge in the indictment was translated to the appellant, and he was called upon through the interpreter to plead, and was informed of his right to challenge the jury. No request was made then or at any time during the trial by the appellant or his counsel for the assistance of the interpreter to translate the evidence for the Crown. Counsel has informed this court that it never occurred to him to ask that the evidence should be translated. After careful examination of the evidence and of the proceedings at the trial, and assuming there was irregularity as contended, this court is satisfied that no substantial miscarriage of justice has actually occurred, and, therefore, in accordance with the proviso to s. 4 (1), of the Criminal Appeal Act, 1907, the appeal should be dismissed.

Notwithstanding that we have arrived at this conclusion we think it advisable to deal with the abstract question raised. When a foreigner is on trial on an indictment for a criminal offence, and he is ignorant of the English language and is undefended, the evidence given at the trial must be translated to him. If he states that he understands part of the evidence and does not wish that part translated, it need not be translated unless the judge in his discretion thinks otherwise, because the object of the translation is already achieved. For example, if an agreement in writing signed by the accused is put in evidence by the Crown, it might well be that the accused knew the contents and did not wish a translation. He is not thereby admitting any part of the case against him, but merely that he understands that part of the evidence. If he does not understand the English language he cannot waive compliance with the rule that the evidence must be translated, he cannot dispense with it by express or implied consent, and it matters not that

no application is made by him for the assistance of an interpreter. It is for the court to see that the means are adopted to convey the evidence to his intelligence, notwithstanding that, he makes no application to the court.

The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty except when tried under the safeguards so carefully provided by the law. No trial for felony can be had except in the presence of the accused, unless he creates a disturbance preventing a continuance of the trial: *R.* v. *Berry* (1) per Wills, J. Even in a charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. The prisoner may be unable, through insanity or deafness or dumbness, or the combination of both conditions, to understand the proceedings or to hear them, either directly or by reading a record of them, or to answer them either by speech or writing. In these cases a jury is sworn to ascertain whether a prisoner is "fit to plead," which is interpreted by Alderson, B., in *R.* v. *Pritchard* (2) (7 C. & P. at pp. 304, 305) as meaning whether he is

> " of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence . . . If you think there is no certain mode of communicating the details of the trial to the prisoner so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind."

If the accused is found not fit to plead he is not tried, but is detained during His Majesty's pleasure.

The authorities dealing with the matter are all discussed in the recent case of *R.* v. *Governor of Stafford Prison, Ex parte Emery* (3). If the accused is fit to plead it may yet be that no communication can be made in the ordinary way; it may be that he is deaf and can only be approached by writing or signs, or dumb and can only make his views known by writing or signs, or a foreigner who cannot speak English and requires the assistance of an interpreter to understand the proceedings and make answer to them. In such cases the judge must see that proper means are taken to communicate to the accused the case made against him and to enable him to make his answer to it. In the case of a foreigner ignorant of the English language who is undefended no difficulty has arisen in practice. The evidence is always translated to him by an interpreter. The more difficult question arises when an accused foreigner ignorant of the English language is defended by counsel and no application is made to the court for the translation of the evidence. There is no rule of law to be found in the books on the subject, and, as the result of inquiry which we have made since the argument, it has become clear that the practice of the courts in this respect has varied considerably during the last fifty years. It was stated at the Bar by counsel for the Crown that the practice has been for the court not to require the translation of the evidence unless the accused or his counsel applied for it. There is no doubt that this practice has been followed by some judges; whereas other judges have inquired at the outset of the trial whether the accused or his counsel wished the translation to be made, and if the answer was in the negative they have permitted the trial to proceed without having the evidence interpreted to the accused. Again, some judges have always insisted upon the translation, except when the accused or his counsel stated that he did not wish it, and other judges have required translation notwithstanding

such a statement. The only practice in this respect upon which there has been uniformity is that whenever any desire has been manifested by the accused or his counsel for the translation it has always been permitted.

We have come to the conclusion that the safer course, where the foreigner accused is defended by counsel, is that the evidence should be interpreted to him, except where he or counsel on his behalf expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission; the judge should not permit it unless he is of opinion that by reason of what has passed before the trial the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases, and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the accused's interests which has distinguished the administration of justice in our criminal courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception above mentioned. Speaking generally, police court proceedings will have taken place, and the evidence will there have been translated to the accused before he has to stand his trial on the indictment, so that at the trial he knows the case to be made against him. He can instruct his counsel upon it, and he may leave his defence in counsel's hands without having the evidence again translated to explain to him that which he already knows, and there seems no reasonable objection to such a course. If there should be a substantial departure from the evidence recorded in the depositions, the judge would take care, even if counsel omitted to ask for it, that the variation or addition should be translated to the accused, so that he might throw any further light upon the case. The importance of the translation of any new or additional evidence cannot be doubted; such evidence may have a special significance to the accused, and may enable him to recollect facts till then forgotten, or to give additional information to his counsel for cross-examination. Further, he may wish to make a statement dealing with the evidence against him instead of himself giving evidence, and he should have all information for that purpose. Or, again, the variation from or addition to the evidence originally given at the police court may have a bearing upon the sentence. We think, therefore, that any substantial variation from the story originally told in the depositions, or any additional evidence should be translated to the accused, even though he may be indifferent upon the matter or might not wish it. It is not suggested in this case that any additional evidence could have been given or any light thrown upon the case had the evidence which, in fact, followed the depositions been again translated to the accused.

There is no authority in English law for the proposition that the omission to translate the evidence in the circumstances under consideration is an irregularity, or is an irregularity which vitiates the proceedings. It is, however, to be noted that in *R.* v. *Lyons* (4) (known as the *Flowery Land Case*), which was a prosecution for murder, tried in 1864 before BRAMWELL, B., the prisoners were foreigners who did not understand English, and were all represented by counsel. The prosecution was conducted by the SOLICITOR-GENERAL. The evidence was not interpreted, but upon the application of counsel for one of the prisoners, the interpreter to the Spanish Consul was permitted to sit near them in order to communicate with the prisoners as the trial proceeded. That the practice was not uniform at that time is shown by another case tried on the same day in 1864 before SHEE, J. (*R.* v. *B* (5)). The accused, who was deaf and dumb, was represented by counsel, and the evidence was interpreted to him. In 1872 Margaret Dixblanc, a Belgian, who did not understand English, and was defended by counsel, was tried before CHANNELL, B., for murder (*R.* v. *Dixblanc* (6)). The evidence was interpreted to her. In 1876 several foreigners, who did not understand English and were defended by counsel, were tried before BRETT, J., for murder on the high seas. The evidence was not interpreted to the prisoners (*R.* v. *Cargalis* (7)). In both of these cases the prosecution was conducted by the Law Officers. There are other cases in which

the course pursued before Bramwell, B., and Brett, J., has been followed, and also others in which a different practice has prevailed.

Counsel for the appellant drew our attention to *R.* v. *Kwok Leung* (8), where a similar question was considered by the full court, which is the equivalent of the Court for Crown Cases Reserved in that colony. That case is, of course, not binding upon us, but we have the advantage of the judgment of Piggott, C.J., and Gompertz, J., and have been impressed by their reasoning. We think, however, that the question whether there was an irregularity in the proceedings by reason of the omission to translate when the accused is defended by counsel is not a matter of law, but of practice, in our courts, and that practice is not settled. In any event we could not, as a matter of law, even apart from the considerations under s. 4 of the Criminal Appeal Act, 1907 hold that an irregularity had been committed at the trial which would justify the quashing of the conviction. It is to be observed that there was no such power in the Hong Kong court as is given to this court by virtue of the proviso to s. 4 of the Criminal Appeal Act, 1907. The result is that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Ballantyne Clifford & Hett*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

R. *v.* STUDER

[Court of Criminal Appeal (Lord Reading, C.J., Ridley and Avory, JJ.), December 20, 1915]

[Reported 85 L.J.K.B. 1017; 114 L.T. 424; 25 Cox, C.C. 312; 11 Cr. App. Rep. 307]

Criminal Law—Demanding money with menaces—"Demand"—Request imposing conditions—Larceny Act, 1861 (24 & 25 *Vict.*, *c.* 96), *s.* 45.

To constitute an offence of demanding money with menaces with intent to steal the language used may be only a request. It need not necessarily be an explicit demand. A mere request for money, if unaccompanied by conditions, would not amount to a demand within the statute, but it is for the jury to decide on the evidence before them whether there has been conduct amounting to a menace.

R. v. *Robinson* (1) (1796), 2 Leach 749, followed.

Notes. Section 45 of the Larceny Act, 1861, has been repealed by the Larceny Act, 1916; see now s. 30 of the 1916 Act which is in substantially the same words. As to extortion by threats, see 10 Halsbury's Laws (3rd Edn.) 797 et seq.; and for cases see 15 Digest (Repl.) 1121 et seq. For Larceny Act, 1916, see 5 Halsbury's Statutes (2nd Edn.) 1011.

Case referred to:

(1) *R.* v. *Robinson* (1796), 2 Leach 749; 2 East, P.C. 1110; 15 Digest (Repl.) 1122, *11,190.*

Also referred to in argument:

R. v. *Boyle and Merchant*, ante, p. 553; [1914] 3 K.B. 339; 83 L.J.K.B. 1801; 111 L.T. 638; 78 J.P. 390; 30 T.L.R. 521; 58 Sol. Jo. 673; 24 Cox, C.C. 406; 10 Cr. App. Rep. 180, C.C.A.; 15 Digest (Repl.) 1123, *11,204.*

Appeal on a point of law against a conviction at the Central Criminal Court, before the Common Serjeant, for demanding money with menaces with intent to steal.

Cecil Hayes for the appellant.
W. Frampton for the Crown.

Dec. 20, 1915. **LORD READING, C.J.,** delivered the following judgment of the court.—The appellant was convicted of demanding money with menaces with intent to steal. The prosecutor was of German birth, but became naturalised in England two or three years before the outbreak of war, and he carried on business as a wholesale druggist in the City. The appellant was his confidential clerk and general manager, and had access to all business papers. Before war broke out the prosecutor had had considerable business transactions with Germany and Austria. After August, 1914, the prosecutor was able to satisfy the authorities on questions relating to his nationality. A conversation between the prosecutor and the appellant showed that the appellant was apparently in a position to bring influence to bear on the police if he so wished. In May, 1915, the appellant stated that certain charges had been made against the prosecutor at Scotland Yard, and the latter suggested that the appellant should go there and obtain information. The appellant did not go to Scotland Yard, and the evidence showed that there was no foundation for his statement that a charge against the prosecutor was pending. The evidence at the trial was voluminous, but it is clear that fictitious telegrams were sent by the appellant to the prosecutor with the object of making him pay £250 to the appellant, who represented that a detective, who was in reality non-existent, would stay the proceedings on payment of that amount. A telegram on May 31, supposed to come from the detective in question, was opened by the prosecutor and was in these terms:

> "Thanks for kindness. Am doing my best. Matters serious. Superiors sure to act at any moment. Advise immediate clearance."

That telegram clearly meant that unless money was paid the superiors of the supposed detective would proceed, which would be a serious matter for the prosecutor. This telegram is said by the prosecution to constitute a demand, together with a menace with intent to steal.

The defence do not deny that the statements made by the appellant, and the telegrams supposed to have come from the detective, were all false; but they say that the offence was only that of attempting to obtain money by false pretences, for which the appellant was not tried. The entire question depends on whether the evidence warranted the jury in finding a verdict under the statute. When *R.* v. *Robinson* (1) is looked at it is clear that there was evidence of a demand. The language used may be only a request, it need not necessarily be an explicit demand. A mere request without conditions would not amount to a demand within the terms of the statute, but in the present case there was ample evidence of a demand. With regard to the question of menace, obviously the appellant acted with the intention of frightening the prosecutor, and there was clearly evidence from which the jury could say that the steps taken by the appellant amounted to a menace. Another point taken by the defence is that there was no intent to steal. This argument is based upon the fact that the appellant had put £1,000 into the prosecutor's business subject to withdrawal on twelve months' notice in writing, and it is urged that the appellant only wanted to recover the money which was owing to him. There is not a particle of evidence to show that this was the real object of the appellant, and in any case a jury would not look favourably on a defence of this kind. It is also said by the defence that at the trial the jury were not directed on questions relating to the intent to steal. It was suggested that the evidence relating to the £1,000 owing to the appellant negatived any intent to steal. The Common Serjeant pointed out to the jury that this point was not

material, and that the fact that money was owing in the future made no difference. We think that on this point the proper direction was given. It was suggested that the Common Serjeant might have left this point to the jury to say whether they took the same view. The answer to that suggestion is that it is the province of the judge to say if there is any defence in law or not. We think that the Common Serjeant took the greatest care in trying the case, and took especial trouble to point out the important facts to the jury. He certainly did not take the case out of their hands. The court is of opinion that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Donnisthorpe & Co.*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

VATCHER AND OTHERS *v.* PAULL AND OTHERS

[Privy Council (Lord Shaw, Lord Parker of Waddington, Lord Sumner and Sir Joshua Williams), November 23, 24, 25, 26, December 17, 1914]

[Reported [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737]

Power of Appointment—Exercise—Fraudulent exercise—Exercise for purpose not justified by instrument creating power—Benefit for appointor or person not object of power—Appointment on condition—Condition to be performed, not by appointee, but by third party—Presumption of validity.

A power of appointment is exercised fraudulently if it is exercised for a purpose or with an intention beyond the scope of, or not justified by, the instrument creating it, and it is enough that the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power.

If a settlement gives the donee power to appoint upon a condition, the appointment is not made bad because it is made on a condition to be performed, not by an appointee, but by a third party, and a bargain or condition which leads to the fund going in default of appointment can never, therefore, defeat the donor's primary intention.

The general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known facts and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the court ought not to draw inferences against the integrity of persons who have long been dead, and cannot, therefore, defend themselves.

Notes. Applied: *Re Crawshay, Hore-Ruthven* v. *Public Trustee*, [1948] 1 All E.R. 107. Considered: *Re Dick, Knight* v. *Dick*, [1953] 1 All E.R. 559; *Re Merten's Settlement, Public Trustee* v. *Wilson*, [1953] 2 All E.R. 707. Applied: *Re Burton's Settlements, Scott* v. *National Provincial Bank, Ltd.*, [1954] 3 All E.R. 193. Referred to: *Re Wright, Hegan* v. *Bloor*, [1918–19] All E.R.Rep. 825; *Cochrane* v. *Cochrane*, [1922] All E.R. Rep. 614; *Re Simpson, Chadderton* v. *Simpson*, [1952] 1 All E.R. 963; *Re Greaves' Will Trusts, Public Trustee* v. *Ash*, [1954] 1 All E.R. 771.

As to fraud on a power, see 30 Halsbury's Laws (3rd Edn.) 275 et seq.; and for cases see 37 Digest 502 et seq.

Cases referred to:

(1) *Sadler* v. *Pratt* (1833), 5 Sim. 632; 58 E.R. 476; 37 Digest 490, *849*.

(2) *Re Perkins*, *Perkins* v. *Bagot*, [1893] 1 Ch. 283; 62 L.J.Ch. 531; 67 L.T. 743; 41 W.R. 170; 37 Sol. Jo. 26; 3 R. 40; 37 Digest 492, *859*.

(3) *Stroud* v. *Norman* (1854), Kay, 313; 2 Eq. Rep. 308; 23 L.J.Ch. 443; 18 Jur. 264; 69 E.R. 132; 37 Digest 490, *851*.

(4) *Re Postlethwaite*, *Postlethwaite* v. *Rickman* (1888), 60 L.T. 514; 53 J.P. 357; 37 W.R. 200; 5 T.L.R. 76, C.A.; 43 Digest 782, *2224*.

Also referred to in argument:

Duke of Portland v. *Lady Topham* (1864), 11 H.L. Cas. 32; 10 Jur. N.S. 501; 12 W.R. 697; 11 E.R. 1242; sub nom. *Duke of Portland* v. *Lady Topham*, *Lady Bentinck* v. *Lady Topham*, *Lord Bentinck* v. *Lady Topham*, 34 L.J.Ch. 113; 10 L.T. 355, H.L.; 37 Digest 503, *963*.

Re Somes, *Smith* v. *Somes*, [1896] 1 Ch. 250; 74 L.T. 49; 44 W.R. 236; 12 T.L.R. 152; 40 Sol. Jo. 210; sub nom. *Re Somes*, *Somes* v. *Somes*, 65 L.J.Ch. 262; 37 Digest 504, *971*.

Wallingford v. *Mutual Society* (1880), 5 App. Cas. 685; 50 L.J.Q.B. 49; 43 L.T. 258; 29 W.R. 81, H.L.; 35 Digest 661, *3963*.

Baudains v. *Richardson*, [1906] A.C. 169; 75 L.J.P.C. 57; 94 L.T. 290; 22 T.L.R. 333, P.C.; 44 Digest 220, *448*.

Bank of Africa, *Ltd.* v. *Cohen*, [1909] 2 Ch. 129; 78 L.J.Ch. 767; 100 L.T. 916; 25 T.L.R. 625, C.A.; 26 Digest (Repl.) 16, *47*.

Appeal from a judgment of the Superior Number of the Royal Court of the island of Jersey, affirming a judgment of the Inferior Number of that court in an action wherein the respondents, Henry Paull, Maria Florence Paull (his wife), and Ellen Vatcher, were plaintiffs, and Eliza Frances Tonkin Higgs, the widow of Henry Vatcher, and Maria George Andrew, the widow of Henry Vatcher, jun., were defendants. The action was to set aside a contract, dated Aug. 18, 1886, on the ground that it was fraudulent and voidable, whereby for the considerations and on the conditions therein mentioned the respondent Maria Florence Paull, principal heiress to the hereditary succession of Henry Vatcher, sen., her grandfather, her sister, the respondent Ellen Vatcher, one of the co-heiresses, and her aunt, Margaret Torkington, now deceased, and another of the co-heiresses, ceded to the principal defendant, the widow of Henry Vatcher, sen., all their rights in the said hereditary succession, and whereby also the co-defendant ceded in favour of the principal defendant all her right of power in the heritages of Henry Vatcher, sen. The substantial question of law argued on appeal was whether the joint appointment made on Mar. 22, 1882, whereby the first appellant and her husband, Henry Vatcher, sen., appointed the settled fund in exercise of a power contained in a settlement upon their marriage, and dated April 6, 1846, in favour of their own family, with a proviso that if the issue of the first marriage should abandon their rights in the appointor's real estate the appointment should be void, was a fraud upon the power. The Inferior Number of the Royal Court gave judgment in favour of the plaintiffs, taking the view on the evidence that the contract of Aug. 18, 1886, had been induced by fraudulent misrepresentation, and incidentally that the joint appointment of 1882 was a fraud upon the power and invalid and the Superior Number affirmed that decision.

Younger, *K.C.*, and *H. E. le V. dit Durrell* (Attorney-General for Jersey) (*Dighton Pollock* and *C. T. le Quesne* with them) for the appellants.

Jenkins, *K.C.*, and *E. Grimwood Mears* (*M. Alavoine* with them) for the respondents.

Dec. 17, 1914. **LORD PARKER OF WADDINGTON.**—Two points arise for decision in the present case. The first is whether the appointment of Mar. 22, 1882, is a valid appointment, a question which is for the most part a question of

law. The second is whether the contract of Aug. 18, 1886, was induced by fraud and ought therefore to be set aside, a question which is for the most part a question of fact.

The late Henry Vatcher, sen., who was born in England, was twice married, first to Margaret Way who died in 1843, and secondly to Eliza Frances Tonkin Higgs. There was issue of the first marriage, two children—namely, Margaret, who married a Mr. Torkington, and Henry, who married Maria George Andrew, spinster, and died in 1868, leaving issue the respondents, Maria Florence Paull and Ellen Vatcher. There was issue of the second marriage of Henry Vatcher, sen., six children—namely, the appellant, John Sidney Adolphus Vatcher, the appellant, Edith Mary Atkinson, Bessie Gertrude, who died in 1885 without issue, the respondent, Charles Gardner Vatcher, the appellant, James Raynold Morley Vatcher, and the appellant, Rose Ethel Monckton. By an indenture of settlement date April 6, 1846 (being a settlement made in contemplation of the second marriage of Henry Vatcher, sen.), certain funds of the value of £8,000 or thereabouts were settled upon trusts for the payment of the income thereof during the joint lives of Henry Vatcher, sen., and his second wife in manner therein provided, and after the death of Henry Vatcher, sen., in case his second wife should survive him, to the second wife during her life or until re-marriage. And subject as aforesaid in trust for the children of Henry Vatcher, sen., whether by his first or second marriage or the issue of such children born in the lifetime of Henry Vatcher, sen., and the second wife or of the survivor of them in such shares, upon such conditions, and in such manner as Henry Vatcher, sen., and his second wife should by writing appoint, and in default of such appointment as the survivor of them should by writing or by will appoint, and in default of any such appointment in trust for the children of the said Henry Vatcher, sen., by either marriage who being males should attain twenty-one years or being females should attain that age or marry and the issue of any male child who should die under twenty-one years of age leaving issue who should be living at that period of distribution, to be divided between them if more than one in equal shares the issue of any deceased male taking per stirpes and not per capita. By virtue of certain further indentures dated respectively Oct. 19, 1847, and May 19, 1855, certain further funds were settled upon trusts similar in all respects to those declared by April 6, 1846, except that there was no power of appointment conferred on the survivor of Henry Vatcher, sen., and his second wife. The aggregate value of the settled property at the death of Henry Vatcher, sen., was about £27,000. In 1857 Henry Vatcher, sen., with his wife and family, took up their abode in the island of Jersey. In 1863 he and his second wife purchased, jointly with benefit of survivorship, a residential property in the island known as Rosemount, and made their home there. Between the year 1865 and the time of his death Henry Vatcher, sen., made several further purchases of real property in the island. Some of the properties purchased were conveyed to Henry Vatcher, sen., some to Henry Vatcher, sen., and the appellant, John Sidney Adolphus Vatcher, jointly with benefit of survivorship, and some to Henry Vatcher, sen., and the appellant, John Sidney Adolphus Vatcher, jointly for themselves and their heirs. In every case the greater part of the purchase price was satisfied by the creation of "rentes" or incumbrances on the property then or previously purchased. By a deed of appointment, dated Mar. 22, 1882, Henry Vatcher, sen., and his second wife appointed that the funds settled by the said indentures of April 6, 1846, Oct. 19, 1847, and May 19, 1855, should be held by the respective trustees thereof after the decease of the survivor of them, the said Henry Vatcher, sen., and his second wife, upon trusts which were declared as follows, that is to say:

"To pay and divide the same unto, between, and among the child, children, or other issue of the said Henry Vatcher by his said wife, Eliza Frances Tonkin Vatcher, when and if they shall attain the age of twenty-one years, but so that such children shall take per stirpes and not per capita, it being our intention

to exclude Margaret Torkington, a daughter of me, the said Henry Vatcher, and the children of Henry Vatcher, a son of me, the said Henry Vatcher, from all participation in any appointment hereby made. Provided, and we lastly declare, that this our appointment is to be revocable by us at any time, and that in case the said Margaret Torkington and the two children of the said Henry Vatcher, the son, shall upon the death of me, the said Henry Vatcher, and of me, the said Eliza Frances Tonkin Vatcher, absolutely renounce, decline, and abandon as tenants, by their procureur or otherwise, all rights and claim to which they or either of them may be entitled to or upon the real estate or freehold and leasehold property or lands and rents to which either of us at our death may be entitled under the law of Jersey or otherwise the appointment hereby made shall be at an end and absolutely void."

It was suggested in the evidence of English law before the Jersey courts that this appointment was void as infringing the English rule against perpetuities. The suggestion, however, was not pressed before their Lordships' Board; indeed, it is, in their Lordships' opinion, reasonably clear as a matter of construction that the issue to take under the appointment are issue living at the death of the survivor of Henry Vatcher, sen., and his second wife, and all such issue must necessarily attain the age of twenty-one years within the period allowed by the rule. The only objection to the appointment urged before their Lordships was that it constituted a fraud on the power.

The term "fraud" in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the court can clearly distinguish between the quantum of the benefit bonâ fide intended to be conferred on the appointee, and the quantum of the benefit intended to be derived by the appointor or to be conferred on a stranger: (see *Sadler* v. *Pratt* (1) and *Re Perkins* (2)). In the present case by the very terms of the settlement creating the power, the donee is entitled to appoint to one or more of the objects of the power exclusively of the others or other of them. He is also entitled to appoint upon condition. The mere fact, therefore, that he intended to benefit the issue of the second to the exclusion of the issue of the first marriage cannot be alleged against the validity of the execution of the power, nor is it any objection to the validity of such execution that the appointment is subject to a condition subsequent with a defeasance in case the condition be not performed. If, therefore, the appointment is open to any objection it must be by reason of the nature of the condition imposed.

It should be noticed that in the present case the condition is not one to be performed by the appointees; it is to be performed if at all by third parties over whose actions the appointees have no control. The case therefore is clearly distinguishable from *Re Perkins* (2) and also from *Stroud* v. *Norman* (3). It is also unlike these cases in another respect, namely, that the defeasance in case the condition is not fulfilled is not inserted with a view to an alternative appointment, but with the intention that on failure of the condition the funds are to go upon the trusts limited by the settlement in default of appointment. In their Lordships' opinion both grounds of distinction are of importance. Apart from cases of appointments made in pursuance of a bargain under which the appointor or person not an object of the power is to derive a benefit there is no authority for holding an appointment bad because it is made on a condition to be performed not by the

appointee but a third party. The real vice of an appointment on condition that the appointee shall benefit the appointor or a third party is that the power is used not with the single purpose of benefiting its proper objects, but in order to induce the appointee to confer a benefit on a stranger, and obviously this vice is absent where the condition is not to be performed by the appointee. Nor is there any case in which a bargain to allow the funds to go in default of appointment or a condition the non-performance of which will leave the funds to go in default of appointment has ever been successfully impeached. The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be bonâ fide exercised for the purpose for which it was given. A bargain or condition which leads to the fund going in default of appointment can never therefore defeat the donor's primary intention. Even in the case of a condition to be performed by the appointee the condition does not necessarily invalidate the appointment. As explained by SIR WILLIAM PAGE WOOD in *Stroud* v. *Norman* (3) it can only do so if the purpose of the appointor in imposing it is to benefit himself or a third person not an object of the power. It is not enough that the appointor or some person not an object of the power may conceivably derive some benefit. If this were not so no father could appoint in favour of an infant child, because if such infant died under twenty-one the father himself would take as next of kin. In order to avoid such appointment it must be proved affirmatively, or the inference to be drawn from the circumstances must be, that the purpose of the appointment is not to benefit the infant, but to benefit the appointor through the infant. This is the real answer to the powerful argument put forward by counsel for the respondents. Though, he said, the renunciation by the first family would enure for the benefit of the second family under the state of circumstances in which the appointment was made, it was none the less possible that the second family might all of them predecease the appointor, in which case it could enure only to the benefit of strangers. Nobody can doubt, however, that the real purpose of the condition was to ensure that the second family, all of them objects of the power, should either (i) take the whole of the settled funds or (ii) if the first family renounced the real estate in their favour, their share in such funds as in default of appointment. The mere fact that in some conceivable event the renunciation might benefit a stranger could not in their Lordships' opinion invalidate the appointment even if the persons to perform the condition had been appointees.

In the courts below the question of the validity of the appointment was a question of fact to be determined on evidence. On the evidence before them these courts could come to no other conclusion than that the appointment was void as constituting a fraud on the power. Their Lordships, however, have to determine the question as a question of law independent of the evidence which was before the courts below, and in their opinion the appointment was in all respects a good and valid appointment within the scope and intention of the power, and cannot be impeached as constituting a fraud thereon.

Their Lordships will now proceed to consider the second question which arises for decision, namely, whether the contract of Aug. 18, 1886, whereby Mrs. Torkington and the two children of Henry Vatcher, jun., renounced their inheritance in the Jersey property in order that the marriage settlement funds might go in default of appointment was induced by fraud and ought therefore to be set aside. Henry Vatcher, sen., died on Mar. 26, 1886, having by his will dated Nov. 4, 1885, bequeathed to his wife the one-third of his personal estate of which by the law of Jersey he was entitled to dispose in addition to the one-third to which she was entitled by Jersey law; the remaining one-third devolved by Jersey law on his children or their issue. He appointed his wife and his son-in-law, Mr. Atkinson, to be his executors. He also signed prior to his death a document entitled "Expression of my wishes for the guidance of my family in the division of my property." By that document he expressed the wish that in the partage of his

real property in Jersey of which by Jersey law he had no power to dispose, Margaret Torkington and the children of Henry Vatcher, jun., should renounce all claim thereto, stating as his reason that the property was uncertain and heavily incumbered and would be an everlasting and unprofitable incumbrance. On the death of Mr. Vatcher, sen., Maria Florence Vatcher, the eldest daughter of Henry Vatcher, jun., became his principal heiress and as such entitled to take possession of his real estate in Jersey subject to the liability of dividing the same with her co-heirs, and of providing for the dower of the testator's widow and of her own mother. In this division her own share would by Jersey law be considerably greater than the share of any of the co-heirs, including her sister Ellen. Their Lordships will assume that the inheritance consisted of all the items set out on pp. 790 to 793 of the record, although it appears that as to the properties comprised in Sched. B they would not form part of the inheritance until the benefit of survivorship reserved to the widow of Henry Vatcher, sen., had been set aside in appropriate legal proceedings, and although as to the properties comprised in Scheds. C and D they did not really form part of the inheritance at all, the only right of the co-heirs being to have the price paid for them by Henry Vatcher, sen., brought into hotchpot in the division. Shortly after the death of Henry Vatcher, sen., negotiations took place between his widow and second family on the one hand and Mrs. Torkington and the two children of Henry Vatcher, jun., on the other hand, as to whether the latter should or should not renounce their shares in the inheritance, it being assumed by all parties and in their Lordships' judgment rightly assumed that if they did not do so the appointment of Mar. 22, 1882, would stand and they would therefore lose all interest in the settled funds. In these negotiations the widow of Henry Vatcher, sen., and his second family were represented by Mr. Coutanche, a Jersey lawyer of repute, and in part also by Mr. Atkinson, who had married a daughter of Henry Vatcher, sen., by his second wife, and was a clergyman. Mrs. Torkington was represented by M. Baudains, another Jersey lawyer, and Mrs. Henry Vatcher, jun., and her two daughters were represented by Mr. Graham, a solicitor, practising at Fowey in Cornwall, assisted at times by M. Baudains. It is alleged that in the course of these negotiations Mr. Coutanche and Mr. Atkinson fraudulently represented to Mr. Graham that the properties mentioned in the statement to which their Lordships have already referred were, having regard to the incumbrances thereon, of no value at all, and by means of such representation induced Mr. Graham to advise his clients to renounce their inheritance.

These proceedings were instituted on Nov. 12, 1910—that is to say, twenty-four years after the alleged fraud. Mr. Coutanche, Mr. Atkinson, and M. Baudains are all dead. The attitude which the court ought to adopt in considering charges of fraud made under such circumstances is well stated by BOWEN, L.J., in *Re Postlethwaite* (4). The general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known facts and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the court ought not to draw inferences against the integrity of persons who have long been dead, and cannot therefore defend themselves. Approaching the question in this way, and after a careful consideration of the evidence, their Lordships have come to the conclusion that no fraud has been established on the part of anyone. In order to establish fraud it must be proved (i) that a representation was made; (ii) that this representation was untrue; (iii) that it was untrue to the knowledge of the person making it; and (iv) that it induced the contract. Under no one of these four heads is the evidence really satisfactory. The evidence that Mr. Coutanche and Mr. Atkinson represented the property to be of no value consists entirely of the statements of Mr. Graham contained in his depositions, corroborated by the document No. 228 at p. 825 of the record. Mr. Graham's recollections as to the precise statements made in conversation which took place nearly a quarter of a century ago cannot be very reliable, and it must be remembered that the

important point was not whether the property had any value at all, but whether it was sufficiently valuable to justify Mr. Graham's clients in abandoning their share in the settled fund, the amount of which was tolerably certain. Value, too, is a matter of opinion rather than of fact. If the statements made by Mr. Coutanche and Mr. Atkinson were to the effect that so far as they could judge the property was not of sufficient value to justify the abandonment by Mr. Graham's clients of all interest in the settled funds, the difficulty of proving fraud would be immensely increased. The respondents, however, attach great importance to the document at p. 825 of the record as corroborating Mr. Graham's oral testimony. Indeed, their counsel in effect admitted that without this document Mr. Graham's evidence could not after so great a lapse of time be treated as sufficient to prove that the statements relied on were made, or, if made, were made dishonestly. It becomes necessary, therefore, to consider the history of this document in detail. The document consists of a schedule of the real property of Henry Vatcher, sen. It appears to have formed the subject of discussion between Mr. Graham and Mr. Coutanche in one of their interviews, in the course of which Mr. Coutanche or his clerk made certain additions in red ink. The document shows the particulars of the real estate and of the "rentes" or incumbrances charged thereon, and also the valuation for the assessment of taxes in the various parishes where the property was situated. The red ink additions show that if the "rentes" be subtracted from the valuation for assesment there will remain an apparent bonus of 157 quarters, which is stated to represent an annual income of £117. There follows a statement of further charges consisting of parochial rates, repairs, and annuities, showing that this annual value of £117 is more than exhausted. It is said that these red ink additions amounted to a representation that the property was valueless and that such representation must have been false to the knowledge of Mr. Coutanche for the following reason. Both the "rentes" and the assessment values are given in quarters of wheat, but though the conventional value of a quarter for assessment purposes is £1, the conventional value of a quarter for "rente" purposes is 14s. 9d., or, in some few cases, 15s. 11d. only. It is said, therefore, that Mr. Coutanche in subtracting the "rente" quarters from the assessment quarters knowingly took advantage of Mr. Graham's want of local knowledge and fraudulently brought out the annual value as £117, where as it should have been £326. On the other hand there is some evidence that the method pursued is not uncommon in Jersey when it is desired to arrive at an approximate annual value, the reason being that though the "rente" quarters are conventionally less in value than the assessment quarters the assessment valuation is always too high. On the whole although the document is one which in normal circumstances would call for some explanation their Lordships cannot treat it as conclusive evidence of fraud on the part of a deceased person.

Secondly, there is in their Lordships' opinion, no satisfactory evidence of the real value of the property at the date of the death of Henry Vatcher, sen. The incumbrances amounted to 652 quarters of "rente" or thereabouts, and there is no satisfactory evidence that the income derived from the property was anything like sufficient to defray the "rentes." The respondents rely mainly in this connection on the fact that Henry Vatcher, sen., was, at his death, working a quarry on the property which has since developed into a paying concern. The greater part of this quarry appears to have been situated on property which did not strictly form part of the inheritance, though the price paid for it might have had to be brought into hotchpot in the division. Quite apart, however, from this consideration, their Lordships are of opinion that there is no sufficient proof of the income which was being derived therefrom at the death of Henry Vatcher, sen. The result of the evidence appears to be that the quarry was still in an experimental stage and might or might not develop into a paying concern. Moreover, at Henry Vatcher's death, Jersey was passing through a financial crisis which had depreciated the value of real estate. The evidence taken as a whole points to the conclusion

that though Henry Vatcher's real property may at his death have had some value, it must as an investment have been extremely speculative and uncertain. It should be noticed that concurrently with the renunciation of the inheritance on the part of Mrs. Torkington and the children of Henry Vatcher, jun., the other co-heirs ceded their rights therein to Mrs. Vatcher, sen., apparently because the property was in the nature of a damnosa hæreditas, and if it could be made profitable at all could only be made profitable by a person with sufficient capital to keep down the incumbrances, and to develop the quarry on the estate.

Thirdly, in the case of Mr. Atkinson there is no evidence at all that he believed the property to have any value even if he stated that it was valueless. On the contrary he allowed his wife to cede her interest in the inheritance to her mother without any consideration at all, which is only explicable on the footing that he thought the property had little or no value. With regard to Mr. Coutanche the only evidence that he knowingly made any misrepresentation is the document to which their Lordships have already adverted.

Lastly the evidence that Mr. Graham in advising his clients relied on the misrepresentations alleged is by no means satisfactory. It appears by the correspondence that both Mr. Graham and M. Baudains formed their own estimate as to the value of the property and were of opinion that it had at any rate some value. Indeed, M. Baudains had informed Mr. Graham that if the principle heiress could take the real estate without endangering her sister's share in the settled fund it would be worth her while so to do, but Mr. Graham did not think this was possible. He was in fact representing two persons with somewhat diverse interests and apparently treated the matter as one in which the interests of the two sisters must be considered together. Their Lordships do not blame him for this, but he was evidently aware that M. Baudains thought the property had some considerable value, and it is unexplained why he should attach more importance to the statement of Mr. Atkinson, a layman, and Mr. Coutanche, who was advising the other side, than to the statements of M. Baudains, whom he had consulted on behalf of his clients, and who was advising Mrs. Torkington. Moreover, it appears that the red ink additions in document No. 228 were made after and not before the final arrangements as to the terms in which Mr. Graham's client should renounce the inheritance.

On the question of fraud, therefore, their Lordships cannot take the view adopted by the courts below. It is true that as a general rule their Lordships' Board treat questions of fact on which there have been concurrent findings in the courts below as conclusively established, but the present case is a peculiar one. In the first place their Lordships cannot help thinking that the evidence to the effect that the appointment of Mar. 22, 1882, was a fraud on the power to some extent coloured the view taken by the courts below of other facts. The appointment seems to have been considered as in the nature of an overt act in a fraudulent conspiracy to deprive the first family of their inheritance, which could not lawfully be done according to Jersey law, and other acts of Henry Vatcher, sen., however innocent, are similarly treated. For example, the fact that so far from paying off the incumbrances on the property, he actually created new incumbrances, and the fact that he took no means to divest himself of what he stated was an onerous property, are in the judgment cited against him. Again, there is in the present proceedings less reason than is usually the case for refusing to go behind concurrent findings. There was no oral evidence at the trial. All the evidence was taken on deposition, and the courts below were in no better position to judge of its effect than is their Lordships' Board. And lastly, the respondents' counsel did not himself rely on the rule, but expressly invited their Lordships to go into the evidence and come to their own conclusions. This their Lordships have done, and though they regret to differ from the courts below, they cannot avoid some satisfaction in acquitting of all charges of fraud persons who have long been dead and against whom in their lifetime no such charge was ever made.

Their Lordships cannot help thinking on reference to the initial stages of these proceedings that no charge of fraud was originally intended to be made. It appears to have been developed in the course of the examination and cross-examination of witnesses for the purpose of the trial. And though in the present case there is no reason to suppose that the appellants were in any way taken by surprise or deprived of the opportunity of proving relevant facts, their Lordships are of opinion that where charges of fraud are intended to be made, full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose. The courts below, in setting aside the contract of Aug. 18, 1886, appear to have been influenced to some extent by the fact that the respondent, Maria Florence Paull, though of full age by Jersey law was according to English law still an infant, and that the respondent, Ellen Vatcher, acted through Mr. Atkinson as her guardian, although his wife had an adverse interest. These points were not relied upon and were in effect abandoned before their Lordships' Board. They are mentioned only to show that their Lordships express no opinion thereon. Under the circumstances their Lordships will humbly advise His Majesty to allow the appeal and to dismiss the action. With regard to costs their Lordships observe that the appellants produced no evidence of English law in the court of first instance, and under these circumstances they think that justice will be done if the respondents are ordered to pay the costs of this appeal and four-fifths only of the costs incurred in the courts below, and will humbly advise His Majesty to that effect.

Solicitors: *Cameron, Kemm & Co.*; *Powell & Skues.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

CLARE AND CO. *v.* DRESDNER BANK

[KING'S BENCH DIVISION (Rowlatt, J.), March 2, 1915]

[Reported [1915] 2 K.B. 576; 84 L.J.K.B. 1443; 113 L.T. 93; 31 T.L.R. 278; 21 Com. Cas. 62]

Bank—Cheque—Payment—Account at branch abroad—Demand on London branch—Liability of bank.

There is no obligation on a bank with branches in different countries to pay in one country a debt due to a customer on current account at a branch in another country.

Per ROWLATT, J.: It seems to me that locality is an essential part of the debt owing by a banker to his customer and that his liability to pay is limited to the place where the account is opened.

Leader, Plunket and Leader v. *Direction der Disconto-Gesellschaft* (1) (1914), 31 T.L.R. 83, distinguished.

Notes. Considered: *Maude* v. *I.R. Comrs.*, [1940] 1 All E.R. 464. Referred to: *Leete* v. *Direction der Disconto-Gesellschaft* (1915), 85 L.J.K.B. 281; *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669; *Richardson* v. *Richardson*, [1927] All E.R.Rep. 92.

As to branch banks, see 2 HALSBURY'S LAWS (3rd Edn.) 177; and for cases, see 3 DIGEST (Repl.) 184–185.

Case referred to:

(1) *Leader, Plunket and Leader* v. *Direction der Disconto-Gesellschaft* (1914), 31 T.L.R. 83; 59 Sol. Jo. 147; 13 Digest (Repl.) 353, *1607*.

Also referred to in argument:

Walton v. *Mascall* (1844), 13 M. & W. 452; 2 Dow. & L. 410; 14 L.J.Ex. 54; 4 L.T.O.S. 158; 153 E.R. 188; 6 Digest (Repl.) 213, *1479*.

Pott v. *Clegg* (1847), 16 M. & W. 321; 16 L.J.Ex. 210; 8 L.T.O.S. 493; 11 Jur. 289; 153 E.R. 1212; 3 Digest (Repl.) 178, *294*.

Atkinson v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q.B.D. 377; 59 L.J.Q.B. 360; 62 L.T. 857; 38 W.R. 630, C.A.; 7 Digest (Repl.) 515, *233*.

Foley v. *Hill* (1848), 2 H.L. Cas. 28; 9 E.R. 1002, H.L.; 3 Digest (Repl.) 177, *289*.

Thorn v. *City Rice Mills* (1889), 40 Ch.D. 357; 58 L.J.Ch. 297; 60 L.T. 359; 37 W.R. 398; 5 T.L.R. 172; 10 Digest (Repl.) 806, *5236*.

Woodland v. *Fear* (1857), 7 E. & B. 519; 26 L.J.Q.B. 202; 29 L.T.O.S. 106; 3 Jur. N.S. 587; 5 W.R. 624; 119 E.R. 1339; 3 Digest (Repl.) 218, *509*.

Re Derbyshire, Webb v. *Derbyshire*, [1906] 1 Ch. 135; 75 L.J.Ch. 95; 94 L.T. 138; 54 W.R. 135; 44 Digest 728, *5816*.

Prince v. *Oriental Bank Corpn.* (1878), 3 App. Cas. 325; 47 L.J.P.C. 42; 38 L.T. 41; 26 W.R. 543, P.C.; 3 Digest (Repl.) 184, *330*.

Action tried by ROWLATT, J., without a jury. The plaintiffs, George Clare & Co., a firm of foreign bankers carrying on business in England, had an account with the Berlin branch of the defendant bank, and at the date of the outbreak of war between England and Germany there was a balance standing to their credit of 5,947 marks 5 pf. The Dresdner Bank, which was a foreign corporation incorporated under the laws of Germany, had its head office in Dresden, and had a branch both in Berlin and in London. On Dec. 1, 1914, the plaintiffs wrote to the London branch requesting the payment of the amount standing to their credit at the Berlin branch. They did not write or make any demand for payment at the head office or the Berlin branch. The money was not paid, and the plaintiffs thereupon brought this action to recover as money had and received by the defendants to their use, the amount of the balance standing to the credit of their account. The writ was served at the office of the London branch, and an application at chambers by the defendant bank to set aside the service was dismissed.

D. M. Hogg for the plaintiffs.

C. W. Lilley for the defendants.

ROWLATT, J.—I think that this action fails. [HIS LORDSHIP having stated the facts, continued.] Counsel for the plaintiffs contends that the relation of banker and customer is simply that of debtor and creditor, with a superadded obligation to honour his customer's cheques. That, no doubt, is quite right. Then he contends that the customer need not make any demand for payment to entitle him to sue the banker. It seems to me, however, that locality is an essential part of the debt owing by a banker to his customer, and that his liability to pay is limited to the place where the account is opened. As a general rule, no doubt, a debtor has to seek out his creditor and pay him; but in the case of a bank with several branches I do not think that that rule can apply. Money has a different value in different parts of the world, even although it is expressed in the same currency, and I cannot conceive it possible that a man with £1,000 to his credit at a bank in New Zealand could come to London and demand payment of that sum from a London branch of that bank without giving any consideration for that convenience, or without giving time to the branch in London to ascertain whether he was in fact a customer of the New Zealand bank and had that amount to the credit of his account there. I come to the conclusion, therefore, although the question does not seem ever to have been raised before, that there is no obligation on a bank with branches in different countries to pay in one country a debt due to a customer on current account at a branch in another country

Counsel for the plaintiffs has referred me to *Leader, Plunket, and Leader* v. *Direction der Disconto-Gesellschaft* (1) decided by SCRUTTON, J., as supporting his contention. In that case, however, the plaintiffs had made a request to the branch in Berlin, where their account was kept, to remit the money to the London branch. The bank had refused this request, and that refusal amounted to a refusal to perform their obligation to pay where the account was opened, and the plaintiffs had a cause of action which they could enforce in this country or wherever the bank could be found. In this case there has not been any request made to the Berlin branch to remit, and consequently no dishonouring by the Berlin branch of the obligation to pay on demand. I cannot assume whether they would or would not have dishonoured; I can only deal with the facts before me. Those facts are that the London branch had been asked to pay here in London money deposited at their branch in Berlin. I do not think that it would be in accordance with either law or business to hold that they were liable to do this. I must therefore give judgment for the defendants.

Judgment for defendants.

Solicitors: *Clifford, Turner & Hopton*; *Herbert Smith, Goss, King & Co.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

R. *v.* KING

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Bankes and Avory, JJ.), February 10, 1914]

[Reported 110 L.T. 783; 24 Cox, C.C. 146]

Criminal Law—Husband and wife—Larceny of wife's property by husband—Property taken when husband "about to leave or desert his wife"—Property taken considerable time before actual desertion—Married Women's Property Act, 1882 (45 & 46 *Vict.*, *c.* 75), *ss.* 12, 16.

If a man steals his wife's property, intending to leave or desert her when the theft is discovered, or at some other time convenient to himself, he steals the property when "about to leave or desert" his wife, although a considerable time may have elapsed between the act of larceny and the actual desertion.

Notes. The Larceny Act, 1916, s. 36, reproduces the provisions of the Married Women's Property Act, 1882, s. 12 and s. 16, without repealing them.

As to larceny between husband and wife, see 10 HALSBURY'S LAWS (3rd Edn.) 771, 772; for the Married Women's Property Act, 1882, see 11 HALSBURY'S STATUTES (2nd Edn.) 799; for the Larceny Act, 1916, see 5 HALSBURY'S STATUTES (2nd Edn.) 1011; and for cases see 15 DIGEST (Repl.) 1075, 1076.

Case referred to:

(1) *R.* v. *James*, [1902] 1 K.B. 540; 71 L.J.K.B. 211; 86 L.T. 202; 66 J.P. 217; 50 W.R. 286; 18 T.L.R. 284; 46 Sol. Jo. 247; 20 Cox, C.C. 156, C.C.R.; 15 Digest (Repl.) 1076, *10,608*.

Also referred to in argument:

R. v. *Audley*, [1907] 1 K.B. 383; 76 L.J.K.B. 270; 96 L.T. 160; 71 J.P. 101; 23 T.L.R. 211; 51 Sol. Jo. 146; 21 Cox, C.C. 374, C.C.R.; 15 Digest (Repl.) 887, *8556*.

R. v. *Payne*, [1906] 1 K.B. 97; 75 L.J.K.B. 114; 94 L.T. 288; 70 J.P. 28; 54 W.R. 200; 22 T.L.R. 126; 50 Sol. Jo. 112; 21 Cox, C.C. 121, C.C.R.; 15 Digest (Repl.) 1076, *10,609*.

Bentsen v. *Taylor, Sons & Co.* (2), [1893] 2 Q.B. 274; 63 L.J.Q.B. 15; 69 L.T. 487; 42 W.R. 8; 9 T.L.R. 552; 7 Asp.M.L.C. 385; 4 R. 510, C.A.; 41 Digest 327, *1843*.

Lemon v. *Simmons* (1888), 57 L.J.Q.B. 260; 36 W.R. 351; 4 T.L.R. 306; 15 Digest (Repl.) 1076, *10,605*.

Appeal against a conviction of larceny at the West Riding Quarter Sessions.

The appellant married a widow who was in possession of a houseful of furniture. They took a house, and the furniture was moved into it. The wife, soon after her marriage, became ill and went to live with her parents. The appellant joined his wife there, and the house, with the furniture in it, was locked up. Shortly afterwards the appellant, without the knowledge of his wife, removed the furniture from the house and sold it. He continued to live with his wife at her parents' house for some weeks after the sale and then left his wife. On discovering his sale of the furniture, the wife prosecuted her husband for larceny.

H. R. Bramley for the appellant.
G. E. C. Yarborough for the Crown.

BANKES, J., delivered the following judgment of the court.—This is an appeal against a conviction on a point of law. The appellant was charged at the instance of his wife with stealing a quantity of furniture belonging to her. He alleges as a matter of law that he ought to have been acquitted on this charge. By s. 12 of the Married Women's Property Act, 1882, a married woman may prosecute her husband for stealing her property provided that the facts of the case fit in with the conditions prescribed by the proviso to the last part of the section. The question as to the right construction of the section came before the court for Crown Cases Reserved in *R.* v. *James* (1). That case decided that the latter part of the section is not in the nature of an exception, but of a proviso; so that where a husband is prosecuted by his wife it does not lie upon the prosecution to satisfy the jury that the case does not come within the terms of the proviso, but the defence may prove facts which bring the case within its terms.

[His Lordship stated the facts, and continued:] Under s. 12 of the Married Women's Property Act, 1882, the time at which criminal proceedings are taken is the real point to consider. If at that time the parties were living together there is a complete defence under the section. If the parties were not living together at that time, and the offence complained of was committed while they were living together, a question arises whether the property was taken by the husband "when leaving or deserting or about to leave or desert his wife." It has been argued that there was misdirection on the part of the chairman on the point whether, when the appellant disposed of the furniture, he was about to leave or desert his wife, and a number of authorities have been quoted which have dealt with the meaning of the word "about," but in circumstances entirely different from those in the present case. There is no special meaning in law attached to the word—its meaning must be gathered from the subject-matter and circumstances of the case.

It was also contended that there was no evidence that the appellant was about to leave his wife. The jury had before them all the circumstances: they were told the position in life occupied by the parties, the amount and value of the furniture, and the way in which it was disposed of and the fact that the wife regarded the furniture as a provision of some value for their children was also put before them. Having regard to all these matters, it was open for the jury to find that the appellant knew that his wife could not continue to live with him after she discovered the theft, and that he would be obliged to leave or desert her. They were justified in finding that the wife must soon discover what had taken place and that the

appellant was about to leave her. The court is of opinion that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. Lindsay Crawford*, Doncaster; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

R. *v.* KING

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Bankes and Avory, JJ.), March 30, 1914]

[Reported 111 L.T. 80; 30 T.L.R. 476; 24 Cox, C.C. 223; 10 Cr. App. Rep. 117]

Criminal Law -Evidence Corroboration—Accomplice—Charge of living on immoral earnings—Need of corroboration of prostitute's evidence.

On a charge of living upon the earnings of prostitution, the women concerned are not in the position of accomplices of the accused. Corroboration of their evidence is not, therefore, essential as a matter of law, but the jury may, at the discretion of the judge, be expressly warned against accepting such evidence without some corroboration.

Notes. As to corroboration, see 10 HALSBURY'S LAWS (3rd Edn.) 458 et seq.; and for cases see 14 DIGEST (Repl.) 527 et seq.

Appeal against conviction at the County of London Sessions for living on the earnings of prostitution, and a sentence of twelve months imprisonment with hard labour.

W. G. Hawtin for the appellant.

H. W. Roome for the Crown.

Mar. 30, 1914. **LORD READING, C.J.,** delivered the following judgment of the court.—The appellant was convicted on two charges of living on the earnings of prostitution of two women and was sentenced to twelve months' imprisonment with hard labour on each indictment, the sentences to run consecutively. Leave to appeal was granted in order that the question which was raised as to the necessity for corroboration in such cases might be argued. Counsel for the appellant has directed our attention to the only piece of evidence which may be regarded as material corroboration in the case. This was the answer to the constable given by the appellant, who, when he was arrested, said in answer to the charge, "Quite right." The jury were directed by the deputy-chairman that this answer was an admission of guilt. There was undoubtedly some evidence of an admission, and the jury were quite able to decide for themselves whether the words were used in that sense. We cannot say that there was no corroboration and it was pointed out generally by the deputy-chairman that the evidence of any woman with regard to a story like the present one should be corroborated. But it is argued that the woman in this case was an accomplice in the offence with which the appellant was charged. It is enough to say that there is no evidence on this point and that it does not necessarily follow. The only possible argument is that in doing what she did, in order to carry out the intention of the appellant, she must have been guilty of the offence of soliciting. But we cannot hold that she is therefore an accomplice in the crime charged against the appellant.

Then the court is asked to lay down a rule that in cases like the present, there must be corroboration and that the jury must receive a caution to that effect. In the opinion of the court no such rule can be laid down; there is nothing to justify it either by statute or at common law. The only argument on this point which could be put forward was to rely on the analogy of other offences created by statute where by the terms of the statute corroboration is necessary. It would in our opinion be most dangerous to lay down any rule in cases like the present. On the other hand a judge is justified in warning the jury not to accept without corroboration the evidence of a woman, who is leading a life of the kind described, against a man. That is entirely a matter for the discretion of the judge, and a warning was given in the case before us. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

SINCLAIR *v.* BROUGHAM AND OTHERS

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington and Lord Sumner), December 8, 9, 10, 12, 15, 1913. February 12, 1914]

[Reported [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 30 T.L.R. 315; 58 Sol. Jo. 302]

Contract—Ultra vires contract—Money paid thereunder—Recovery.

A building society, established under the Building Societies Act, 1836 [repealed], and having borrowing powers, established and developed, in addition to the legitimate business of a building society, a banking business, which was admitted to be ultra vires. In connection with this banking business customers deposited sums of money in the usual way. An order winding-up the society was made, and the assets of the society, after payment in full of the outside creditors and the costs, were found to be sufficient to pay the unadvanced shareholders in full, but were not sufficient to pay in full them and also the customers of the bank on deposit and current accounts.

Held: (i) the doctrine of ultra vires excluded any claim in personam based on the circumstance that the society had been improperly enriched at the expense of the depositors with the bank, and so the depositors could not recover their money unless, adopting the dealings by the society with the money and claiming in rem, they could trace their money into the hands of the society as actually existing assets; at law money could be followed not only where a fiduciary relationship existed, but in any case where the property in the money had not passed and the money could be earmarked in the hands of the recipient or traced into assets acquired with it, and that was true where money had been paid under an ultra vires contract under which no property could pass; in equity, when money had been paid to a person who had wrongfully obtained it, the court would declare that there was a charge on the fund in the bank with which the money had been mixed, and that doctrine applied in the case of money acquired under a transaction which was ultra vires the recipient; accordingly, in the present case the depositors had the right to follow the money

so far as it was invalidly converted into the, possibly depreciated, assets in which it had been invested, whether those assets were mere debts due to the society or ordinary securities: (ii) no action for money paid under a mistake of fact or for money had and received would lie to enable the depositors to recover their money: (iii) subject to the payment of all proper costs, charges, and expenses, the liquidator, in distributing the remaining assets of the society between the depositors and the unadvanced shareholders, should proceed on the principle of distributing them pari passu in proportion to the amounts properly credited to them respectively in the books of the society in respect of their advances at the date of the commencement of the winding-up.

Decision of the Court of Appeal (sub nom. *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183), varied.

Re Guardian Permanent Benefit Building Society (1), 23 Ch.D. 440, distinguished.

Re Blackburn and District Benefit Building Society v. *Cunliffe, Brooks & Co.* (2), 29 Ch.D. 902, overruled.

Re Hallett's Estate (3), 13 Ch.D. 696, considered.

Notes. Considered: *Banque Belge* v. *Hambrouck*, [1921] 1 K.B. 321; *Dominion Coal Co.* v. *Maskinonge Steamship Co.*, [1922] 2 K.B. 132; *Re Airedale Co-operative Worsted Manufacturing Society, Ltd.*, [1933] Ch. 639; *Re Simms, Ex parte the Trustee* v. *William Simms, Ltd.*, [1933] All E.R. Rep. 302; *Morgan* v. *Ashcroft*, [1937] 3 All E.R. 92; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579; *Re Diplock's Estate, Diplock* v. *Wintle*, [1948] 2 All E.R. 318; *Ministry of Health* v. *Simpson*, [1950] 2 All E.R. 1137; *Rousou's Trustee* v. *Rousou*, [1955] 2 All E.R. 169. Referred: *R. Leslie, Ltd.* v. *Shiell*, ante, p. 511; *Roscoe (Bolton), Ltd.* v. *Winder*, [1915] 1 Ch. 62; *Hamilton* v. *Dysart*, [1916] 1 A.C. 57; *John* v. *Dodwell*, [1918] A.C. 563; *Kensington and Knightsbridge Electric Lighting Co.* v. *Notting Hill Electric Lighting Co.* (1918), 87 L.J.K.B. 565; *Holt* v. *Markham*, [1922] All E.R. Rep. 134; *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co.*, [1924] A.C. 226; *Bowling* v. *Cox*, [1926] A.C. 751; *Anchor Donaldson* v. *Crossland*, [1929] A.C. 297; *Marconi's Wireless Telegraph Co.* v. *Newman*, [1930] 2 K.B. 292; *Harry Parker, Ltd.* v. *Mason*, [1940] 4 All E.R. 199; *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; *Re Reading's Petition of Right*, [1949] 2 All E.R. 681; *Boissevain* v. *Weil*, [1950] 1 All E.R. 728; *Rivoli Hats, Ltd.* v. *Gooch*, [1953] 2 All E.R. 823; *Metropolitan Police District Receiver* v. *Croydon Corpn.*, [1956] 2 All E.R. 785.

As to ultra vires contracts generally, see 8 HALSBURY'S LAWS (3rd Edn.) 126, and cases there cited.

Cases referred to:

(1) *Re Guardian Permanent Benefit Building Society* (1882), 23 Ch.D. 440; 52 L.J.Ch. 857; 48 L.T. 134; 32 W.R. 73, C.A.; varied on appeal, sub nom. *Murray* v. *Scott*, *Agnew* v. *Murray*, *Brimelow* v. *Murray* (1884), 9 App. Cas. 519; 53 L.J.Ch. 745; 51 L.T. 462; 33 W.R. 173, H.L.; 7 Digest (Repl.) 482, *26*.

(2) *Re Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1885), 29 Ch.D. 902; 54 L.J.Ch. 1091; 53 L.T. 741; 1 T.L.R. 504, C.A.; 7 Digest (Repl.) 519, *259*.

(3) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 12 Digest (Repl.) 554, *4195*.

(4) *Re Phœnix Life Assurance Co., Burgess and Stock's Case* (1862), 2 John. & H. 441; 31 L.J.Ch. 749; 7 L.T. 191; 9 Jur. N.S. 15; 10 W.R. 816; 70 E.R. 1131; 10 Digest (Repl.) 1057, *7336*.

(5) *Flood* v. *Irish Provident Assurance Co., Ltd. and Hibernian Bank, Ltd.*, [1912] 2 Ch. 597, n.; 107 L.T. 540, n.; 46 I.L.T. 214; 29 Digest 372, *r*.

(6) *Moses* v. *Macferlan* (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 12 Digest (Repl.) 605, *4679*.

(7) *Slade's Case* (1603), 4 Co. Rep. 92 b.

(8) *Starke* v. *Cheesman* (1699), Carth. 509; 1 Ld. Raym. 538; 1 Salk. 128; 91 E.R. 1259; 6 Digest (Repl.) 287, *2109*.

(9) *Taylor* v. *Plumer* (1815), 3 M. & S. 562; 2 Rose, 457; 105 E.R. 721; 35 Digest 167, *6*.

(10) *Ex parte Cooke, Re Strachan* (1876), 4 Ch.D. 123; 46 L.J. Bcy. 52; 35 L.T. 649; 41 J.P. 180; 25 W.R. 171, C.A.; 5 Digest (Repl.) 776, *6613*.

(11) *Clayton's Case, Devaynes* v. *Noble* (1816), 1 Mer. 529, 572; 35 E.R. 767, 781; 12 Digest (Repl.) 547, *4156*.

(12) *Pennell* v. *Deffell* (1853), 4 De G.M. & G. 372; 1 Eq. Rep. 579; 23 L.J.Ch. 115; 22 L.T.O.S. 126; 18 Jur. 273; 1 W.R. 499; 43 E.R. 551, L.JJ.; 12 Digest (Repl.) 553, *4193*.

(13) *Baroness Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354; 54 L.J.Q.B. 577; 53 L.T. 62; 49 J.P. 773; 1 T.L.R. 477, H.L.; 13 Digest (Repl.) 275, *984*.

(14) *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (1884), 9 App. Cas. 857; 54 L.J.Ch. 376; 52 L.T. 225; 33 W.R. 309, H.L.; 7 Digest (Repl.) 517, *245*.

(15) *Re Companies Acts, Ex parte Watson* (1888), 21 Q.B.D. 301; 57 L.J.Q.B. 609; sub nom. *Re Sheffield Permanent Building Society, Ex parte Watson*, 59 L.T. 401; 36 W.R. 829; sub nom. *Ex parte Watson*, 52 J.P. 742, D.C.; 7 Digest (Repl.) 517, *247*.

(16) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653; L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 90 Digest (Repl.) 29, *6*.

(17) *Re Blackburn and District Benefit Building Society* (1883), 24 Ch.D. 421; 52 L.J.Ch. 894; 49 L.T. 730; 32 W.R. 159; affirmed sub nom. *Walton* v. *Edge* (1884), 10 App. Cas. 33; 54 L.J.Ch. 362; 52 L.T. 666; 49 J.P. 468; 33 W.R. 417; 1 T.L.R. 96, H.L.; 7 Digest (Repl.) 542, *401*.

(18) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309; 22 L.T. 284; 34 J.P. 341; 18 W.R. 388, L.J.; 7 Digest (Repl.) 513, *220*.

(19) *Re Wrexham, Mold and Connah's Quay Rail. Co.*, [1899] 1 Ch. 440; 68 L.J.Ch. 270; 80 L.T. 130; 47 W.R. 464; 43 Sol. Jo. 277; 6 Mans. 218; sub nom. *Re Wrexham, Mold and Connah's Quay Rail. Co., Ex parte North and South Wales Bank*, 15 T.L.R. 209, C.A.; 10 Digest (Repl.) 1278, *9027*.

(20) *Prince* v. *Oriental Bank Corpn.* (1878), 3 App. Cas. 325; 47 L.J.P.C. 42; 38 L.T. 41; 26 W.R. 543, P.C.; 3 Digest (Repl.) 228, *558*.

(21) *Chandler* v. *Vilett* (1670), 2 Wms. Saund. 117; 1 Sid. 453; 85 E.R. 833; 32 Digest 345, *277*.

(22) *Orton* v. *Butler* (1822), 5 B. & Ald. 652; 1 Dow. & Ry. K.B. 282; 106 E.R. 1329; 43 Digest 467, *48*.

(23) *Owen* v. *Challis* (1848), 17 L.J. (C.P.) 266.

(24) *Weston* v. *Downes* (1778), 1 Doug. K.B. 23; 99 E.R. 19; 12 Digest (Repl.) 261, *2027*.

(25) *Longchamp* v. *Kenny* (1779), 1 Doug. K.B. 137; 99 E.R. 91; 12 Digest (Repl.) 614, *4740*.

(26) *Sadler* v. *Evans* (1766), 4 Burr. 1984; 98 E.R. 34; 12 Digest (Repl.) 606, *4685*.

(27) *Straton* v. *Rastall* (1788), 2 Term Rep. 366; 100 E.R. 197; 12 Digest (Repl.) 559, *4229*.

(28) *Clarke* v. *Shee and Johnson* (1774), 1 Cowp. 197; 98 E.R. 1041; sub nom. *Clarke* v. *Johnson & Co.*, Lofft. 756; 12 Digest (Repl.) 633, *4393*.

(29) *Towers* v. *Barrett* (1786), 1 Term Rep. 133; 99 E.R. 1014; 12 Digest (Repl.) 639, *4941*.

(30) *Baylis* v. *Bishop of London*, [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 29 T.L.R. 59; 57 Sol. Jo. 96, C.A.; 35 Digest 156, *526*.

(31) *Marriot* v. *Hampton* (1797), 7 Term Rep. 269; 2 Esp. 546; 101 E.R. 969; 12 Digest (Repl.) 630, *4858*.

(32) *Crockford* v. *Winter* (1807), 1 Camp. 124, N.P.; 12 Digest (Repl.) 633, *4890*.

(33) *Martin* v. *Morgan* (1819), 1 Brod. & Bing. 289; Gow, 128, n.; 3 Moore, C.P. 635; 129 E.R. 734; 35 Digest 150, *476*.

(34) *Johnson* v. *Johnson* (1802), 3 Bos. & P. 162; 127 E.R. 89; 35 Digest 154, *513*.

(35) *Miller* v. *Allee* (1849), 3 Exch. 799; 13 L.T.O.S. 121; 13 Jur. 431; 42 Digest 259, *2930*.

(36) *Smith* v. *Jones* (1842), 1 Dowl. N.S. 526; 11 L.J.C.P. 99; 6 Jur. 283; 12 Digest (Repl.) 605, *4680*.

(37) *Tregoning* v. *Attenborough* (1831), 7 Bing. 733; 1 Dowl. 225; 5 Moo. & P. 453; 131 E.R. 283; 2 Digest (Repl.) 732, *2435*.

(38) *Phillips* v. *London School Board*, *Cockerton* v. *London School Board*, [1898] 2 Q.B. 447; 67 L.J.Q.B. 874; 79 L.T. 50; 46 W.R. 658; 14 T.L.R. 501, C.A.; 12 Digest (Repl.) 256, *1982*.

(39) *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; 76 L.J.Ch. 187; 96 L.T. 301; 23 T.L.R. 187; 35 Digest 205, *303*.

(40) *Buckley* v. *Gross* (1863), 3 B. & S. 566; 1 New Rep. 357; 32 L.J.Q.B. 129; 7 L.T. 743; 27 J.P. 182; 9 Jur. N.S. 986; 11 W.R. 465; 122 E.R. 213; 3 Digest (Repl.) 75, *143*.

(41) *Spence* v. *Union Marine Insurance Co.* (1868), L.R. 3 C.P. 427; 37 L.J.C.P. 169; 18 L.T. 632; 16 W.R. 1010; 3 Mar. L.C. 82; 29 Digest 256, *2074*.

(42) *Rogers* v. *Ingham* (1876), 3 Ch.D. 351; 35 L.T. 677; 25 W.R. 338, C.A.; 35 Digest 93, *25*.

Also referred to in argument:

Re David Payne & Co., Ltd., *Young* v. *David Payne & Co., Ltd.*, [1904] 2 Ch. 698; 73 L.J.Ch. 849; 91 L.T. 777; 20 T.L.R. 590; 48 Sol. Jo. 572; 11 Mans. 437, C.A.; 10 Digest (Repl.) 761, *4940*.

Hastelow v. *Jackson* (1828), 8 B. & C. 221; 2 Man. & Ry. K.B. 209; 6 L.J.O.S.K.B. 318; 108 E.R. 1026; 25 Digest 406, *95*.

Diggle v. *Higgs* (1877), 2 Ex.D. 422; 46 L.J.Q.B. 721; 37 L.T. 27; 42 J.P. 245; 25 W.R. 777, C.A.; 25 Digest 400, *52*.

Jaques v. *Golightly* (1776), 2 Wm. Bl. 1073.

Tappenden v. *Randall* (1801), 2 Bos. & P. 467; 126 E.R. 1388; 12 Digest (Repl.) 316, *2437*.

Jaques v. *Withy and Reid* (1788), 1 Hy. Bl. 65; 126 E.R. 40; 12 Digest (Repl.) 303, *2334*.

Shoolbred v. *Roberts*, [1899] 2 Q.B. 560; 68 L.J.Q.B. 998; 81 L.T. 522; 6 Mans. 397; on appeal, [1900] 2 Q.B. 497; 69 L.J.Q.B. 800; 83 L.T. 37; 16 T.L.R. 486; 7 Mans. 388, C.A.; 5 Digest (Repl.) 784, *6661*.

Hall v. *Swansea Corpn.* (1844), 5 Q.B. 526; 1 Dav. & Mer. 475; 13 L.J.Q.B. 107; 2 L.T.O.S. 345; 8 J.P. 503; 8 Jur. 213; 114 E.R. 1348; 13 Digest (Repl.) 41, *544*.

Re Cork and Youghal Rail. Co., Ex parte Overend, Gurney & Co. and London and Hamburgh and Continental Exchange Bank (1869), 21 L.T. 47; on appeal, 4 Ch. App. 748; 39 L.J.Ch. 277; 21 L.T. 735; 18 W.R. 26, C.A.; 12 Digest (Repl.) 304, *2337*.

Hancock v. *Smith* (1889), 41 Ch.D. 456; 58 L.J.Ch. 725; 61 L.T. 341; 5 T.L.R. 459, C.A.; 12 Digest (Repl.) 554, *4203*.

Wilson v. *Church* (1879), 13 Ch.D. 1; 41 L.T. 50, C.A.; on appeal sub nom. *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176; 43 L.T. 60, H.L.; 36 Digest (Repl.) 616, *1771*.

Royal Bank of Canada v. *R.*, [1913] A.C. 283; 82 L.J.P.C. 33; 108 L.T. 129; 29 T.L.R. 239, P.C.; 12 Digest (Repl.) 258, *1995*.

Houldsworth v. *Evans* (1868), L.R. 3 H.L. 263; 37 L.J.Ch. 800; 19 L.T. 211, H.L.; 9 Digest (Repl.) 447, *2922*.

Re Oatway, Hertslet v. *Oatway*, [1903] 2 Ch. 356; 71 L.J.Ch. 575; 88 L.T. 622; 3 Digest (Repl.) 75, *141*.

Central Transportation Co. v. *Pullman's Palace Car Co.* (1891), 139 U.S. 24.

Cooper v. *Phibbs* (1867), L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L.; 22 Digest (Repl.) 156, *1411*.

Daniell v. *Sinclair* (1881), 6 App. Cas. 181; 50 L.J.P.C. 50; 44 L.T. 257; 29 W.R. 569, P.C.; 35 Digest 641, *3719*.

Re Mouat, Kingston Cotton Mills Co. v. *Mouat*, [1899] 1 Ch. 831; 68 L.J.Ch. 390; 80 L.T. 406; 47 W.R. 506; 43 Sol. Jo. 380; 25 Digest 150, *20*.

Laing v. *Reed* (1869), 5 Ch. App. 4; 39 L.J.Ch. 1; 21 L.T. 773; 34 J.P. 134; 18 W.R. 76, L.C. & L.J.; 7 Digest (Repl.) 482, *25*.

Re Bottomgate Industrial Co-operative Society (1891), 65 L.T. 712; 56 J.P. 216; 40 W.R. 139, D.C.; 3 Digest (Repl.) 167, *247*.

Amalgamated Society of Railway Servants v. *Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 26 T.L.R. 177; 54 Sol. Jo. 215, H.L.; 12 Digest (Repl.) 283, *2182*.

Chapleo v. *Brunswick Building Society* (1881), 6 Q.B.D. 696; 50 L.J.Q.B. 372; 44 L.T. 449; 29 W.R. 529, C.A.; 7 Digest (Repl.) 519, *256*.

Brownlie v. *Russell* (1883), 8 App. Cas. 235; 48 L.T. 881; 47 J.P. 757, H.L.; 7 Digest (Repl.) 478, *1*.

Barwick v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex.Ch.; 26 Digest (Repl.) 101, *690*.

Appeal by the appellant representing himself and other depositors in the Birkbeck Permanent Benefit Building Society, from an order of the Court of Appeal, affirming an order of NEVILLE, J., whereby a declaration was made as to the proper mode of the application of the assets of the society.

Cave, K.C., and *Tomlin, K.C.*, for the appellant.

Clauson, K.C., and *Cecil Turner* for the respondent, Mr. Registrar Brougham, the official receiver and liquidator.

Upjohn, K.C., *Younger, K.C.*, and *A. M. W. Wells* for the respondent representing shareholders.

Their Lordships took time for consideration.

Feb. 12. **VISCOUNT HALDANE, L.C.**—In the opinion which I am about to deliver **LORD ATKINSON** desires me to state he concurs.

In June, 1911, an order was made for the winding-up of the Birkbeck Permanent Benefit Building Society. The society was formed in 1851, under the Building Societies Act, 1836 [repealed], with rules which, with certain amendments subsequently made, were duly certified and enrolled. The object of the society, according to these rules, was to enable the members to raise a fund out of which they might be individually enabled to buy or build houses. Rule 35 conferred on the directors a power to borrow without limit, but it is clear that the power so given could not extend beyond borrowing for the legitimate purposes of the society. There were two classes of shareholders, those to whom loans were granted and those who were mere investors. Under an amendment rule the investing shares were divided into two classes, A shares and B shares, differing mainly in this respect, that the A shares matured and were to be paid off after a certain period, while the B shares were permanent. The shareholder could, however, in either case give notice and withdraw the amount of his share. During the earlier period of the society's existence the funds, which were derived both from shares and from loans by depositors, were laid out in mortgages to members. Later on, while the society continued its business as a building society, it began gradually to increase its deposits and to do the business of a banker. In the balance-sheet of

Mar. 31, 1910, the liabilities to shareholders are stated to amount to £1,053,728, while the liabilities to depositors are £10,784,323. The assets are stated to include mortgages from advanced members, loans, and property in hand, amounting to £726,610; money at call, short loans and advances to customers, £995,466; investments in various kinds of stocks, shares, and debentures, £8,740,788; ground rents, £433,826; and cash at the bankers and in hand, £1,069,753. The society had begun, about 1871, to call itself the Birkbeck Bank. Many of its business documents came to be so headed, and it is obvious that at the time when it was wound-up it had, while still retaining its business as a building society, turned much the larger part of its enterprise into that of a bank. Notwithstanding that the Act of 1836 does not incorporate the building societies registered under it, its provisions make it clear that such a course as the Birkbeck Society took was contrary to these statutory provisions, and the apparent action of the society in carrying on the business of banking and in borrowing for that purpose was, therefore, ultra vires, and was not in contemplation of law the action of the society. The contracts entered into for the purposes of this business were accordingly, so far as the society was concerned, void.

The questions which now arise are in substance how the liquidator is to dispose of the mass of assets in his hands. He raised these questions before NEVILLE, J., on a summons. The learned judge ordered the assets to be applied—first, in payment of costs; secondly (as I gather), by general consent in paying debts properly incurred to outside creditors; thirdly, in paying the unadvanced members or shareholders, the amounts due to them in respect of the subscriptions paid on their shares, including any bonus and interest to which they were entitled by the rules; and, fourthly, in distribution of the balance among the customers of the society on deposit or current account (for brevity I shall speak of these as depositors) in proportion to the amounts standing to their credit in the books. The majority in the Court of Appeal (COZENS-HARDY, M.R., and BUCKLEY, L.J., FLETCHER MOULTON, L.J., dissenting) took the same view. The decision of that majority was based on the following grounds. They held, first of all, that the rule enabling borrowing did not authorise the society to engage in banking business, and that its action in so doing was altogether ultra vires.

I think that on this point there is no doubt that the courts below were right, and that they carried their view to its proper conclusion when they held that every receipt on deposit for the purposes of such business was ultra vires. The majority went on to hold that in so far as the legitimate indebtedness of the society was not increased, for the reason that the money borrowed was applied in the payment of legitimate debts, the depositors could be treated as subrogated to the rights of these debtors, at all events to the extent of their debts as distinguished from any securities for these debts. They also thought that if the depositors could identify their money as earmarked they could follow it under what is called a tracing judgment. But they held that unless the depositors could bring themselves within one or other of these propositions they could not claim to be creditors either at law or in equity, and that their only right was to an order such as was made in *Re Guardian Permanent Benefit Building Society* (1), which would give them the surplus assets after payment of all legitimate debts and of 20s. in the pound to the members or shareholders. It was the order made in that case which NEVILLE, J., had followed. BUCKLEY, L.J., referred to difficulties which he felt in understanding the decision of SIR GEORGE JESSEL in that case. He was unable to see why, if the assets belonged to the society, the members were not held entitled not only to 20s. in the pound, but to the share in the surplus which the rules gave them. But he considered that the Court of Appeal were bound by the decision of the Court of Appeal in that case. For reasons to which I will refer later on, it will appear that I share the difficulty in understanding it which BUCKLEY, L.J., experienced. FLETCHER MOULTON, L.J., was of opinion that the principle which the authorities had laid down carried with it the consequence that the court would

not, even in the case of an ultra vires transaction which could give rise to no debt as between the parties to the transaction, permit the one who had wrongfully received the money to keep it merely because he was in possession of it. He thought that as the money must be taken to have been received by the misrepresentation or carelessness of its agents, the society could not keep it as against the depositors. This seemed to him to be implied in what was laid down in *Re Guardian Permanent Benefit Building Society* (1), not merely in the Court of Appeal, but in the subsequent decision on appeal to the House of Lords (*Murray* v. *Scott* (1)). He held that not until the society had made restitution of this money (which was never really part of the assets) to the depositors, could there be assets belonging to the society which ought to be distributed on the principle laid down by SIR GEORGE JESSEL in the *Guardian Society's Case* (1). To proceed otherwise would be to look at possession only, and to disregard rights of property. He, therefore, dissented, holding that the depositors should be paid in priority to the B shareholders. With the A shareholders a settlement had been come to, and as to their title no question was then, or is now, raised.

The question before the House is whether NEVILLE, J., and the majority in the Court of Appeal, arrived at a conclusion which was right in point of principle, apart from the authorities, and whether, if your Lordships should be disposed to differ from them, we are so bound by the authorities, and particularly by the cases decided in this House, that we are precluded from arriving at a different conclusion. It is contended for the appellants that they are entitled to succeed in recovering their deposits either on the footing of being money had and received by the society to their use, or as being money which never truly formed part of the assets, and which can now be followed in the hands of the society's agents and the liquidator. I propose to consider in the first place the question whether an action for money had and received would have lain against the society on the footing that, although its conduct in receiving the depositors' money was ultra vires, it had become improperly, as between itself and the depositors, enriched thereby, so that the amount so received was money held to the depositors' use and recoverable as a debt, independently of any right to trace and follow. Two authorities were cited in support of the argument that such an action could have been brought successfully. One of these was a judgment of SIR WILLIAM PAGE WOOD, V.-C., in *Re Phœnix Life Assurance Co.* (4). The other was a decision of the Court of Appeal in Ireland which followed his judgment, in *Flood* v. *Irish Provident Assurance Co.* (5). In these cases the principle of tracing was not relied on, but it was apparently held that the amount of certain premiums which had been paid in respect of policies, the issue of which was ultra vires, could be recovered as money had and received. If these decisions had related to the recovery of borrowed money, I should find it difficult to reconcile them with principle. If it be outside the power of a statutory society to enter into the relation of debtor and creditor in a particular transaction, the only possible remedy for the person who was paid the money would on principle appear to be one in rem and not in personam, a claim to follow and recover specifically money which could be earmarked as never having ceased to be his property. To hold that a remedy will lie in personam of a statutory society, which by hypothesis cannot in the case in question have become a debtor, or entered into any contract for repayment, is to strike at the root of the doctrine of ultra vires as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure.

It is, therefore, binding both at law and in equity. In the jurisprudence of England the doctrine of ultra vires must now be treated as established in a stringent form by Acts of the legislature and decisions of great authority which have interpreted these Acts. This is a principle which it appears to me must today be taken as a governing one, not only at law but in equity. I think it excludes from the law of England any claim in personam based even on the circumstance that the defendant

has been improperly enriched at the expense of the plaintiff by a transaction which is ultra vires. All analogies drawn from other systems, such as that of the Roman law, appear to me to be qualified in their application by two considerations. The first is that, broadly speaking, so far as proceedings in personam are concerned, the law of England really recognises (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed. This is a point to which I shall have to return later on in what I have to say. The second consideration is that where an Act of Parliament imposes a restriction on capacity, that restriction is binding in equity as much as at law, the principles of which equity follows.

Nor does the difficulty of extending the scope of the judgments of SIR WILLIAM PAGE WOOD and the Irish Court of Appeal to cases of borrowing appear less when the foundation of the action for money had and received is investigated. Consideration of the authorities has led me to the conclusion that the action was in principle one which rested on a promise to pay, either actual or imputed by law. *Moses* v. *Macfarlan* (6) is the leading case on the point. It was an action on the case for money had and received under circumstances where any notion of an actual contract was excluded. But LORD MANSFIELD explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt (2 Burr. at p. 1009):

> "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract."

The claim in *Moses* v. *Macfarlan* (6) was one of assumpsit—in the form of the common indebitatus assumpsit count. This was a form of claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed in consimili casu under the provisions of c. 24 of the Statute of Westminster (13 Edw. 1). By degrees, out of this action on the case and, as one of its forms, a new form which was soon to diverge wholly from tort, the action of assumpsit arose. In *Slade's Case* (7), the judges resolved that "every contract executory imports in itself an assumpsit," with the result that it became no longer necessary or desirable to use as the remedy where money was due the action of debt which was embarrassing because it let in the right to a "wager of law." Then came the extension of indebitatus assumpsit to cases in which it was clear that no express promise could be proved. For, as LORD MANSFIELD points out, the law is ready to imply a debt in such cases arising quasi ex contractu. The promise to pay which created the right of action might have been a pure fiction of law. In many cases no such promise could possibly have been established. Yet it took some time before the judges brought themselves to go so far.

Starke v. *Cheesman* (8) was a claim on a bill of exchange by the holder against the drawer on the allegation that the drawee had refused to accept. It was held that an actual promise must be implied. But what is remarkable is the language of the judgment in which the declaration, which contained an indebitatus assumpsit count, was held good. HOLT, C.J., is reported to have said (1 Ld. Raym. at p. 538):

> "that the notion of promises in law was a metaphysical notion, for the law makes no promise but where there is a promise of the party."

Yet, the observation of HOLT, C.J., notwithstanding, a little later on this "metaphysical notion" became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none which finally

gave the action its comprehensive range, and made it available even where no fact importing or implying privity of contract could be proved. The history of the action of assumpsit has been described by a writer to whom lawyers and historians alike owe much, the late PROFESSOR AMES of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law. Speaking of the action of assumpsit generally he says (LECTURES ON LEGAL HISTORY at p. 166):

> "In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestion of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment."

Notwithstanding the wide scope of the remedy so described, I think that it must be taken to have been given only, as I have already said, where the law could consistently impute to the defendant at least the fiction of a promise. And it appears to me that as matter of principle the law of England cannot now, consistently with the interpretation which the courts have placed on the statutes which determine the capacity of statutory societies, impute the fiction of such a promise where it would have been ultra vires to give it. The fiction becomes, in other words, inapplicable where substantive law, as distinguished from that of procedure, makes the defendant incapable of undertaking contractual liability. For to impute a fictitious promise is simply to presume the existence of a state of facts, and the presumption can give rise to no higher right than would result if the facts were actual.

I am, accordingly, of opinion that while the decisions of SIR WILLIAM PAGE WOOD and of the Irish Court of Appeal, to which I have referred, may possibly, notwithstanding that the issue of the policies was ultra vires, be supported on the ground that they related merely to the failure of consideration for the premiums paid (a question on which it is unnecessary for me to express any opinion) they cannot be invoked as authorities for the proposition that an action for money had and received would have lain in a case of borrowing ultra vires. It follows that the depositors in the present case will not succeed unless they are able to trace their money into the hands of the society or its agents as actually existing assets. The question is whether they are able to establish enough to succeed upon this footing. Their claim cannot be in personam and must be in rem, a claim to follow and recover property with which, in equity at all events, they had never really parted.

I proceed, therefore, to consider the case on this restricted footing. The evidence is very scanty, but it must be taken that the depositors' money was used on a large scale in acquiring the assets now in the liquidator's hands, for the value of these assets is far in excess of the contributions of the shareholders, and much of it can be due to the money of the depositors alone. The difficulty of establishing a title in rem in this case arises from the apparent difficulty of following money. In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognises as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title. But the exception is not extended

beyond the limits which necessity imposes. If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money. This is a principle not merely of equity but of the common law. It is explained in the judgment of LORD ELLENBOROUGH, C.J., in *Taylor* v. *Plummer* (9), who pointed out that there was no reason why the doctrine that money could not be followed should apply to circumstances in which a broker had wrongfully invested money of his principal in purchasing securities into which it could be traced. The reason of this is plain. The broker could not in these circumstances set up as against his principal the rule which applies to what has been paid over as currency, that ordinarily transfer of possession is transfer of property. So long as the money which the principal has handed to his agent to be applied specifically, and not on a debtor and creditor account, can be traced into what has been procured with it, the principal can waive his right of action for damages for tort, and, affirming the proceeding of the broker, claim that his money is invested in a specific thing, which is his. But LORD ELLENBOROUGH, C.J., laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his bankers, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client, the broker, which precluded the notion of following the money.

That seems to be, so far as the doctrine of the common law is concerned, the limit to which the exception to the rule about currency was carried—whether the case be that of a thief or of a fraudulent broker, or of money paid under mistake of fact, you can, even at law, follow, but only so long as the relation of debtor and creditor has not superseded the right in rem. This is well put by BRAMWELL, L.J., in *Ex parte Cooke* (10), who explains why the principal in *Taylor* v. *Plummer* (9) could claim the money (4 Ch.D. at p. 128):

> "Because the money was paid to the broker, not as trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him, but was handed to him in a fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal."

THESIGER, L.J., in *Re Hallett's Estate* (3), states the principle in other words, but to the same effect (13 Ch.D. at pp. 723, 724):

> "All cases where it has been held that moneys mixed and confounded, but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty, in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts—in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and cestui que trust, or of principal and agent."

It is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed, and the money itself can be earmarked in the hands of the person who has wrongfully obtained it. A person standing in a fiduciary relation may be in this position, but it is not because of his trust or fiduciary duty. The common law, which we are now considering, did not take cognisance of such duties. It looked simply to the question whether the property had passed, and if it had not, for instance, where no relationship of

debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it. And this appears to me to be, on ground of principle, as true of money paid under mistake of fact or on an ultra vires contract, under which no property could pass or relation of debtor be constituted, as it is true in the case of a broker or bailee.

But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrongdoer into his account with his banker, who simply owed him a debt, so that no money was or could be, in the contemplation of a court of law, earmarked. Here equity which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy. The Court of Chancery could and would declare, even as against the general creditors of the wrongdoer, that there was what it called a charge on the banker's debt to the person whose money had been paid into the latter's bank account in favour of the person whose money it really was. And, as JESSEL, M.R., pointed out in *Re Hallett's Estate* (3), this equity was not confined to cases of trust in the strict sense, but applied, at all events, to every case where there was a fiduciary relationship. It was, as I think, merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxiliary jurisdiction, wherever money was held to belong in equity to the plaintiff. If so, subject to certain qualifications which I shall presently make, I see no reason why the remedy explained by JESSEL, M.R., in *Re Hallett's Estate* (3) of declaring a charge on the investment in a debt due from bankers on balance, or on any mass of money or securities with which the plaintiff's money had been mixed, should not apply in the case of a transaction that is ultra vires. The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient, in my opinion, to bring the transaction within the general principle.

There was another point which was decided in *Re Hallett's Estate* (3). JESSEL, M.R., and BAGGALLAY, L.J., held that the rule in *Clayton's Case* (11) did not apply so as to determine by reference to dates the appropriations of cheques drawn on the bank account, inasmuch as they considered that a person standing in a fiduciary relationship must be taken to have intended to draw cheques for his own purposes only on so much of the balance as was his. On this second point THESIGER, L.J., dissented from the majority. He thought that he was bound by the decision in *Pennell* v. *Deffell* (12) and the subsequent authorities which had followed it. He said (13 Ch.D. at p. 752):

> "Equity has gone very far in aid of trust creditors when it holds that they may follow and obtain, in priority to general creditors, moneys paid to a banker, and therefore no longer existing in specie as moneys numbered and earmarked, but converted into a debt, and it may be that the distinguished judges I have referred to may have thought that equity had gone far enough, and that in the absence of express appropriation, the general rule of appropriation of payments in and out of a banker's account should apply to that debt when forming part of a larger debt, made up as to the rest of moneys, not trust moneys, paid into the bank."

As all the outside creditors have been paid off by consent, we have not in the appeal before the House to consider the decision in *Re Hallett's Estate* (3) on this second point. I do not desire to be taken as indicating any opinion on a question which is not before us, and to which I have only referred for the purpose of making this clear.

I now proceed to apply these conclusions to the case we have to deal with. I must begin by pointing out that the circumstances here are in material points different from those in *Re Hallett's Estate* (3). There the agent had in breach of

his duty paid the money of his principal into his bank, so that it formed part of a general debt due to him on current account with the bankers. It was held that the money of the principal must be paid to him out of the debt so due. To call the right of the principal a charge on the debt, as JESSEL, M.R., did, was only to express compendiously, but somewhat loosely, that the indebtedness was for a single sum of which the amount of the principal's money formed an integral part, and that the agent could not draw on account of the single sum, in which he had improperly mixed his own funds with the money of his principal, until he had made good the amount of that money. For the purpose of the question before us the really relevant part of the judgment in *Re Hallett's Estate* (3) is that which shows how the difficulty of following money into a debtor and creditor account like a banker's is got over in equity. The loan to the bankers was regarded as an investment pro tanto of the principal's money, and the latter was treated as entitled to waive the breach of duty by his agent, and to claim the investment to the extent of the amount due to him as made on his behalf. The agent could not set up that any part of the money in the bank was his until he had made good his breach of duty, and in that sense there was a charge. In the present case the investment was not made in breach of a fiduciary duty on the part of the society, and it was actually made with the authority of the depositors, although on the supposition that a banking business was ultra vires. What was a material point in *Re Hallett's Estate* (3), therefore, does not occur here. No doubt it was ultra vires of the society to undertake to repay the money. But it was none the less intended that in consideration of giving such an undertaking the society should be entitled to deal with it freely as its own. The consideration failed and the depositors had the right to follow the money so far as invalidly borrowed into the assets in which it had been invested, whether these assets were mere debts due to the society or ordinary securities, but that was their only right. As to the part of the assets which was acquired with money paid by the shareholders, the case appears to me to be free from difficulty. The money paid to the society by the shareholders was paid as the consideration for the shares which were issued to them. That money, therefore, beyond question, became the money of the society. A large part of it has probably been applied ultra vires in the acquisition of the assets of the banking business. These assets can accordingly be claimed only by the society itself as belonging to it, and the shareholders have no direct title to them.

The total mass of assets which the liquidator has to distribute thus represents in part money which the depositors are entitled to follow and in part money which the society is entitled to follow. If the present value of these assets was equivalent to the total amount of such money, there would be no difficulty; the assets would be apportioned according to the sources from which they came. Does it make a difference that the value has shrunk so that the two sets of claimants cannot be paid in full? I do not think so. The position of the society is different from that of the agent in *Re Hallett's Estate* (3). The depositors have no alternative right in this case to disaffirm the transaction to the extent of claiming on the footing that their money has been applied in breach of trust. All they can do is to adopt the dealing with the money that they handed over, under circumstances in which it never really ceased to be theirs, and claim the part of the mass of assets which represents it as belonging to them in equity. There has been no breach of fiduciary duty on the part of the society, and it appears to me that this circumstance is material in distinguishing the consequences here from those which followed in *Re Hallett's Estate* (3) on the footing that there the agent could not gain, at the expense of the principal, an advantage for himself or his general creditors by in effect setting up a breach of duty. The depositors can, in my opinion, only claim the depreciated assets which represent their money, and nothing more. It follows that the principle to be adopted in the distribution must be apportionment on the footing that depreciation and loss are to be borne

pro rata. I am of course assuming in saying this that specific tracing is not now possible.

What is there must be apportioned accordingly among those whose money it represents, and the question of how the apportionment should be made is one of fact. In the present case the working out of a proper apportionment based on the principle of tracing not only would involve immense labour, but would be unlikely to end in any reliable result. The records necessary for tracing the dealings with the funds do not exist. We have, therefore, treating the question as one of presumption of fact, to give such a direction to the liquidator as is calculated to bring about a result consistent with the principles already laid down. I think that this direction should be that, without disturbing anything that has up to now been settled or agreed, he should apportion the entirety of the remaining assets (including mortgages and loans) between the depositors and the shareholders in proportion to the amounts paid by the depositors and by the shareholders respectively. In this way I am of opinion that the nearest approach practicable to substantial justice will be done. I think that this is the utmost extent to which, consistently with well-established principles, a court of justice can go in compelling the society to restore that of which it has become possessed through its ultra vires transactions. In his dissenting judgment in the Court of Appeal, FLETCHER MOULTON, L.J., proposed to go further, and to apply the assets in paying the depositors before the shareholders received anything. For reasons which result from what I have already stated, I think that to do this would really be inconsistent with settled law as to the effect of ultra vires transactions. What I propose is, I think, not at variance with what this House actually decided in *Murray* v. *Scott* (1) and in such cases as *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (14), and *Baroness Wenlock* v. *River Dee Co.* (13). It is not the method of distribution directed in *Re Guardian Permanent Benefit Building Society* (1), where the Court of Appeal said that not only the creditors of the society, but the unadvanced members, must be paid in the first instance, and the balance only divided among the lenders from whom advances had been obtained without legal authority. But I do not think that the decision there upon this point can be upheld unless on the facts in that case no reliable attempt to trace was held to be possible. If such presumptions as to the sources of the assets could have been made, as I think must be made, in the present case, the method of distribution adopted would not have been justifiable on the assumption that the principle I have stated is the right one. There is much force in the criticism of the judgments in that case, made by FLETCHER MOULTON, L.J., and by BUCKLEY, L.J., in the present case. The reasoning implied in those judgments appears to me to have been pushed to an extent which, unless carefully qualified, establishes, not its conclusion, but either too much or too little. The agents of the society in the present case, unlike the Guardian Society, have acted ultra vires in the application not only of the depositors' but of the society's own money, by lending it to customers with whom it dealt as a banker, and in investing it in securities for banking purposes. And we are not dealing with any question in which the shareholders are seeking to claim against the society on a footing inconsistent with their true contract as quasi partners. It is in their case, as in that of the depositors', a question only of a right to follow, and in a distribution by a liquidator based on this principle I see no reason why either set of claimants should have priority over the other. The contest does not arise between shareholders as such and creditors of the society. It arises between persons, each of whom claims that, so far as the point at present in dispute is concerned, certain moneys were his, and never ceased to be his, and are now represented by specific assets.

The only authorities to which I wish to make further reference specifically are *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (14), which I have already mentioned, and the subsequent decision in *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (2). In the first of these

cases this House laid down the principle, affirming the Court of Appeal, that where securities had been deposited with bankers for overdrafts which were ultra vires, the bankers could not hold the securities. That seems to have been obviously right on the facts before the House. In the subsequent case the Court of Appeal took a further step, and held that the liquidator could recover from the bankers moneys paid to them by the society and applied in discharge of the money which they had lent to it by way of overdraft and so lent ultra vires. I think that decision, which was not brought before this House for review, was wrong, under the circumstances of the case, in the absence of proof by the society, who by the fact of repayment had made an admission to the contrary effect, that the money advanced by the bankers had been lost, and could not be treated as charged. The society ought, in my opinion, to have been regarded, in the absence of evidence to this effect, as having simply returned to the bankers the latter's own money. For the same reason I entertain considerable doubt whether *Ex parte Watson* (15) was rightly decided. I have examined the other authorities cited by the learned counsel on both sides in the course of the argument, but except in so far as I have already referred to these authorities I do not think it necessary to comment on them. For it is only on the points which I have mentioned that I find anything in what I am about to propose that is not really in harmony with them. I move that the judgments of the court below be varied so as to give effect to a declaration, subject to matters which have already been settled by the consent of the parties, and subject to any application which may be made by any individual depositors or shareholders with a view of tracing his own money into any particular asset, and subject to the payment of all proper costs, charges, and expenses, the liquidator ought to proceed in distributing the remaining assets of the society between the depositors and the unadvanced shareholders on the principle of distributing them pari passu in proportion to the amounts properly credited to them respectively in the books of the society in respect of their advances at the date of the commencement of the winding-up, and that the case be remitted to the court of first instance to apply this principle. As the appeal is one of an unusual character, and the litigation was essential for ascertaining the rights of all parties, I think we should not disturb the orders of the courts below in regard to costs, and that the costs of all parties to this appeal should be paid out of the assets on the same footing as in the court below.

LORD DUNEDIN.—The Birkbeck Permanent Benefit Building Society, established in 1851 under the Building Societies Act, 1836, and having for its proper object the usual purposes of a building society, started and developed a banking business. On June 20, 1911, a winding-up order was pronounced. The outside creditors, to use a convenient term, were inconsiderable in number and value, and have been paid. There remains the claims of the bank customers or depositors and the shareholders. The exact figures are not available, but an approximate idea may be gathered from the balance-sheet of Mar. 31, 1910, from which it appears that in rough figures, the claims of the shareholders represented a little over one million pounds, those of the depositors ten and three-quarter millions. The shareholders are divided into two classes, A and B. The A shareholders made an arrangement with the depositors, and, accordingly, no question arises in respect of them. The B shareholders elected to stand on their legal rights. For the purposes of this case it is enough to describe the B shareholders in the terms which have become familiar through cases decided in your Lordships' House as unadvanced shareholders, who had not at the date of the winding-up given notice of withdrawal. On June 30, 1911, the liquidator by summons directed against persons representative of each class of claimants, asked for directions from the court as to how the assets were to be applied. The assets were not sufficient to pay all claimants in full, but they were more than sufficient to pay the outside creditors and the shareholders. This summons after certain amendments was

finally disposed of by an order of NEVILLE, J., of Nov. 6, 1911. By this time the arrangement already mentioned between the A shareholders and the depositors had been come to. The order ranked the claimants and directed the assets of the society to be distributed as follows:—(i) Costs of winding-up, including costs of scheme of arrangement between A shareholders and depositors. (ii) Payment of outside creditors. (iii) Payment to unadvanced members of all sums due, including interest and bonus. (iv) Balance to depositors in proportion to sums at their credit. This order has the effect, so far as the B shareholders are concerned, of paying them in full. Against this order an appeal was taken, and the order was affirmed by the Court of Appeal, FLETCHER MOULTON, L.J., dissenting. Appeal has now been taken to your Lordships' House.

I do not propose to occupy your Lordships' time by discussing the question whether the accepting of the depositors' money on a contract to repay was ultra vires. I think it clearly was ultra vires, and I agree with the learned judges of the Court of Appeal in the reasons they give for so holding. The order as made is admittedly made on the authority of the order made by the Court of Appeal in *Re Guardian Permanent Benefit Building Society* (1). In itself the order obtains but scant praise from the learned judges who felt bound to pronounce it. The Master of the Rolls says that the *Guardian* order is binding upon him, but adds ([1912] 2 Ch. at p. 209):

> "I feel a difficulty in discovering the principle on which it was based. It seems to me a rough and ready tracing judgment, illogical, but possessing the merit of attempting to do partial justice to the lenders."

BUCKLEY, L.J., explains this illogicality in a very pertinent passage which I need not quote. Apart from the fact that the *Guardian* order was framed by eminent judges—SIR GEORGE JESSEL, COTTON, and BOWEN, L.JJ.—it seems to me that its authority is somewhat scant, and, in particular, that there is no possibility of saying it has in any way received the approval of your Lordships' House.

I should like to make this clear by a brief examination of that case. There were two sets of questions—one as to the position of the lenders of money, the other as to the position of certain paid-up preference shareholders who had taken shares under a certain r. 32 of the society. The society in that case had by its rules a power to borrow without any limit as to extent. The Court of Appeal held that a power to borrow without limitation as to amount was ultra vires; that consequently the lender of money had no legal or equitable claim of debt against the society; and they then made the order in question. As in question with the other shareholders they admitted the claim of the preference shareholders, but this—although valuable from another point of view in the discussion of these matters—is for the moment beside the question. The ranking under the order, therefore, was—first, outside creditors; second, shareholders; third, balance to lenders of money. The case was taken to your Lordships' House on two points—by the lenders of money as against the order postponing them, and by the ordinary shareholders as against the preference shareholders. Their Lordships in this House held that the Court of Appeal was wrong in holding that a power to borrow was ultra vires because unlimited, and, no question being raised as to the borrowing having been for anything but legitimate objects of the society, the result was that the lenders became ordinary creditors, and as such ranked before all shareholders. As regards the preference shareholders, they affirmed the Court of Appeal. It appears plainly from this that the result of this was entirely to sweep away the order—not upon an expressed opinion that the order was itself wrong, but because it affirmed the true facts to be such as to make the order inapplicable to the facts of the case. Consequently this House had really no opportunity of considering whether the order itself was right.

It was strenuously contended, however, at your Lordships' Bar, that the *Guardian* order was at least inferentially approved by the House in the subsequent, but nearly contemporaneous, case of *Cunliffe Brooks & Co.* v. *Blackburn and District*

Benefit Building Society (14). This is, I think, a misconception of the case. In that case a bank had made advances to the society upon deposit of securities as in ordinary bankers' practice, the securities being held by the bank to meet the overdraft. The suit was one at the instance of the liquidator of the society to recover the securities. The Court of Appeal held that the overdraft was a borrowing and was ultra vires, but said that if the bank could show that the moneys paid upon the overdraft, or any part of them, could be shown to have been expended in paying the just debts of the society, the bank would pro tanto be entitled to the benefit of the securities. The bank appealed. The liquidator presented no cross-appeal. This House held that the decision of the Court of Appeal was right in so far as it held that an overdraft was a borrowing and was ultra vires, with the resulting consequence that the bank could not hold the securities in respect in contract. As regards the equity which was conceded to them by the order, they pointed out that no appeal was made against that order. Now, it will be observed that this case dealt with the retention of the securities alone, and the moment that contract was gone the right to the securities was gone, for to hold them it was necessary to hold them against all the world, i.e., against the ordinary creditors of the society. But the question was not raised, and could not be raised in that litigation, of what would be the fate of a claim at the instance of the bank against the general funds in the liquidation, and if that claim was made, what would be its ranking or position as in a question with shareholders. This is clear from the mere statement of the case. But it was clearly seen by LORD WATSON, who in the course of his judgment expressed himself as follows (9 App. Cas. at p. 871):

> "It it were possible in the present suit, to determine the whole questions which have arisen, or may yet arise, between the parties in regard to these advances by way of overdraft, your Lordships would have many important questions to consider. But the sole object of these proceedings at the instance of the liquidators is to recover certain assets of the society, which are held by the appellants, in security of the advances made by them."

I, therefore, come to the conclusion that not only is the *Guardian* order not binding on this House, but that it does not bear with it any evidence that the question in its broad aspect was very carefully argued.

Now, I think it is clear that all ideas of natural justice are against allowing A. to keep the property of B., which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A. Where there is contract the solution is according to the contract, or you might say the position truly does not arise. Such are the cases of a bailment of a chattel or of a loan of money. But there are many cases where the position does arise and where there is no contract. The case of a chattel is easy. A shopkeeper delivers an article at the house of B. in mistake for the house of A. An action would lie against B. for restitution. Such an action could easily be founded on the right of property. To use the Roman phraseology, there would be a jus in re. And where there was a jus in re there would not be, I take it, any difficulty in finding a form of common law action to fit the situation. But the moment you come to deal with what is called a fungible [a movable effect which perishes by being used and which is estimated by weight, number and measure], and especially when you deal with money, then the jus in re may disappear, and with it the appropriateness of such common law action. The familiar case is the paying of money by A. to B. under the mistaken impression in fact that a debt was due, when in truth there was no debt due. It was to fit cases of this sort that the common law evolved the action for money had and received. I think one cannot help feeling that this action was truly the putting of an equitable doctrine under a legal form. I am using the word equitable in a non-technical sense, for I am not suggesting for a moment that the action was borrowed from technical equity. My noble and learned friend LORD SUMNER, in his opinion, which I have had the advantage of seeing, has conclusively shown

that it was not. But being a legal form, it does not admit, in spite of Lord Mansfield's dictum that such an action was very beneficial and to be encouraged, of being stretched beyond its capacity. What concerns my view, however, is only this, that it is a contrivance which is introduced to meet an equitable idea, which idea is a wider idea than that expressed by the proposition that when there is a jus in re an action will lie, and when there is not such a jus it will not. This follows from the undoubted fact that where money is in question under modern conditions (by which I mean not put into bags or a stocking), there never will be a jus in re, there can at most be only a jus ad rem.

Viewing, as I do, the equity as based on inherent ideas of justice, it is, I think, very instructive to see how it is dealt with in other systems. I, therefore, make no apology for going to the Roman law, not as an authority, for such it is not, but as instructive as to how these matters may be dealt with, and as suggestive, as I shall afterwards show, as to the true answer to the difficulties of the present case. The English common law has various actions which, under a classification which I understand to be really one of modern growth, are divided into actions in respect of contract and of tort. But in the Roman law the actions covering the same field are actions ex contractu and quasi ex contractu, action ex delicto and quasi ex delicto. The class we are dealing with are obviously actions quasi ex contractu. Accordingly we find in the case of a chattel that while the actio commodati covered the case where there was a contract, i.e., a bailment, there was also an actio utilis where there was no contract. And coming to the case of money, while mutuum was proper loan pro-mutuum covered the cases where money was had and received without contract, and a special form of action for the common case of the payment of a supposed but non-existing debt was known as condictio indebiti. Now, the English law having no quasi contract, got over the difficulty in such cases as the action for money had and received by the fiction of a contract. It is, I think, obvious that the distinction between the fiction of a real contract on the one hand, and the existence of a quasi contract on the other, is a distinction of a most metaphysical description. Both systems, at any rate in the case of money paid under a mistake in fact, recognise the obligation to repay where there is no jus in re. Both systems, I think, recognise the equitable rule, and proceed to carry it out according to the forms of their own development. Now, that there is an obligation to restore, binding the defendant to pay in an action for money had and received, does not, I think, admit of doubt. The result is that it is a real debt, and as such entitled to take its place along with the debts of all proper creditors. To put an example. Suppose a sum of money was paid by A. to the credit of B. at his bankers, under the mistaken idea that a debt was due. Suppose that the next day, before A. had discovered the mistake, B. drew out the whole balance at his credit and spent the cash, and went bankrupt the same day. Can it be doubted that A. would have a claim in B.'s bankruptcy which would rank equally with all B.'s ordinary creditors?

Up to this time I have been putting cases where the recipient of the money does not receive it under an ultra vires contract. Let me now examine the position where the money is received under a contract to repay and where that contract is found to be ultra vires. That there can be no resulting proper contractual obligation is clear from the decisions of this House in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (6) and *Baroness Wenlock* v. *River Dee Co.* (15). It is here that the difficulty comes in in extending the action for money had and received to such a case. For, in the first place, if that action lay it would have the effect of bringing in A., who has, ex hypothesi, no binding contract to urge against B., pari passu with the ordinary creditors of B. who have got binding contracts; and in the second, how is it possible to say that there is a fictional contract which is binding in circumstances in which a real contract is not binding? I confess that for a person not bred to the common law to express an opinion as to the true meaning and extent of common law actions is to handle periculosae plenum opus aleae.

But to the best of my comprehension, and notwithstanding *Re Phœnix Life Assurance Co.* (4), I have come to the conclusion that the action for money had and received cannot be stretched to meet the situation.

It is not, however, necessary that the claim should be one capable of being made good by action at law. It will suffice if there is an equitable remedy. Precisely the same difficulty was felt and met in the Roman law. True, there was then no doctrine of ultra vires in the modern sense of the word. But after all the only effect of the doctrine of ultra vires is to render contracts which are ultra vires a nullity. You cannot have more than a nullity, and such a nullity was equally found in the Roman law in the case of the contracts of pupils, who were totally incapable of contracting. Now, the Roman law met the situation by recognising that there was the super-eminent equity with which I started, and proceeded to apply it, while giving full effect to the doctrine of there being no contract. The super-eminent equity was expressed by the Roman jurists in the brocard nemo debet locupletari jactura aliena. When, therefore, the advance was made to the pupil, there was no longer, as in the case of the ordinary person, an obligation to restore—a debt taking its place along with other debts—but the pupil was bound to give up in quantum locupletior; that is to say, to give up the superfluity which he was possessing. But only a superfluity—that is to say, something which if he kept would be pure gain to him. I cite authority for what I have said:

> "Dig. 13.6. Commodati vel contra:—1 (ULPIAN). Impuberes commodati actione non tenentur quoniam nec constitit commodatum in pupilli persona sine tutoris auctoritate usque adeo, ut, etiamis pubes factus dolum aut culpam admiserit, hac actione non tenetur, quia ab initio non constitit."

Cf. the doctrine that an ultra vires contract of a company cannot be ratified even by all the members.

> "3. (ULPIAN). Sed mihi videtur, si locupletior pupillus factus sit dandam utilem commodati actionem secundum divi Pii rescriptum. Dig. 26.8. De auctoritate et consensu tutorum et curatorm:—5 (ULPIAN). Pupillus obligari tutori eo auctore non potest. . . . Sed et cum tutor mutuam pecuniam pupillo dederit vel ab eo stipuletur, non erit obligatus tutori. Naturaliter tamen obligabitur in quantum locupletior factus est: nam in pupillum non tantum tutori verum cuivis actionem in quantum locupletior factus est, dandam divus Pius rescripsit."

POTHIER, the great French jurist, took the same kind of view. In his "TRAITÉ DES OBLIGATIONS," after dealing with contracts, he goes on to consider "Des autres causes des obligations," and he puts first in this category quasi contracts. On these he comments as follows:

> "Section 114. Dans les contrats, c'est le consentement des parties contractantes qui produit l'obligation: dans les quasi contrats il n'intervient aucun consentement, et c'est la loi seule ou l'équité naturelle qui produit l'obligation en rendant obligatoire le fait d'où elle résulte. 115. Toutes personnes, même les enfants et les insensés, qui ne sont pas capables de consentement, peuvent par le quasi contrat qui résulte d'un fait d'un autre être obligées envers lui et l'obliger envers elles; car ce n'est pas le consentement qui forme ces obligations, et elles se contractent par le fait d'un autre, sans aucun fait de notre part."

I have made these citations to show that other great systems of law have not been unable to solve the problem arising where the equity of restitution comes in contact with the doctrine of nullity of contract.

Is English equity to retire defeated from the task which other systems of equity have conquered? Let us for a moment examine what the argument on the other side is. There being no contract, it is impossible, it is said, to have any obligation

on the part of the society to restore what it has taken from the depositors. The only right of the despositors is a right to vindicate property; or, in other words, when you have a jus in re you can enforce it, but if the thing has so disappeared that a jus in re is no longer to be found (and this must practically always be so in the case of money), then your remedy is gone. The sole relief which equity can give is that if you can show that your money has paid a just debt, in which case you shall have action. This comes to this, that having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested. Such a plea on the face of it seems only worthy of the Pharisee who shook himself free of his natural obligations by saying Corban. In the words of technical equity it is unconscionable. The appalling result in this very case would be that the society shareholders having got proceeds of the depositors' money in the form of investment, so that each individual depositor is utterly unable to trace his money, are enriched to the extent of some 500 per cent. I am aware that the order under review shrinking from that result provides that when the shareholders get 20s. in the pound the rest may go to the depositors. But as to that there is, to my mind, no possible answer to the terse and inexorable logic of BUCKLEY, L.J. Even as it is the result is that illegitimate banking guarantees the shareholders 20s. in the pound. But further, the whole strength of this argument lies in the idea that the jus in re represents the depositors' only right: that there can be no obligation on the other side at all. It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a jus in re, for you cannot have a jus in re in currency. It shows that both an action founded on a jus in re, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.

It is the case that the common law, as I have already said, works by means of a fiction which becomes inapplicable when the money has been received under an ultra vires contract. All, therefore, that is left to it is to vindicate in forma specifica, and its forms of action fail when the thing can no longer be identified. Equity—I am now speaking of technical equity—has already found itself able, in the exercise of its auxiliary jurisdiction, as the respondents admit, to deal with the situation when the money has gone to pay a just debt. Is its action limited to that situation? I think not. I think it can always, in the exercise of the same jurisdiction, help the common law by tracing, and can say that if the proceeds of property can be shown to be what I have called a superfluity in the person of the recipient, then it will hold that that property is traced just as surely as if it was still in the original form. To do this is to give full effect to the doctrine of ultra vires—for the party receiving is not ordered to pay as a debt the equivalent of what he originally got, but ordered merely to surrender what he still has as a superfluity, an enrichment which, but for the original reception of the money, he would have been without.

It, therefore, in each case becomes a question of evidence. Now, that the society, in the present case, has got a superfluity is obvious. The assets, shrunk as they are owing to the fall in the value of investments, are still far beyond all moneys contributed by the shareholders. But what is the measure of the superfluity? The outside creditors here were actually paid, because their claims were inconsiderable. In my judgment, they were rightly paid, under the circumstances of the actual case, and had they not been, they would stand, after expenses of the liquidation, as first in the ranking. For, in a question with shareholders, we are told that they were debts of a character which the directors had a power to make. And in a question with the depositors, they were incurred in a business, illegally carried on no doubt, as for the society, but yet one which the depositors had been willing that the directors should carry on. Now, what is the position of the shareholders? I take it to be clear that the shareholders are not creditors of the

society, but are merely the persons who are entitled on a winding-up to share the assets of the society among them. This is, I think, quite settled by the decision of your Lordship's House in *Walton* v. *Edge* (17), where an unadvanced member who had given notice of withdrawal was held entitled in the liquidation to be paid in full before his fellow unadvanced members who had given no such notice. The position, therefore, comes to this. The shareholders are entitled to share among them the proper assets of the society. But they are not entitled to be made rich at the expense of the depositors by swelling the assets of the society by means of the proceeds of moneys which they themselves never contributed. There is a mixed mass of assets as to the precise composition of which as to source it is impossible to pronounce. Had the assets never shrunk there would be enough to pay both in full. But they have shrunk, and someone must bear the loss. Now, there are certain situations, of which *Re Hallett's Estate* (3) is an example, where the one sharing party has a right to say to the other: It is not in your mouth to say that the assets are not all mine, to the extent of my full claim. I do not think this is one of those positions. Neither party is here in any fiduciary position to the other. It is a mere question of evidence. What has happened is truly this. The directors of the society have taken the moneys of the shareholders which they had a right to receive, and the moneys of the depositors which they had not, and mixed them so that they cannot be discriminated from each other, and have put them, so to speak, in the society's strong box, where the mixed mass is found by the liquidator. It is here, and here only, that I differ from my noble and learned friend, LORD MOULTON, in his dissenting judgment in the court below—a judgment which really follows the extremely able judgment of BRISTOWE, V.-C., of the County Palatine Court of Lancaster, in *Re Guardian Permanent Benefit Building Society* (sub nom. *Crace-Calvert's Case*) (1). There being no direct evidence, the only equitable means is to let each party bear the shrinkage proportionately to the amount originally contributed, and this is the judgment of my noble and learned friend on the Woolsack, in which I concur.

I wish to remark, in conclusion, that it sems to me that this line of reasoning gives full effect to the doctrine of ultra vires, even in the somewhat rigid form in which it has been adopted by your Lordships' House in *Ashbury Railway and Iron Co.* v. *Riche* (16). To go further, as the respondents' argument seeks to do, is, I think, to run the doctrine mad. It was a doctrine which was introduced in order to let societies keep their own money, not to appropriate other people's. I have dealt with the whole matter rather on principle than on authority. But I ought to say that I concur with the LORD CHANCELLOR in thinking that *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (2) was wrongly decided, and for the reason he gives; and that I agree with FLETCHER MOULTON, L.J., in thinking that the decision of this House in *Murray* v. *Scott* (1) being the second question in *Re Guardian Permanent Benefit Building Society* (1) is really an affirmation of the principle that there may be an equity when there is no contract, for the contract under which the £30 shares were issued before the amendment of r. 32 was made was null and void, the rule not having been certified by the certifying barrister.

LORD PARKER OF WADDINGTON.—The Birkbeck Permanent Benefit Building Society is an association formed under and regulated by the Building Societies Act, 1836. It is not incorporated, but acts through its directors, and acquires and holds property in the names of the trustees. Its objects are defined by its rules, and do not, and, indeed, having regard to the statute, could not, properly include the carrying on of the business of bankers. It was, therefore, ultra vires for the society to carry on a banking business. Nevertheless, for many years prior to its liquidation its directors and agents, affecting to act on its behalf, had carried on an extensive banking business, popularly known as the Birkbeck Bank, and in the course of such business had received many millions of pounds on deposit

or current account. Moneys so received are in contemplation of law borrowed moneys, and although the society had under its rules power to borrow for the purposes of its legitimate business, it, of course, had no power to borrow for the purposes which were ultra vires. It is reasonably clear, having regard to the documents in evidence, that all those persons from whom the directors and agents of the society received money on deposit or current account must have been aware that the borrowing thus constituted was borrowing in the normal course and for the purposes of a banking business, and not for the legitimate purposes of the society. None of such persons, therefore, can rely on the borrowing powers conferred by the society's rules.

It has been settled in *Re National Permanent Benefit Building Society* (18), *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (14), and *Baroness Wenlock* v. *River Dee Co.* (13), that an ultra vires borrowing by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make. At the same time there seems to be nothing in those decisions which would bind the House if they were considering whether an action would lie in law or in equity to recover money paid under any ultra vires contract which was not a contract of borrowing—for example, money paid to a company or association for the purchase of land which the company had no power to sell and the sale of which was therefore void, or money paid to the company or association by way of subscription for shares which it had no power to issue. In such cases the implied promise on which the action for money had and received depends would form no part of, but would be merely collateral to, the ultra vires contract. It will, therefore, be well to postpone consideration of such cases as *Re Phœnix Life Assurance Co.* (4) and *Flood* v. *Irish Provident Assurance Co.* (5) till the question actually arises.

Accepting the principle that no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow, the question remains whether the lender has any other remedies. On this point the result of the authorities may be stated as follows: First, it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred before or after the money was borrowed), the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied. There appears to be some doubt whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground that to this extent there is no increase in the indebtedness of the company or association, in which case, if the contract of loan involves a security for the money borrowed, the security would be validated to a like extent; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off: see *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (14), *Baroness Wenlock* v. *River Dee Co.* (13), and *Wrexham, Mold and Connah's Quay Rail. Co.* (19). It is still open to your Lordships' House to adopt either view, should the question actually come up for determination. Secondly, it appears to be also well settled that the lender in an ultra vires loan transaction has a right to what is known as a tracing order. A company or other statutory association cannot by itself or through an agent be party to an ultra vires act. If its directors or agents affecting to act on its behalf borrow money which it has no power to borrow, the money borrowed is in their hands the property of the lender. At law, therefore, the lender can recover the

money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased.

Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for anyone who could not plead purchase for value without notice, to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognised as such by the common law. The principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *Re Hallett's Estate* (3) by SIR GEORGE JESSEL. He gives two instances. First, he supposes the case of property being purchased by means of trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded. By the actual decision in the case, this principle was held applicable when the trust money had been paid into the trustee's banking account. I will add two further illustrations which have some bearing on the present case. Suppose the property is acquired by means of money, part of which belongs to one owner and part to another, the purchaser being in a fiduciary relationship to both. Clearly each owner has an equal equity. Each is entitled to a charge on the property for his own money, and neither can claim priority over the other. It follows that their charges must rank pari passu according to their respective amounts. Further, I think that as against the fiduciary agent they could by agreement claim to take the property itself, in which case they would become tenants in common in shares proportioned to amounts for which either could claim a charge. Suppose, again, that the fiduciary agent parts with the money to a third party who cannot plead purchase for value without notice, and that the third party invests it with money of his own in the purchase of property. If the third party had notice that the money was held in a fiduciary capacity, he would be in exactly the same position as the fiduciary agent, and could not, therefore, assert any interest in the property until the money misapplied had been refunded. But if he had no such notice this would not be the case. There would on his part be no misconduct at all. On the other hand, I cannot at present see why he should have any priority as against the property over the owner of the money which had, in fact, been misapplied.

It remains to mention *Re Guardian Permanent Benefit Building Society* (*Crace-Calvert's Case*) (1) which has in the present case been followed by NEVILLE, J., and the Court of Appeal. It is worth while to call attention to the facts of this case, which differ in some important particulars from the facts of the case your Lordships have to decide. There the society was, like the society in the present case, formed under and regulated by the Building Societies Act, 1836, and, according to the rules, had an unlimited power of borrowing money when required for its legitimate purposes. The Court of Appeal first decided that such an unlimited power to borrow was void, so that the society had in effect no power to borrow at all, a decision subsequently reversed in this House: *Murray* v. *Scott* (1). The directors of the society had affected to borrow money from various lenders, but no lender was able to prove that his money had gone in discharge of any legitimate indebtedness of the society, or to trace his money into any particular asset of the society. Part of it had been applied in paying off loans previously contracted and the remainder, together with the loans so paid off, had in some way or other

been used for the legitimate purposes of the society and found its way into the society's assets. The society was in liquidation, and it was treated by SIR GEORGE JESSEL as fully established that its assets had been increased by and to a large though undefined extent represented the borrowed moneys. He therefore held that after paying thereout the costs of the liquidation and all debts and everything to which the members were entitled by way of return of capital, interest, and bonus, the surplus ought, "on the plainest possible principles of equity," to be returned to the people who advanced the money. No doubt at first sight it is difficult to be certain as to the principles of equity to which SIR GEORGE JESSEL referred. But I think the difficulty may be solved by disentangling the equity itself from the directions by means of which the court endeavoured to give effect to it. The equity lay in this, that it would be unconscionable for the society to retain the amount by which its assets had been increased by, and in fact still represented, the borrowed money. It would be inequitable for the society to take advantage of the misapplication by its agents of money belonging to others and held by them in a fiduciary capacity. In other words, it was the same equity as that on which a tracing order is based. I cannot, however, disguise from myself that the directions given by the court with the object of working out this equity are open to considerable criticism, at any rate if they be treated as proper to be given in every case, and not depending on the particular facts then before the court.

Suppose that when the moneys were advanced, the assets of the society were insufficient to pay the creditors of the society in full, or to pay anything to the contributories, but that by means of the ultra vires loans, such assets had at the date of the winding-up been so increased that both creditors and contributories could be paid in full, the creditors and contributories remaining the same. Would it be in accordance with equity and good conscience that these creditors or contributories should claim to be paid in full? I cannot think that it would. It seems to me that in equity and good conscience the amount of increase in the assets due to the ultra vires borrowings ought to be restored to the lenders. Neither creditors nor contributories ought in equity to be allowed to retain an advantage derived by reason of the misapplication by the society's agents of moneys which were in the position of trust moneys. Counsel sought to explain *Re Guardian Permanent Benefit Building Society* (*Cracc-Calvert's Case*) (1) in the following way. It was clear, they put it, that the money of the ultra vires lenders, or at any rate some part of it (the exact amount being unascertained), was in the mass of assets in the hands of the liquidator. If the legal claims of all persons having any possible claim on the assets were first satisfied, what then remained would clearly represent the borrowed money. This money would, in fact, be identified as the lenders' money, not by any positive evidence, but by a process of exclusion. This explanation fails in at least one important respect. The legal claims of the society's members were not confined to payments of the principal of their shares with interest and bonus. The members were legally entitled to all the assets, except such part thereof as the lenders could identify as belonging in equity to them, subject, of course, to the claims of the society's creditors. Logically, therefore, it would be impossible to arrive at what in equity belonged to the lenders by first satisfying the legal claims of the creditors and members. It was said that in *Crace-Calvert's Case* (1) there were admittedly no profits; but why, if this be assumed, should the members be entitled to interest or bonus? It seems to me that the actual directions given in that case must be considered merely as a rough and ready way of ascertaining in the particular case before the court the extent to which the assets had been increased by and represented this borrowed money, and not as capable of logical justification. If the court had, as it might have done, directed an inquiry on the point, material facts, not before the court, might have been disclosed. It might have been shown that the debts due to the ordinary creditors had really been incurred in preserving the bulk of assets in which the shareholders and ultra vires lenders were alike interested.

in which case it might be equitable that these debts should be first paid out of the fund. On the other hand, it might have been shown that these debts were incurred before the ultra vires borrowing, in which case I cannot at present see how the creditors could claim to be in a better position because of the ultra vires borrowing. And again, the true facts with regard to profits might have come out. The answer to the inquiry would have thus depended largely on the facts put in evidence. One question of principle only would, I think, have been involved. Could the society be considered as having itself been a party to any breach of fiduciary duty so as to preclude it from asserting any interest in the assets, until the ultra vires lenders had been fully repaid thereout? or was the society in the position of a person who had innocently received from a fiduciary agent money belonging to another and invested it with money of its own? My present opinion is that the first of these questions should be answered in the negative and the latter in the affirmative, in which case the society and ultra vires lenders would, as against the assets, rank pari passu and without any priority the one over the other. It is, however, unnecessary to decide this point, because the facts of *Crace-Calvert's Case* (1) are distinguishable from the facts of the case now before your Lordships.

It is important to observe that in *Crace-Calvert's Case* (1) the money was borrowed for and applied to the legitimate purposes of the society, the loan being ultra vires because the society, according to the Court of Appeal, had no power to borrow at all even for its legitimate purposes. In the present case the society had power to borrow for its legitimate purposes, and the borrowing in question is ultra vires only because, to the knowledge of the lenders, it was for a purpose not authorised by the society's constitution. This distinction is, I think, of considerable importance. In the first place, if the agents of a society, having power to borrow, borrow money intending, to the knowledge of the lenders, to apply it for an illegitimate purpose, but in fact apply it for the legitimate purposes of the society, there seems no reason, either in law or in equity, why the loan to the extent to which it is so utilised should not be treated as valid. In the next place, if the money be in fact utilised for the illegitimate purpose for which it is borrowed, say the carrying on of an ultra vires banking business, to whom does this business belong? Whose are the assets and whose are the liabilities? The society cannot be a party to any transaction or series of transactions not within its powers. The society, therefore, is neither entitled to the assets nor subject to the liabilities acquired or incurred in the business. No doubt, if the business is a financial success, the directors or agents who carried it on would have to account to the society for the profits or surplus assets, for equity will not allow a director or other agent to make a profit out of his directorship or agency. It is quite clear, however, that the society could not be entitled to anything except the profits or surplus. It could not claim to be entitled to the assets of the business, and exempt from its liabilities on any plea of ultra vires, and for this purpose the borrowed moneys would be a liability of the business. But suppose that the illegitimate business is carried on in part only with the borrowed money and in part with money belonging to the society. Even in this case the business will not belong to the society, nor will the society be entitled to its assets or subject to its liabilities, any more than it would have been the case if the only money employed in the business had been the borrowed money. Further, the society's right in equity to take the assets subject to the liabilities if the business were successful would be similarly unaffected. But the fact that the society's own money had been employed by its directors or agents in an ultra vires business would entitle the company to an additional equity. It would be entitled, on the principles of *Re Hallett's Estate* (3), to follow the money as long as it or any property acquired by its means could be identified. In other words, it would have exactly the same equities in this respect as the ultra vires lender, including the equity which in my opinion underlies *Crace-Calvert's Case* (1). It follows from this that it would be

entitled to take or claim a lien on any assets of the business acquired exclusively with its money, and to a lien or charge on any asset or mass of assets acquired partly only with its money, subject nevertheless to this, that if the ultra vires lenders could establish a similar lien or charge, the two liens or charges would rank pari passu. Moreover, this right on the part of the society would not be affected by the question whether the business had been carried on at a profit or at a loss.

The present case is not quite so simple as the one I have supposed for this reason. The legitimate business of the society included the making of loans to members to enable them to acquire houses or land. Many such loans were, in fact, made, but it is impossible to say how far the money lent was the money of the society or the money of the ultra vires lenders. The question is whether these facts in any way affect the situation. Of course, if the society could trace its own money into any of these loans the security for the loan would undoubtedly belong to the society, but no such tracing appears to be possible. And again, if any ultra vires lender could trace his money into any of these loans, he would not only be entitled to the security, but might claim to be a secured creditor of the society on the ground that the ultra vires borrowing was validated by the use of the money for purposes for which there was a valid borrowing power in the society, but no ultra vires lender can so trace his money. There does not appear to be any presumption of law as to whose money was utilised for the purposes of those loans. Moreover, the directors treated the loans in question as part of the banking business and included them in the balance-sheet which was posted up in the bank premises and supplied to customers who asked for it. Under these circumstances I think the fact that those loans were within the legitimate purposes of the society cannot affect the situation in any way. The case, therefore, presents itself in this way: Here is a mass of assets arising in the course of an ultra vires business carried on by the directors and agents of the society. There are, on the other hand, liabilities, how or for what purpose incurred, is not in evidence. No one claims any interest in the assets except the ultra vires lenders, the members of the society and the creditors, in respect of the liabilities to which I have referred. The ultra vires lenders and the members are willing that these liabilities and the costs of the liquidation, which are in effect costs of administering the fund, shall be first paid. If this is done, what is left may be taken to represent in part the moneys of the ultra vires lenders and in part the moneys of the society wrongfully employed in the business. The equities of the ultra vires lenders and of the society are equal, and it follows that the remainder of the assets ought to be divided between the ultra vires lenders and the society rateably, according to the capital amount contributed by such lenders and the society respectively. This mode of distribution gives effect to all the equities of the parties, and there is in it nothing necessarily inconsistent with the decision in *Crase-Calvert's Case* (1), for there the business actually carried on was intra vires, and thus belonged to the society, except in so far as the ultra vires lenders could establish any equitable claim. It depends solely on the fact that the assets for distribution, being assets not for a legitimate, but an ultra vires business, are not the assets of the society except in so far as they can substantiate some equity to them, and that such equity as they have can arise only from an application of the same principle to which the ultra vires lenders are themselves entitled to have recourse.

There are two further points which arose in the course of the argument before your Lordships' House and which I desire to mention. In the first place, there is the decision of the Court of Appeal in *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (2). Speaking for myself, I am by no means satisfied that a statutory company or association whose agents have borrowed money on its behalf, though it has no power to borrow, can in no circumstances repay the loan. It may well be that if the money does not come into the coffers of such company or association or, if so coming, it is subsequently lost, there may

be no power of repayment. But if the money can be traced, or if the circumstances are such that if the society were in liquidation there would be an equity such as that to which effect was given in *Crace-Calvert's Case* (1), why should not the company or association repay the money so far as it represented by assets in their hands? As at present advised, I see no reason why it should not; nor, indeed, am I satisfied that the equity to which effect is being given in this case is necessarily confined to a liquidation. It is, however, unnecessary for your Lordships to decide these points. In the second place there is *Murray* v. *Scott* (1), which constitutes the basis of the dissenting judgment of FLETCHER MOULTON, L.J., in the present case. With this judgment I find myself, in all respects except one, in substantial agreement. I agree that so far as the distributable assets represent the money of the ultra vires lenders they are not in equity the assets of the society. The distributable assets must be purged to this extent before it can be ascertained what in equity belongs to the society. The point on which I differ is this. Whereas FLETCHER MOULTON, L.J., was of opinion that the amount to which the assets must be purged is the amount of the moneys lent, I think the true view is that the amount to which the assets must be purged is the amount only to which they have been increased by and still represent the borrowed money. It is only in this connection that *Murray* v. *Scott* (1) requires consideration. In that case the society had issued £30 preference shares which they had no power to issue, and received from the subscribers the full amount thereof. The society had subsequently obtained power to issue £1 preference shares and had accepted a surrender of each £30 preference share in consideration of the issue to the holder of thirty £1 preference shares. It was held that though the latter transaction could not stand at law, yet the society were in equity bound to treat the subscribers, either as holders of validly issued £1 preference shares or creditors for the amounts they had subscribed. It is clear that in either case they would, according to the actual decision in *Crace-Calvert's Case* (1), be paid before the ultra vires lenders got anything, so that the equity was not the Crace-Calvert equity. The equity is, in the judgments of SIR GEORGE JESSEL, M.R., and COTTON and BOWEN, L.JJ., based upon the misrepresentation of the society's agents in that they had printed in the rules of the society a clause expressly empowering the issue of £30 preference shares, though such clause had been disallowed by the barrister, and, therefore, did not in fact form part of such rules. The decision was affirmed by this House, SIR GEORGE JESSEL'S reasons being approved by LORD BLACKBURN. Now, undoubtedly if the agents of a society affect to borrow money in the course of a banking business, there is not only an express representation of authority, but an implied representation of (i) a power to borrow, and (ii) a power to borrow for banking purposes, for without such powers the authority could not be given. Yet the same judges had just decided *Crace-Calvert's Case* (1) and clearly did not intend to go back on their decision. I can hardly think they intended to base their decision on the particular manner in which the misrepresentation had been made. It seems to follow, therefore, that in the case of an ultra vires borrowing the nature of the transaction precluding, as it did, the creation of a debt at law or in equity, no such equity could, in their opinion, arise as that which they held to arise in *Murray* v. *Scott* (1), which was an ultra vires issue of shares. I doubt, therefore, whether *Murray* v. *Scott* (1) can be relied on as any authority in the present case, and, if so relied on, it is contrary to *Crace-Calvert's Case* (1) and other cases which decide that no debt can arise out of an ultra vires borrowing. It is to be observed that COTTON, L.J., refers to the equity as arising not only if the ultra vires transaction is brought about by the misrepresentation, but if it be brought about by "the carelessness or otherwise" of the company's agents. In other words, he seems to me to be dealing with it simply as a case of total failure of consideration from whatever cause. I am not satisfied that total failure of consideration would not have afforded ample ground for the actual decision, and, as I have already said, there is nothing to preclude this House from deciding

that, under the circumstances of *Murray* v. *Scott* (1), an action lay at law for money had and received. The appeal having in part succeeded and in part failed I think the reasonable course would be that the costs of all parties should be treated as costs of the liquidation and paid out of the assets.

LORD SUMNER.—I agree that the whole banking business of the Birkbeck Society was ultra vires; that the banking contracts of loan, which ostensibly arose in the course of it, were void; that the funds procured alike from shareholders investing in the building society business and the customers of the banking business have been inextricably confused, and have been indiscriminately employed in acquiring assets, which cannot now be attributed to the one branch rather than to the other; and that everybody concerned—customers, shareholders, and officers—must all be taken to have known of the legal invalidity both of the acquisition of the depositers' funds and of the disposition of any funds in a banking business. Probably very few of them knew or suspected it in fact, but the knowledge that a banking business was being carried on was common to all, and all had notice of the rules. All must equally abide by the legal consequences of this invalidity.

The depositors' case has been put, first of all, as consisting in a right enforceable in a common law action. It is said that they paid their money under a mistake of fact, or for a consideration that has wholly failed, or that it has been had and received by the society to their use. In my opinion, no such actions could succeed. To hold otherwise would be indirectly to sanction an ultra vires borrowing. All these causes of action are common species of the genus assumpsit. All now rest, and long have rested, upon a notional or imputed promise to repay. The law cannot de jure impute promises to repay, whether for money had and received or otherwise, which, if made de facto, it would inexorably avoid. To the other difficulties of such claims I will allude shortly. There was no mistake of fact. The facts were fully known so far as was material. The rules and objects of the society were accessible to all. The only mistake made was a mistake as to the law, or that mistake of conduct to which all of us are prone, of doing as others do and chancing the law. There was no failure of consideration. As BOWEN, L.J., says in *Re Guardian Permanent Benefit Building Society* (1) (23 Ch.D. at p. 470):

> "Those who deal with a society, which professes to have power to borrow, have equal means of knowledge with the society itself of the statutory powers of the company; they are put, so to speak, upon inquiry whether the company really can borrow validly or not, and if they choose to lend their money to a company, which cannot properly borrow, it cannot be said there is a failure of consideration. The company has got their money, it is true, but they must be taken to have known what they bought and to have been willing to pay their money on the chance."

Further, the depositors' money was not had and received by the society, but by its officers, and receipt is an essential, *Prince* v. *Oriental Bank Corpn.* (20). If it was ultra vires for the society to take customers' accounts—that is, in the eye of the law, to borrow the money on its promise to repay, it was ultra vires for it to authorise its officers to do so on its behalf. The money, cheques, bills, and so forth, have no doubt reached the society's coffers, and thereafter have been dealt with as the depositors were willing and intended that it should be dealt with, and, so far as has appeared in this case, the officers of the society are not now chargeable. The society has the proceeds, or rather the liquidator has them, in that sense of possession which is necessary to found "tracing orders" and otherwise for the purpose of the winding-up, but it has not got them and there is no receipt of them in the sense which is necessary to raise the implication of a promise to repay, that would bind the society.

In these straits, LORD MANSFIELD's celebrated account of the action of money had and received in *Moses* v. *Macferlan* (6) was, of course, relied upon. It was

said that for anyone to keep the depositors' money as against them would be unconscientious, while that they should get it back would be eminently ex æquo et bono, though it appeared also that conscience had nothing to say against payment of the depositors in full at the expense of the shareholders, though all must be deemed alike cognisant of the invalidity of the society's banking business. *Burgess and Stocks' Case* in *Phœnix Life Assurance Co.* (4), which was relied on, is irrelevant if treated as a case of an intra vires borrowing of the amounts of the premiums in question, which seems to have been the ratio decidendi of PAGE WOOD, V.-C. If the decision is supposed to be that in every case where money is paid under a contract which proves to be ultra vires it may be recovered as upon a consideration that has wholly failed, I think it goes too far, for the reasons I have already given. There may have been special facts to justify such an opinion in that case, though I think not, for the effect of it must, in any view, have been to bind the society in fact to a contract which in law was not binding at all. The other cases cited seems to me insufficient to support the appellant's claim to any common law right. The action for money had and received cannot now be extended beyond the principles illustrated in the decided cases, and although it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, I think it is clear that no authority extends them far enough to help the appellant now.

Resort was then had to equity, and, as I understood it, the argument was that the action for money had and received was founded on equity and good conscience, and imported a head of equity (apart altogether from its possibly too limited application at law)—namely, that whenever it is ex æquo et bono for A. to repay money which he has received from B., and would be against conscience for B. to keep it, then A. has an equity to have B. decreed to repay it. For this again LORD MANSFIELD's authority in the same case was invoked. I cannot but think that LORD MANSFIELD's language has been completely misunderstood. Historically, the action for money had and received was not devised by the Court of Chancery, nor was it applied there either in form or in substance. It was a form of assumpsit, already old in LORD MANSFIELD's time, and his own citation of earlier actions of this sort should be enough to show, if that were necessary, that he never thought otherwise. It was said to be a "liberal" action in that it was attended by a minimum of formality, and was elastic and readily capable of being adapted to new circumstances. The action has been described as "liberal" because "the party waives all torts, trespasses, and damages": Anon. (1772) Lofft. 320. In and after LORD MANSFIELD's time its liberality in point of practice is shown by the fact that the plaintiff declared with a minimum of particulars and the defendant pleaded the general issue, under which he could prove almost anything: see 2 WILLIAMS SAUNDERS 120, notes to *Chandler* v. *Vilett* (21); *Orton* v. *Butler* (22); *Owen* v. *Challis* (23). No doubt it gave scope (at least in days when reported cases were less multitudinous than now) for decisions to meet what is called the "justice of the case." These features attracted LORD MANSFIELD, chafing already at the rigidity of the older forms of action, and emulous, no doubt, of the adaptability and growth which characterised the doctrines of equity in his time. He, and BULLER, J., spoke of the action in somewhat varying terms from time to time: see *Weston* v. *Downes* (24); *Longchamp* v. *Kenny* (25); *Sadler* v. *Evans* (26); *Straton* v. *Rastall* (27). LORD MANSFIELD, who in *Clarke* v. *Shee* (28) merely described the action as "a liberal action in the nature of a bill in equity," in *Towers* v. *Barrett* (29), says it is "founded on principles of eternal justice." In *Straton* v. *Rastall* (27) BULLER, J., says (2 Term Rep. at p. 370) that

> "of late years this court has very properly extended the action for money had and received. It is founded on principles of justice . . . but it must be remembered that it was extended on the principle of its being considered like a bill in equity. And therefore, in order to recover money in this form of action,

the party must show that he has equity and conscience on his side, and that he could recover in a court of equity."

But the reported cases do not show how, if at all, this obligation was enforced. I think it is evident that LORD MANSFIELD did not conceive himself to be deciding that this action was one in which the courts of common law administered "an equity" in the sense in which it was understood in the Courts of Chancery: see observation of FARWELL, L.J., in *Baylis* v. *Bishop of London* (30), and the cases actually decided show that the description of the action as being founded in the æquum et bonum is very far from being precise. Even the decision in *Moses* v. *Macferlan* (6) which has since been dissented from, for some time unsettled the law: see SMITH'S LEADING CASES (11th Edn.), notes to *Marriot* v. *Hampton* (31), and this last-mentioned case is one which illustrates the proposition that money is not thus recoverable in all cases where it is unconscientious for the defendant to retain it, for no one could doubt that Hampton's retention of the money in that case was very like sharp practice. *Crockford* v. *Winter* (32) and *Martin* v. *Morgan* (33) are instances, on the other hand, which show that LORD ELLENBOROUGH, C.J., and DALLAS, C.J., respectively understood that in that form of action the court strove to do what was just and not to administer equity. With whatever complacency the Court of King's Bench might regard the views expressed in *Moses* v. *Macferlan* (6), protests were very early made against it in the Common Pleas: *Johnson* v. *Johnson* (34), and in *Miller* v. *Atlee* (35), POLLOCK, C.B., bluntly declared the notion that the action for money had and received was an equitable action to be "exploded," and PARKE, B., sitting by him did not say him nay. This episode is reported only in 13 Jurist., but it smacks of truth. Since, then, allusions have been made from time to time to the connection between this cause of action and equity or the æquum et bonum (though they are not precisely the same things) —for example, in *Smith* v. *Jones* (36), *Tregoning* v. *Attenborough* (37), *Rogers* v. *Ingham* (42), *Phillips* v. *London School Board* (38), and *Lodge* v. *National Union Investment Co.* (39)—but I take them all to be merely descriptive of the undoubtedly wide scope of this essentially common law action. There is now no ground left for suggesting as a recognisable "equity" the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer.

The appellant next submitted that, even though the money of the depositors might not be repayable in full, the order made by NEVILLE, J., for convenience called the *Guardian* order, was inapplicable in the present case, and, indeed, that the judgment of the Court of Appeal in *Crace-Calvert's Case* (1) in *Re Guardian Permanent Benefit Building Society* (1) was wrong. I think that in any case that order is not applicable in the case now before your Lordships. There the money was borrowed by the directors, and it does not appear that the shareholders as a body were in fact cognisant of the borrowing. Here the fact that a banking business was being carried on was a matter of notoriety and even of pride. There the money, when received, was applied to the legitimate purposes of a building society, and the only business carried on was that of a building society; here the money was applied on a very large scale for the purposes of the ultra vires banking branch; here, further, the shareholders' money, paid in respect of shares they held, was very largely applied in the same way. For the reasons pointed out by my noble and learned friend LORD PARKER OF WADDINGTON I think that this substantially and sufficiently differentiates *Crace-Calvert's Case* (1). The majority of the Court of Appeal, while deeming themselves bound to follow and apply *Re Guardian Permanent Benefit Building Society* (1), did not conceal their doubts of its correctness. Should that case come before your Lordships' House directly for review, as it clearly is open to review, I confess that I should be slow in arriving at the conclusion that I could not assent to the decision of so strong a court. In that case assets were found, to which no doubt Mrs. Crace-Calvert's money had con-

A tributed, but which were employed in the business legitimately carried on by the society. Primâ facie they were the society's assets, and out of them the unadvanced shareholders were by the rules entitled to be repaid the amount of their shares severally. This at least was their legal right. No one could show what particular assets were the fruits of the borrowed money. Against this legal right, who had an equity that should prevail? Not, at any rate, the ultra vires lenders, who had B no legal right at all, who had certainly lent their money in order that it might be invested in the building society business, and who also, in the view of the court, which I think was right, were to be deemed in law to have lent on the chance (doubtless, as they thought, without risk) that all would be well and that the contract would be performed. I think the order made was rightly described by COZENS-HARDY, M.R., as a rough tracing order. A ruthless logic would have given C all to the shareholders, principal, interest, bonus, and surplus, but this would have held the shareholders entitled to approbate the gains, while bound in law to reprobate the borrowing by which they were acquired. It is plain that JESSEL, M.R., thought that, by giving what was given to the shareholders, the court had eliminated all but the proceeds of the ultra vires borrowing, and I should hesitate to reject this view, if the only alternative were to find the shareholders entitled to every- D thing, though I recognise that it was not more than approximately exact.

I think the present case must be decided upon equitable principles upon which there is no direct authority. Of equitable principles I hesitate to speak confidently, for did not JESSEL, M.R., say that the principle of the *Guardian* order, which has given so much trouble, was one of the plainest of them? Yet, perhaps, I may say of myself what THESIGER, L.J., said of BRAMWELL, B., in *Re Hallett's Estate* E (3) (13 Ch.D. at p. 722), that

> "even to the mind of a common law judge the principles of law, which have been applied now for some time in equity, have been made perfectly plain."

What ought to be done I think is clear; the only difficulty is how to describe the F principle and how to affiliate it to other legal or equitable rules. The question is one of administration. The liquidator, an officer of the court, who has to discharge himself of the assets that have come to his hands, asks for directions, and, after hearing all parties concerned, the court has the right and the duty to direct him how to distribute all the assets. No part of them can remain undistributed as res nullius. No one has ventured to argue before your Lordships that the shareholders take G everything, to the exclusion of the depositors, and so make a huge windfall. In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognised rule of law or equity be disregarded. In this case neither the shareholders nor the depositors have the better equity; the money of each has, with the consent of all, been indiscriminately applied in acquiring assets beyond as well as within the society's powers, the former in much the H larger measure. The claims of each class are equal, and, I think, for the present purpose identical. Analogous cases have been decided with regard to chattels. They differ, no doubt, because of the fact that the property in the chattels remained unchanged, though indentification and even identity of the subject-matter of the property failed, whereas here, except as to currency, and even there only in a restricted sense, the term property as we use that term of chattels does not apply, I and, at least as far as intention could do it, both depositors and shareholders had given up the right to call the money or its proceeds their own, and had taken instead personal claims on the society. In *Buckley* v. *Gross* (40), where tallow in burning warehouses melted and ran down a sewer, and a stranger collected it, BLACKBURN, J., says (3 B. & S. at pp. 574, 575):

> "The tallow of the different owners was mixed up into a molten mass, so that it might be difficult to apportion it among them; but I dissent from the doctrine that, because the property of different persons is confused together,

that entitles a third party to steal it with impunity. Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass."

Again, *Spence* v. *Union Marine Insurance Co.* (41) is a case where cotton in bales belonging to different consignees was so damaged by sea perils that it arrived with marks obliterated and otherwise injured, and after delivery to the respective consignees of all that could be specifically identified as theirs, a mass of unidentifiable damaged cotton remained. There, as here, no doubt one bale, in fact, represented A.'s money and another B.'s; there as here all were depreciated, but probably not each in the same degree, but no one could say which bale was any particular person's property, or who, therefore, should bear the greater and who the less depreciation. The goods could not be treated as bona vacantia, they could not fall into the hands of the first person who reduced them into possession, and on principles and analogies derived from Roman law the court treated the consignees as tenants in common of the unidentifiable cotton, in the proportion borne by the numbers originally shipped by them to the number remaining. This decision has never been questioned for nearly fifty years. I agree, without recapitulating reasons, that the principle on which *Re Hallett's Estate* (3) is founded justifies an order allowing the appellant to follow the assets, not merely to the verge of actual identification, but even somewhat further in a case like the present, where, after a process of exclusion, only two classes or groups of persons, having equal claims, are left in, and all superior claims have been eliminated. Tracing in a sense it is not, for we know that the money coming from A. bought one security, and that coming from B. another, and that the two securities did not probably depreciate exactly in the same percentage, and we know further that no one will ever know any more. Still, I think this well within the "tracing" equity, and that among persons making up these two groups, the principle of rateable division of the assets is sound. I agree in the decision proposed, both as to the order to be substituted for that of the Court of Appeal and as to the costs.

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[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

A

METFORD AND OTHERS *v.* EDWARDS

[KING'S BENCH DIVISION (Bankes, Avory and Lush, JJ.), July 30, 1914]

[Reported [1915] 1 K.B. 172; 84 L.J.K.B. 161; 112 L.T. 78; 79 J.P. 84; 30 T.L.R. 700; 24 Cox, C.C. 490]

B

Licensing—Club—Supply of liquor to members—Property in liquor vested in trustees for members—Club not conducted in good faith—Frequent drunkenness on premises—Licensing (Consolidation) Act 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *ss.* 65, 91, 95.

C

Where a club is duly formed in accordance with its rules and forms a real association of persons governed by and carried on under those rules, one of which provides that the property of the club, including intoxicating liquor, shall be vested in trustees representing and acting for all the members of the club, the supply of intoxicating liquor to members of the club for payment is a distribution of the liquor among the members of the club, and is not a "sale" of such liquor within s. 65 (1) of the Licensing (Consolidation) Act, 1910, [see now s. 120 (1) of the Licensing Act, 1953: 33 HALSBURY'S STATUTES (2nd Edn.) 142] even though the club is liable to be struck off the register of clubs under s. 95 (1) (b) and (c) of the Act [see s. 144 (1) (b) and (c) of the Act of 1953] upon the ground that it is not conducted in good faith as a club and there is frequent drunkenness on the premises.

D

E

Per LUSH, J.: The fact that a club is not conducted in good faith cannot affect the question whether there is a distribution of liquor among the members as distinct from a sale.

Graff v. *Evans* (1) (1882), 8 Q.B.D. 373, applied.

Notes. As to the sale of intoxicating liquor in clubs see 5 HALSBURY'S LAWS (3rd Edn.) 279 et seq., and for cases see 7 DIGEST (Repl.) 670 et seq.

F

Case referred to:

(1) *Graff* v. *Evans* (1882), 8 Q.B.D. 373; 51 L.J.M.C. 25; 46 L.T. 347; 46 J.P. 262; 30 W.R. 380; 8 Digest (Repl.) 671, *133*.

Case Stated by the stipendiary magistrate for Pontypridd, Glamorgan.

G

On Dec. 5, 1912, an information was laid by the respondent, a superintendent of police, against the appellants for that each of them on Oct. 5, 1912, at Tonypandy, Glamorgan, unlawfully did sell by retail intoxicating liquor which they were not then licensed to sell by retail, contrary to the statute in such case made and provided, and summonses were issued accordingly. At the hearing counsel for the respondent intimated that the charge he proposed to make against the appellant Metford was that of aiding and abetting the other appellants in the commission of the offence charged against them.

H

Upon the hearing of the information on Dec. 19, 1912, the following facts were admitted or proved. (a) On Feb. 6, 1911, the Tonypandy County Working Men's Club and Institute (hereinafter called "the club") was duly registered with the clerk to the justices of the petty sessional division in which the club premises were situated and in accordance with ss. 91 and 92 of the Licensing (Consolidation) Act, 1910, and on Mar. 7, 1911, the club was registered with the Registrar of Friendly Societies under the provisions of the Friendly Societies Act, 1896. (b) On Jan. 22, 1912, a return was made by the secretary of the club to the clerk to the justices of the petty sessional division in which the club was situated in accordance with s. 92 of the Licensing (Consolidation) Act. (c) On Oct. 5, 1912, the club was entered by the police, who purported to act under the powers of a search warrant granted under s. 96 of the Licensing (Consolidation) Act. (d) On Oct. 5, 1912, the club premises consisted of two cottages which were in a dirty and

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dilapidated condition and quite unfit for use as club premises. One of the rooms on the ground floor of the cottages was fitted up as a public-house bar, and, at the time when the police entered, sixteen persons were in the room, each of them provided with intoxicating liquor, and the steward of the club—namely, the appellant Metford—and his wife were standing behind the bar serving intoxicating liquor to those who were on the premises and receiving money in exchange therefor. (e) On the same day, Oct. 5, 1912, the stock of intoxicating liquor upon the club premises consisted of eight barrels of beer, 532 bottles of wine and spirits, 204 bottles of beer and stout, and 20 gallons of cider. (f) At the time when the police entered the club premises on Oct. 5, 1912, there were fifty-nine persons present on the club premises, all of whom were provided with intoxicating liquor and six of whom were drunk and five under the influence of drink. One of the persons under the influence of drink was the vice-chairman of the club. (g) Out of the fifty-nine persons present at the time of the raid, fourteen were persons of whose election as members of the club there was no record in the minutes, although their names appeared on nomination forms. (h) The books of account found on the club premises showed that during the twelve months preceding the raid the bar takings in respect of intoxicating liquor amounted to £1,684 13s. 3d., and that members' subscriptions for the same period amounted to £46 15s. (i) Forty-four persons were seen leaving the club premises in a drunken condition on different days in the months of July, August, and September, 1912. (j) On Nov. 6, 1912, complaint was made by the respondent (i) that the club was not conducted in good faith as a club; (ii) that there was frequent drunkenness on the premises of the club; (iii) that illegal sales of intoxicating liquor had taken place on the premises of the club; (iv) that persons who were not members were habitually admitted to the club merely for the purpose of obtaining intoxicating liquor; (v) that persons were habitually admitted as members of the club without an interval of at least forty-eight hours between their nomination and admission; and (vi) that the supply of intoxicating liquor was not under the control of the members (or the committee appointed by the members), and on Nov. 6 a summons was issued summoning the club to answer the complaints and to show cause why the club should not be struck off the register. (k) On Nov. 28, 1912, the complaint came on for hearing before the justices, who found that the club was not conducted in good faith as a club and that there had been frequent drunkenness on the premises of the club, and they ordered that the club be struck off the register of clubs for a period of twelve months. (l) The appellants (eighteen in number) held official positions in connection with the club, being respectively the steward, chairman, vice-chairman, secretary, treasurer, committee-men, and trustee. The appellant Metford (the steward) was paid a wage of £2 10s. per week. On Oct. 5 when the police entered there were thirteen of the appellants on the club premises, and the other five appellants had attended committee meetings from time to time.

The respondent contended that the appellants other than the appellant Metford were guilty of unlawfully selling by retail certain intoxicating liquor which they were not then licensed to sell by retail on Oct. 5, 1912, and that the appellant Metford, the steward of the club, was guilty of aiding and abetting the other appellants in the commission of the offence. The appellants contended that there had been no sale of intoxicating liquor within the meaning of the Licensing (Consolidation) Act, 1910; that inasmuch as the club was registered in accordance with the provisions of the Act, and at the date of the alleged offence—namely Oct. 5, 1912—the club had not been removed from the register, the club was a legal entity and the members of its committee could not be held individually responsible for the offence alleged against them; that in law there had been no sale of any intoxicating liquor by or on behalf of the appellants; that there was no evidence that the appellants knew that the club was carried on otherwise than as a bona fide club; that, as regards the appellant Metford, inasmuch as no offence had been committed by the other appellants, Metford was not guilty of any offence.

A The magistrate accepted the contentions of the respondent and convicted all the appellants.

The case having been sent back for re-statement on certain points, the magistrate stated that there was no evidence that any sales were made to non-members of the club, and he did not find as a fact that there had been any such sales. He was not satisfied that persons were habitually admitted as members of the club B without an interval of at least forty-eight hours between their nomination and admission, and he did not find that there had been any breach of s. 95 (g) of the Licensing (Consolidation) Act, 1910, and, in answer to the question whether sales were made to alleged members of the club, and, if so, whom the liquors sold belonged to, he said that certain alleged members of the club who were present on the club premises on Oct. 5 when the police entered were heard ordering liquors C from the steward and were handed such liquors by the steward to whom they handed money, and from the evidence given as to the general method of conducting the club he found as a fact that the liquors with which the persons were supplied when the police entered had been ordered, delivered, and paid for in the manner described, but there was no evidence to identify the persons who had so ordered or paid for the liquors or to show whether they were members of the club or non-D members. The liquors formed part of the general property of the club, and as such were vested by r. 14 in the trustees of the club, representing and acting for the whole of the members of the club.

The case was again remitted to the magistrate that he might give his reasons (i) for finding whether the club was or was not on Oct. 5, 1912, a bona fide club, and (ii) why he came to the conclusion that the sale of liquor on that day was illegal. E He found that on Oct. 5, 1912, the club was not conducted in good faith as a club and was not a bona fide club, and his reasons for so finding were that on the hearing before nim on Dec. 19 the order of the justices on Nov. 28 ordering that the club be struck off the register was referred to, and counsel for the respondent stated that the grounds on which the order was founded was that the justices found as a fact that the club was on Oct. 5 not conducted in good faith as a club, that there F was frequent drunkenness on the premises, and that counsel for the appellants practically admitted that as his submission was that, as the club had been registered and was on Oct. 5, 1912, still on the register, there had been no illegal sale of liquor on that day, even though the club was on that day not a bonâ fide club and there had been frequent drunkenness on the premises. Further, from the evidence taken before him, he came to the conclusion that the club was not being conducted for G any of the objects stated in its rules—namely, "to afford to its members the means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation"—but that its sole object was to provide means for its frequenters (irrespective of whether they were duly elected members or not) to purchase intoxicating liquor in a place other than a licensed house and during H prohibited hours. He also inferred that the state of things when the police entered was of common occurrence and was in no way exceptional. The reason why he came to the conclusion that the sale of liquor at the club on Oct. 5 was illegal was that he found as a fact that the liquor with which each person present when the police entered had been supplied was supplied by or on behalf of the steward in consideration of payments of money made to him. He held that such I a transaction constituted a sale by retail of such liquor, and as the club was not a bona fide club, but was conducted for the purpose of enabling its frequenters to purchase liquor as above mentioned, he held that the registration of the club afforded no protection to the appellants against the provisions of the Licensing Acts.

By the Licensing (Consolidation) Act, 1910, s. 65 (1) [see now s. 120 (1) of the Licensing Act, 1953] :

"Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authoris-

ing him to hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor."

Section 91 [s. 143 of Act of 1953] imposes upon the secretary of every club in which any intoxicating liquor is supplied to members or their guests the obligation to have the club registered, but such registration shall not constitute the club licensed premises; and by s. 95 [s. 144 of Act of 1953], where a club has been duly registered, it may be struck off the register upon all or any of the grounds therein specified, among which are (b) that it is not conducted in good faith as a club, or that it is kept or habitually used for any unlawful purpose; or (c) that there is frequent drunkenness on the club premises.

George Elliott, K.C., for the appellants.
The respondent did not appear.

BANKES, J.—This Special Case raises a very important point, and it is a great pity that nobody has appeared on the part of the respondent to put some other view of the matter before us.

The matter arises in this way. In December, 1912, proceedings were taken before the stipendiary magistrate against a number of persons who were officers and members of what was called the Tonypandy County Working Men's Club and Institute for an alleged breach of s. 65 of the Licensing (Consolidation) Act, 1910, in selling intoxicating liquor by retail without holding a justices' licence. The learned magistrate originally stated a Case, and, in answer to a request by the court, he has on two further occasions supplemented his original finding, and, as a result of a perusal of those three Cases, the conclusions I come to with regard to his findings are that there was a club called the Tonypandy County Working Men's Club and Institute, it was not a sham, it was not a mere name, it was an association of persons together under the rules which form part of the Case, and to some of which we have been referred. Those rules provide for the starting, if I may use that expression, of a club which shall consist of ordinary members and honorary members. It provides for an association of persons. There are a number of rules which deal with the constitution of the club, but there are two only which seem to me to be material to which I need refer, and those have reference to the property of the club. Rule 25 provides that all moneys received on account of the club from any source shall be applied or invested towards the carrying out of the objects of the club; and r. 14 provides that all the property of the club shall be vested in trustees representing and acting for the whole of the members of the club. It was, of course, competent for the magistrate, if he thought the facts warranted it, to have found that there was no real association of members at all, that there was no real club at all, that there was no association which was governed by, or carried on under, these rules. But, in my view, and this is an important point, he has not found that. He has, in my view, found that there was a club, but that it was not conducted in good faith, as it was intended to be conducted, and consequently he finds that it was not a bona fide club. When he uses the words "was not a bona fide club" I understand him to say that he found that it was a real association of persons governed by the rules, but that it was not conducted in accordance with the rules, and in that sense was not conducted in good faith as a club. If that is the proper interpretation of the learned magistrate's finding—and I think it must be so, having regard to what he said in the second supplemental Case, where he finds that the intoxicating liquors formed part of the general property of the club, and as such were by virtue of r. 14 vested in the trustees of the club representing and acting for the whole of the members of the club—that finding, in my opinion, goes the whole length of finding that, although it was not properly conducted, it was a real association of persons who could properly be called a club, that it was governed by the rules, and that the property was vested

A in the trustees and was the property of the club. If that is so, the liquor which these persons were charged with selling without a licence was liquor which was the property of the club, and the selling, which was complained of, was a transfer, if I may use that expression, of the liquor, the property of the club, by the duly appointed officers of the club to members of the club.

There is no finding here that there was any supply of liquor to any person who B was not a member. Therefore, the only question that we have to decide is whether, assuming the existence of a real club, and assuming the liquor to be the property of that club, and assuming the transaction complained of to be a transfer of that liquor by the officers to the members, does that constitute a "sale" within s. 65 of the Licensing Act of 1910? In my opinion, it does not. I think that that transfer is what is called in the statute itself, when it speaks of clubs, a supply C of liquor to a member, and, if it is a supply, it is not a sale within the meaning of the section. Why I say that is this. Section 91, the section which deals with the registration of clubs, provides that "the secretary of every club which occupies a house or part of a house which is habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests . . . shall cause the club to be registered." In speaking of a transfer of liquor to a member D it speaks of it as a supply to the member, and sub-s. (2) of the section provides: "The registration of a club under this Act shall not constitute the club premises licensed premises, or authorise any sale of intoxicating liquor therein which would otherwise be illegal." As I read that subsection it means that if there is a sale of intoxicating liquor upon the premises of a club, however bona fide that club may be, to use one expression, or however old established or respectable that club E may be, if the transaction with regard to any intoxicating liquor upon the premises of that club constitutes a sale as opposed to the supply to a member, it is not protected by reason of the registration.

If that is a correct view of the statute, how is it applicable to this case? It seems to me to follow if one assumes the existence of a real association of persons who own the liquor, and a transfer only of that liquor to a member of the associa- F tion, that it is a supply of liquor, and is not a sale. On those grounds, in my opinion, the learned magistrate was wrong in coming to the conclusion to which he did come as stated in the last Case, namely, that the transaction constituted a sale by retail of such intoxicating liquor, and that, as the club was not a bonâ fide club, but was conducted solely for the purpose of enabling the frequenters of the club (whether duly elected members or not) to purchase intoxicating liquor G in a place other than in a licensed house and during prohibited hours, he held that the registration of the club afforded no protection to the appellants against the provisions of the Licensing Act of 1910. I only desire to say in conclusion that nothing I have said would apply to a case where there is no real association of persons owning the club, and if upon the facts in any particular case it is found that any individual, or body of individuals, under the name of a club or supply- H ing their own liquor to persons for payment, in my opinion, that transaction would constitute a sale, and would come within the provisions of the Licensing Act.

AVORY, J.—Upon the facts which were before the learned magistrate in this case I think that he might properly have come to the conclusion that there was a I sale of intoxicating liquor prohibited by s. 65 of the Licensing Act. I am not sure that in this case the result which the court has arrived at is not due to the learned magistrate having given the wrong reasons for his judgment. I have been inclined to think that his judgment was right, but that the reasons for it are wrong, and if he had founded it upon other reasons I believe it might have been supported. I say that for this reason, that, in the Case which he last re-stated to this court, in answer to questions which were submitted to him, he says:

"I held that such a transaction constituted a sale by retail of such intoxicating liquor, and I take this to be a finding of fact which he might have arrived

at] as the club was not a bona fide club, but was conducted solely for the purpose of enabling the frequenters of the club, whether duly elected members or not, to purchase intoxicating liquor in a place other than in a licensed house, and during prohibited hours, I held that the registration of the club afforded no protection to the appellants."

If that had been the only finding by the magistrate in the case, that this club was conducted solely for the purpose of enabling frequenters, whether members or not, to purchase intoxicating liquors in a place other than in a licensed house, and during prohibited hours, I think there would have been nothing to be said against his conclusion that that amounted to a sale within the meaning of s. 65. As I have intimated, I think he might fairly have come to that conclusion upon the facts of this case; but he has, in answer to the questions which were originally submitted to him by this court, undoubtedly also found as a fact that the intoxicating liquor which was supplied formed part of the general property of the club, and as such was by virtue of r. 14 vested in the trustees of the club representing and acting for the whole of the members of the club. In other words, he has found that the liquor which was sold in this case was the property of the members of the club, to whom in fact it was supplied, and, if he has so found, then it is clear that *Graff* v. *Evans* (1) is an authority that such a transaction does not amount to a sale within the meaning of the Licensing Act. I think that the learned magistrate, as soon as he came to the conclusion that this was not a bona fide club, but was conducted for the purposes which he has described, might also have gone on to say that in his opinion, not being a bona fide club, the rules were not bona fide—in fact were nothing but a blind to cloak an illegal transaction, namely, the sale of intoxicating liquor that was going on. If he had so held, there would have been no vesting of the property in the trustees or in the members of the club, and if there had been no vesting of the property in the trustees for the benefit of the members generally, then, in my opinion, the transaction would clearly have amounted to a sale; but in face of this finding by the learned magistrate—which I agree is contradictory, to some extent, at all events, of the later findings—I am certainly unable to differ from the conclusion which has been already expressed.

LUSH, J.—In order to justify this conviction it must be shown that there was a sale by retail of intoxicating liquor, and the question is whether, upon the findings that the learned magistrate has made, the facts established that there had been such a sale. In my opinion, there was no sale. It is quite clear that if this had been what has been called a bona fide club there was no sale, and I want to point out why, if this had been a bona fide club, it must have been conceded that there was no sale. In *Graff* v. *Evans* (1), which was the case of a bona fide club, it was held that the supply of liquors to members of the club was not a sale, and the reason appears to me to be that where the members of a bona fide club are the owners of the intoxicating liquor, and merely distribute it among themselves, that is a case of distribution and not a case of sale. It appears to me that that conclusion equally follows although the club is not what has been called a bona fide club. The language of s. 95, sub-s. 1, of the Act is that where a club has been registered in pursuance of the Act, a court of summary jurisdiction under certain conditions may make an order directing the club to be struck off the register on all or any of the grounds specified, the ground in para. (b) being that the club is not conducted in good faith as a club. The fact that the club was not conducted in good faith cannot, in my view, affect the question whether there was a distribution as distinct from a sale. If it is a club, then, if the members are the proprietors and owners of the intoxicating liquor, they just as much distribute it among themselves as they would have done if the club had been conducted in good faith. The penalty which the Act prescribes in the case of a club not being conducted in good faith is that the club may be taken off the register. That is the

penalty, but the fact that it is conducted in good faith cannot affect the question whether, if it is a club, as the magistrate finds this is, the members have distributed their own intoxicating liquor among themselves in contra-distinction to the fact of it being a sale. There is this further penalty provided by s. 93, that if a club has been taken off the register, and intoxicating liquors are afterwards supplied to members, a penalty is imposed, although the distribution exists just as much in the case of the one club as in the case of the other. For these reasons I think, upon the findings of the learned magistrate, which include the finding that the intoxicating liquor was the general property of the club, this conviction cannot be sustained, and the appeal must be allowed.

Conviction quashed.

Solicitors: *Wrentmore & Son*, for *Spickett & Sons*, Pontypridd.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

R. *v.* LIGHT

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Rowlatt and Shearman, JJ.), February 22, 1915]

[Reported 84 L.J.K.B. 865; 112 L.T. 1144; 31 T.L.R. 257; 59 Sol. Jo. 351; 24 Cox, C.C. 718; 11 Cr. App. Rep. 111; 79 J.P. Jo. 113]

Criminal Law—False pretences—Attempt to obtain money by false pretences—Pretence false to knowledge of prosecutor.

A conviction of attempting to obtain money by false pretences is good even though the person to whom the false pretence is made knows it to be false.

R. v. *Hensler* (1) (1870), 22 L.T. Rep. 691, followed.

Notes. As to obtaining property by fraud, see 10 HALSBURY'S LAWS (3rd Edn.) 819 et seq.; and for cases see 15 DIGEST (Repl.) 1162 et seq.

Case referred to:

(1) *R.* v. *Hensler* (1870), 22 L.T. 691; 34 J.P. 533; 19 W.R. 108; 11 Cox, C.C. 570, C.C.R.; 15 Digest (Repl.) 1169, *11,804.*

Also referred to in argument:

R. v. *Roebuck* (1856), Dears. & B. 24; 25 L.J.M.C. 101; 27 L.T.O.S. 143; 20 J.P. 325; 2 Jur. N.S. 597; 4 W.R. 514; 7 Cox, C.C. 126, C.C.R.; 15 Digest (Repl.) 1167, *11,788.*

R. v. *Mills* (1857), 1 Dears. & B. 205; 26 L.J.M.C. 79; 29 L.T.O.S. 114; 21 J.P. 294; 3 Jur.N.S. 447; 5 W.R. 528; 7 Cox, C.C. 263, C.C.R.; 15 Digest (Repl.) 1169, *11,803.*

R. v. *Button*, [1900] 2 Q.B. 597; 69 L.J.Q.B. 901; 83 L.T. 288; 64 J.P. 600; 19 Cox, C.C. 568; 15 Digest (Repl.) 1177, *11,893.*

Appeal against a conviction.

The appellant described himself as the principal of the "British Health Institute," and issued advertisements stating that arrangements had been made for testing urine, if desired, at a nominal fee of 1s. 6d. Two individuals, who suspected the genuineness of the advertisement, forwarded to the appellant a solution of water with colouring ingredients mixed with soap, and asked for an analysis of their "water." Letters were received from the appellant advising a course of treatment to cost not less than one guinea in each case. He was convicted before the

Recorder at the Central Criminal Court of attempting to obtain money by false pretences.

Charles Doughty for the appellant.
R. D. Muir for the Crown.

ROWLATT, J., delivered the following judgment of the court.—On the point of law raised in this case, it was argued that, where a charge of attempting to obtain money is preferred, a conviction cannot be obtained unless the prosecutor believes the false pretence made. It is quite clear that, on a charge of obtaining goods or money by false pretences, no conviction is possible unless it is shown that the mind of the prosecutor was misled by the false pretence, and that he was thereby induced to part with his money or goods. But it is a fallacy to suppose that the same principle applies when an attempt only is charged. A man makes false pretences with the intention of obtaining money, and uses the false pretences in endeavouring to obtain money. The prosecutor may not believe the false statement and does not part with his money, or he may part with his money intending to carry the matter further. In each of these cases, the appellant has made false pretences with the object of obtaining money, and has failed because the prosecutor has not been misled. There is, as it seems to us, no difficulty in deciding that, under these circumstances, a man is guilty of attempting to obtain property or money by false pretences. The point was determined in *R.* v. *Hensler* (1), and is covered by that case. There is no ground for saying that the jury were not properly directed in the present case, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Sewell, Edwards & Nevill; City Solicitor.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

KATES *v.* JEFFERY

[King's Bench Division (Darling, Avory and Rowlatt, L.JJ.), May 2, 1914]

[Reported [1914] 3 K.B. 160; 83 L.J.K.B. 1760; 111 L.T. 459; 78 J.P. 310; 12 L.G.R. 974; 24 Cox, C.C. 324]

Case Stated—Point not taken before justices—Right to raise point in Divisional Court.

On the argument of an appeal in the Divisional Court on a Case Stated by justices, no point can be taken before the Divisional Court which was not taken before the justices, unless it is a point on a question of law alone which no evidence could alter.

Dictum of Blackburn, J., in *Knight* v. *Halliwell* (1) (1874), L.R. 9 Q.B. at p. 417, applied.

Notes. Applied: *London County Council* v. *Farren*, [1956] 3 All E.R. 401.

As to the form of a Case Stated, see 25 Halsbury's Laws (3rd Edn.) 254, 255; and for cases see 33 Digest 413, 414.

Cases referred to:

(1) *Knight* v. *Halliwell* (1874), L.R. 9 Q.B. 412; 43 L.J.M.C. 113; 30 L.T. 359; 38 J.P. 470; 22 W.R. 689; 33 Digest 420, *1305.*

(2) *Purkis* v. *Huxtable* (1859), 1 E. & E. 780; 28 L.J.M.C. 221; 33 L.T.O.S. 106; 23 J.P. Jo. 293; 120 E.R. 1102; sub nom. *Purkis* v. *Constable*, 5 Jur. N.S. 790; 33 Digest 419, *1303*.

(3) *Giebler* v. *Manning*, [1906] 1 K.B. 709; 75 L.J.K.B. 463; 94 L.T. 580; 70 J.P. 181; 54 W.R. 527; 22 T.L.R. 416; 50 Sol. Jo. 377; 4 L.G.R. 561; 21 Cox, C.C. 160, D.C.; 14 Digest (Repl.) 187, *1530*.

Also referred to in argument:

Ross v. *Helm*, [1913] 3 K.B. 462; 82 L.J.K.B. 1322; 107 L.T. 829; 77 J.P. 13; 11 L.G.R. 36; 23 Cox, C.C. 248, D.C.; 25 Digest 107, *316*.

Connor v. *Butler*, [1902] 2 I.R. 569.

Dodd v. *Pearson*, [1911] 2 K.B. 383; 80 L.J.K.B. 927; 105 L.T. 108; 75 J.P. 343; 27 T.L.R. 376; 9 L.G.R. 646; 22 Cox, C.C. 526, D.C.; 25 Digest 112, *355*.

Case Stated by Kent justices.

At a court of summary jurisdiction sitting at Tonbridge, an information was preferred by the respondent, Edgar Thomas Jeffery, of Southborough, an inspector of nuisances under the Public Health Act, 1875, against the appellant, Edward Kates, also of Southborough, charging that, on Nov. 17, 1913, he had in his possession for the purpose of sale or of preparation for sale and intended for the food of man a carcase of a cow which was unfit for human food. It was proved or admitted that on Nov. 17, 1913, the respondent, whilst acting in his capacity as an inspector of nuisances for the urban district of Southborough, inspected and examined the carcase of a cow which was at that time in the possession of the appellant, and as the meat then appeared to him to be diseased and unfit for the food of man, he seized and carried away the same in order that the carcase might be dealt with by a justice. The meat was subsequently examined by a justice, and was adjudged by him to be unfit for human food. It was consequently condemned and ordered to be destroyed in pursuance of the provisions of the Public Health Act, 1875. The meat was destroyed in accordance with the order. When giving evidence in support of the information, the respondent swore that he was an inspector of nuisances for the urban district of Southborough, and this was not questioned by the appellant until the close of the case for the prosecution, nor was he cross-examined on the point, and the case for the prosecution proceeded on the assumption that the respondent was an inspector of nuisances and the appellant raised no point thereon.

It was contended on behalf of the appellant that, before any conviction could take place, it was necessary that the appointment of the respondent as inspector of nuisances, and the approval of his appointment by the Local Government Board, should have been formally proved in evidence, and that the mere evidence of the respondent on this point in the witness-box was insufficient. It was contended on behalf of the respondent that, as there was no cross-examination on the point, the evidence of himself that he was an inspector of nuisances and had been duly appointed and approved, and that he was acting within the scope of his authority was sufficient to establish the fact; as the point was never raised at the hearing of the information, the appellant had waived any objection.

The justices convicted the appellant who now appealed.

Barrington-Ward for the appellant.

Rowland Harker for the respondent.

DARLING, J.—I am of opinion that this appeal must be dismissed. With regard to the first point, that is, whether there was sufficient evidence of the appointment of the respondent and of the approval of his appointment by the Local Government Board, which was the only point raised before the justices in the court below, this has now been abandoned by counsel for the appellant. There is not the least

ground for suggesting that there was not sufficient evidence that the respondent was a properly appointed sanitary inspector.

But then another point is now raised, and that is that there was no evidence given before the justices that the sanitary inspector was authorised by the local authority in such a manner as was necessary to enable him to take proceedings against the appellant. This point was not taken when the case was before the justices. If it had been taken, in all probability the justices would have adjourned the case, if necessary, in order that such evidence might have been produced, and would have proceeded with the hearing when the evidence was forthcoming. In *Knight* v. *Halliwell* (1) BLACKBURN, J., said (L.R. 9 Q.B. at p. 417), after referring to *Purkis* v. *Huxtable* (2), and observing that, if the point which was attempted to be raised before the Court of Queen's Bench in that case had been taken before the justices, evidence with regard to it could have been supplied, "here a question of law, which no evidence could alter, arises on the statement of facts." And I have no doubt that, in *Giebler* v. *Manning* (3), LORD ALVERSTONE, C.J., was speaking in the same sense, and that his language was equivalent to that of BLACKBURN, J.,—although there is some difference in the reports—namely, that a question of law arising on the facts stated by justices, but not taken before them, can only be taken before this court if it is one which no evidence could alter.

In my view, if this court sees that there is a question of law arising from the facts of a Case Stated which no evidence could possibly alter, this court is entitled to take the point and to deal with the question of law, even though it was not raised in any way before the justices. And again, the court cannot refuse to raise such a point merely because it was not taken by one of the parties in the court below. For example, if a Case Stated by justices should allege that a lease for a limited number of years was an estate in fee simple, this court would not only be entitled but would be bound to take the point of law. But no such point of law arises on the facts stated in the present case. The question whether the respondent was duly authorised to take proceedings against the appellant was a pure question of fact, and if the point of law had been taken that, without evidence of that fact, the prosecution would not lie, the justices might, and no doubt would, have adjourned the hearing of the case in order that the authority of the sanitary inspector might have been produced. As I have said, the whole thing was a question of fact, and, that being so, it is not now open to the appellant to raise it before us, and, therefore, the appeal must be dismissed.

AVORY, J.—I am of the same opinion.

ROWLATT, J.—I agree.

Appeal dismissed.

Solicitors: *Neve, Beck & Kirby*, for *Neve & Peach*, Tonbridge; *Wilfred Dell*, for *R. Vaughan Gower*, Tunbridge Wells.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

EVANS & CO., LTD. *v.* LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (Avory, Rowlatt and Shearman, JJ.), April 30, 1914]

[Reported [1914] 3 K.B. 315; 83 L.J.K.B. 1264; 111 L.T. 288; 78 J.P. 345; 30 T.L.R. 509; 12 L.G.R. 1079; 24 Cox, C.C. 290]

Shop—Hours of closing—Early closing day—Liability to penalty of limited company as "occupier"—Shops Act, 1912 (2 *& 3 Geo. 5, c. 3*), *s.* 4 (1)—*Summary Jurisdiction Act*, 1848 (11 *& 12 Vict., c.* 43).

A limited company which occupied a shop **held** to have been properly convicted under s. 4 of the Shops Act, 1912, which imposed an obligation on occupiers of shops to close their shops in the afternoon on one day in the week, there being nothing in the provisions of that Act to exclude it.

Notes. The Shops Act, 1912, has been repealed. See now s. 1 of the Shops Act, 1950.

As to the liability for offences in respect of shops, see 17 HALSBURY'S LAWS (3rd Edn.) 68–70; and for cases see 24 DIGEST (Repl.) 1043 et seq. For the Shops Act, 1950, s. 1, see 29 HALSBURY'S STATUTES (2nd Edn.) 189.

Case referred to:

(1) *Wills* v. *Tozer* (1904), 53 W.R. 74; 20 T.L.R. 700; 48 Sol. Jo. 654; 13 Digest (Repl.) 265, *909*.

Also referred to in argument:

Pearks, Gunston and Tee, Ltd. v. *Ward, Henner* v. *Southern Counties Dairies Co.*, [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 18 T.L.R. 538; 20 Cox, C.C. 279; 13 Digest (Repl.) 265, *915*.

Chuter v. *Freeth and Pocock, Ltd.*, [1911] 2 K.B. 832; 80 L.J.K.B. 1322; 105 L.T. 238; 75 J.P. 430; 27 T.L.R. 467; 22 Cox, C.C. 573; 9 L.G.R. 1055, D.C.; 13 Digest (Repl.) 265, *916*.

Hawke v. *E. Hulton & Co., Ltd.*, [1909] 2 K.B. 93; 78 L.J.K.B. 633; 100 L.T. 905; 73 J.P. 295; 25 T.L.R. 474; 22 Cox, C.C. 122; 16 Mans. 164, D.C.; 13 Digest (Repl.) 266, *919*.

Pharmaceutical Society v. *London and Provincial Supply Association, Ltd.* (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 957, H.L.; 13 Digest (Repl.) 264, *908*.

Case Stated by a metropolitan police magistrate.

At the Westminster Police Court sitting on Dec. 4, 1913, the respondents, the London County Council, preferred an information against the appellants, Evans & Co., Ltd., charging that, during the week ending Oct. 25, 1913, being the occupiers of a shop known as Nos. 197–201, Brompton Road, in the county of London and within the metropolitan police district, they did not close the shop for the service of customers not later than one o'clock in the afternoon on one weekday in the aforesaid week, as required by the Shops Act, 1912, s. 4 (1).

The following facts were proved or admitted: The appellants were a corporation, to wit, a limited liability company, duly incorporated and registered under the Companies Acts, and carried on business as milliners, fancy drapers and ladies' outfitters at the aforesaid premises. An inspector employed by the respondents under the Shops Act, 1912, inspected the premises every day during the week ending Oct. 25, 1913, and the premises were open on each day during the week for the service of customers after 1 p.m., and customers were served therein after 1 p.m. on each of such days.

It was contended on behalf of the appellants that, being a limited company, they were not an "occupier" within the meaning of s. 4 of the Shops Act, 1912. The word "occupier" as therein used applied to an individual only, and not to a corporate body. A limited company was not a "person" within the meaning of

ss. 1 and 2 of the Summary Jurisdiction Act, 1848. It was contended on behalf of the respondents that the words "occupier" and "person" included a limited company.

The magistrate was of opinion that the appellants were "occupiers" within the meaning of s. 4, and that, under the Interpretation Act, 1889, s. 2 (1), the Summary Jurisdiction Acts were applicable to corporations in respect of these offences, and that there was nothing in the nature of the appellants' offence or of the penalty imposed by the Shops Act, 1912, or otherwise, to indicate any contrary intention. He, therefore, imposed a penalty on the appellants, who now appealed.

By the Shops Act, 1912, s. 4:

(1) "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week. . . . (4) Where the local authority have reason to believe that a majority of the occupiers of shops of any particular class in any area are in favour of being exempted from the provisions of this section, either wholly or by fixing as the closing hour instead of one o'clock some other hour not later than two o'clock, the local authority, unless they consider that the area in question is unreasonably small, shall take steps to ascertain the wishes of such occupiers, and, if they are satisfied that a majority of the occupiers of such shops are in favour of the exemption, or, in the case of a vote being taken, that at least one-half of the votes recorded by the occupiers of shops within the area of the class in question are in favour of the exemption, the local authority shall make an order exempting the shops of that class within the area from the provisions of this section either wholly or to such extent as aforesaid. . . . (7) In the case of any contravention of or failure to comply with any of the provisions of this section, the occupier of the shop shall be guilty of an offence against this Act, and shall be liable to a fine not exceeding—(a) in the case of a first offence, one pound; (b) in the case of a second offence, five pounds; and (c) in the case of a third or subsequent offence, ten pounds."

R. W. Turner for the appellants.
Bodkin for the respondents.

AVORY, J.—The question whether a company incorporated under the Companies Acts is liable, or may be made liable, under the provisions of a penal statute has been naturally the subject of discussion in recent years, and the decision of such a question turns, in my opinion, on the application of s. 2 of the Interpretation Act, 1889, to the particular case in question. Section 2 of that Act says:

"In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall unless the contrary intention appears, include a body corporate";

and in every case which comes before the court the question which has to be determined is whether the contrary intention appears in the statute under which the proceedings are taken. In this case, the proceedings are taken under s. 4 (1) of the Shops Act, 1912, which provides that

"Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week."

Subsection (4) provides: [His Lordship read the subsection]. Subsection (7) provides that

"In the case of any contravention of or failure to comply with any of the provisions of this section, the occupier of the shop shall be guilty of an offence against this Act, and shall be liable to a fine."

The only other section in the Act which it is material to consider is s. 14, which provides that

> "All offences against this Act shall be prosecuted, and all fines under this Act shall be recovered, in like manner as offences and fines are prosecuted and recovered under the Factory and Workshop Act, 1901."

That is, in effect, saying that they shall be prosecuted and recovered under the provisions of the Summary Jurisdiction Acts. Subsections (2) and (3) of that section I think are also material, for a reason which I will state in a moment. By sub-s. (2):

> "Where an offence for which the occupier of a shop is liable under this Act has, in fact, been committed by some manager, agent, servant, or other person, the manager, agent, servant, or other person shall be liable to the like penalty as if he were the occupier."

By sub-s. (3):

> "Where the occupier of a shop is charged with an offence against this Act, he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, he proves to the satisfaction of the court that he has used due diligence to enforce the execution of the Act, and that the said other person has committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the occupier shall be exempt from any fine."

The question in this case is whether a limited company can be lawfully convicted under s. 4 of the Shops Act, 1912. It is admitted and found in the Case that the appellants were, at the date in question, the occupiers of this shop. The appellants were on the rate book as the occupiers of the shop, and primâ facie, therefore, they come clearly within the words. Is there anything in this Act which shows that a body corporate is not intended to be included in the provisions of it? Counsel for the appellants has argued that s. 4 (4) displays a contrary intention, because it contemplates occupiers who are in certain events to exercise the right of voting on the question whether shops of that class shall be exempt from the operation of the section; and he says that a limited company cannot exercise that right of voting under that subsection. For myself, I am not by any means satisfied that a limited company cannot exercise the right of voting under that subsection. I see nothing in this Act such as there was in *Wills* v. *Tozer* (1). I see nothing which makes it impossible or which puts any difficulty in the way of a limited company exercising the right of voting under the subsection. There is nothing which says that the members shall be personally present and record their votes. There is certainly nothing which prevents a limited company from expressing its wish as an occupier. A limited company can express its wish in the ordinary way, either by a resolution of the directors or by the directors authorising the manager to express its views on its behalf. So far as I can see, there being no particular machinery for recording the votes, there is no practical difficulty in the company exercising that right of voting. Even if there were, it would not, in my opinion, justify the argument that this Act cannot be applied in the case of a limited company where a shop is admittedly open in breach of the provisions of the Act.

But counsel for the appellants argues further that, apart from the provisions of the Shops Act, the fine has to be recovered under the provisions of the Summary Jurisdiction Acts, and he says that there are certain provisions in various sections of the Summary Jurisdiction Act, 1848, which are inapplicable to a limited company. That is quite true. There are, no doubt, certain provisions in that Act which contemplate imprisonment in certain events which are not applicable to

the case of a limited company, but this court has for many years past had to consider this question under other statutes where it is provided that the fine is to be recovered or the offence is to be prosecuted under the provisions of the Summary Jurisdiction Acts. It has been held in cases under the Sale of Food and Drugs Acts and in cases under the Merchandise Marks Act, that there is nothing in those statutes, or in the provisions of the Summary Jurisdiction Acts, which prevents the application of the particular statute to a limited company. I think it is no answer to say that there are certain provisions of the Summary Jurisdiction Acts which cannot be applied, if in fact there are other provisions which are all that are necessary for the purpose that can be applied.

For these reasons, I think that the argument that there is anything in the Shops Act, 1912, which shows any contrary intention to the provisions of the Interpretation Act, 1889, that the word "person" shall include a corporation fails.

I refer again to s. 14 (2) and (3) of the Shops Act, 1912, for this purpose as showing that they would appear to have been enacted for the purpose of meeting a case where a limited company is the occupier; but they are essentially provisions which may be most useful in a case where a limited company is the occupier of a shop, because it is just in such a case as that where, although the occupier is primâ facie liable, it may be shown that the manager or agent of the limited company is the person who really has committed the offence. No such point is raised in this case. We must assume that the appellants were the persons who in fact committed the offence, if anybody did, and we are only asked to say whether they can be made liable under this statute.

For these reasons I think that the appeal must be dismissed.

ROWLATT, J.—I agree. In this shop there was a state of facts which, under the Shops Act, 1912, subjected the occupiers to a fine. The appellants are, in the ordinary acceptation of the words, the occupiers of that shop, and they have been convicted and fined. It is objected that they are not occupiers because occupiers have votes, and they cannot exercise the vote. If it be true that they cannot exercise the vote, as to which I offer no opinion at all, that circumstance may be pathetic without being relevant, because it seems to me that the vote is a privilege conferred on the occupier if he can exercise it. If he cannot exercise it, he is none the less the occupier, and must accept the liabilities of such.

SHEARMAN, J.—I agree.

Appeal dismissed.

Solicitors: *Stileman & Neate*; *Edward Tanner.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

R. *v.* GRUBB

[Court of Criminal Appeal (Lord Reading, C.J., Avory, Lush, Bailhache and Shearman, JJ.), April 19, May 10, 1915]

[Reported [1915] 2 K.B. 683; 84 L.J.K.B. 1744; 113 L.T. 510; 79 J.P. 430; 31 T.L.R. 429; 59 Sol. Jo. 547; 25 Cox, C.C. 77; 11 Cr. App. Rep. 153]

Criminal Law—Larceny—Fraudulent conversion—Person "entrusted" with property—"Receipt" of property for or on account of another person—Dealings through company directed and controlled by one person—Larceny Act, 1901 (1 *Edw.* 7, *c.* 10), *s.* 1.

A person may be "entrusted" with property or may "receive" it for or on account of another person within the meaning of s. 1 of the Larceny Act, 1901, notwithstanding that the property is not delivered to him directly by the owner, and even if the owner does not know of his existence and does not intend to entrust the property to him. If a person has obtained or assumed the control of the property of another person under circumstances by which he becomes entrusted with it, or by which his receipt becomes a receipt for or on account of another person, and he fraudulently converts the property, he has committed an offence under s. 1. For the purpose of determining whether the offence has been committed, the words "being entrusted" should not be read as being limited to the moment of the sending or delivering of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property; equally, the words "having received" may cover the receipt at any time by a person who receives the property for or on account of another.

If a person having exclusive control over the affairs and management of a company intends to fraudulently convert property in the possession of the company, he may be guilty of an offence under s. 1 whether the property is fraudulently converted to the use or benefit of the company or to his own use and benefit. If the acts done by him are done with an intent to defraud, it will not serve as a defence to a charge under s. 1 to show that he did the acts as agent or servant of the company.

Notes. The Larceny Act, 1901, s. 1, has been replaced by the Larceny Act, 1916, s. 20.

Referred to: *R.* v. *Bottomley* (1922), 87 J.P. 26; *R.* v. *Cuffin* (1922), 127 L.T. 564; *R.* v. *Morter* (1927), 20 Cr. App. Rep. 53.

As to fraudulent misappropriation, see 10 Halsbury's Laws (3rd Edn.) 790 et seq.; and for cases see 15 Digest (Repl.) 1109 et seq. For the Larceny Act, 1916, s. 20, see 5 Halsbury's Statutes (2nd Edn.) 1022.

Case referred to:

(1) *Salomon* v. *Salomon & Co.*, *Salomon & Co.* v. *Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, *11*.

Also referred to in argument:

Continental Tyre and Rubber Co. (*Great Britain*), *Ltd.* v. *Daimler Co., Ltd.*, *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.* v. *Thomas Tilling*, *Ltd.*, [1915] 1 K.B. 893; 84 L.J.K.B. 926; 112 L.T. 324; 31 T.L.R. 159; 59 Sol. Jo. 232; 20 Com. Cas. 208, C.A.; on appeal sub nom. *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.*, [1916–17] All E.R.Rep. 191; [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 9 Digest (Repl.) 718, *4762*.

R. v. *South* (1907), 71 J.P. 191; 15 Digest (Repl.) 1112, *11,045*.

R. v. *Lord* (1905), 69 J.P. 467, C.C.R.; 15 Digest (Repl.) 1112, *11,051*.

Booth v. *Helliwell*, [1914] 3 K.B. 252; 83 L.J.K.B. 1548; 111 L.T. 542; 78 J.P. 223; 30 T.L.R. 529; 24 Cox, C.C. 361; 12 L.G.R. 940, D.C.; 9 Digest (Repl.) 532, *3502*. A

Appeal against conviction under the Larceny Act, 1901, for fraudulent conversion of property.

The appellant was charged on indictment with having fraudulently converted to his own use or benefit, or to the use or benefit of another person, property entrusted to him for certain specific purposes and property received by him for or on account of another person under s. 1 of the Larceny Act, 1901. By s. 1 of that Act: B

"(1) Whosoever—(a) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof or (b) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour. . . ." C D

Hawke, K.C., and *Horace Douglas* for the appellant.

The Solicitor-General (Sir S. O. Buckmaster, K.C.), A. H. Bodkin, G. A. H. Branson, Cecil Whiteley and *Montague Shearman* for the Crown.

Cur. adv. vult.

May 10. **LORD READING, C.J.**, read the following judgment of the court.— E The appellant was convicted under the Larceny Act, 1901, of having fraudulently converted to his own use or benefit property entrusted to him for certain specific purposes and property received by him for or on account of another. He appeals to this court to quash the conviction on two grounds: the first, that, as a matter of law, there was no evidence to support the verdict; the second, that the learned recorder had misdirected the jury. If there had been no company in existence, there is no doubt that, if there was evidence that the property had been entrusted to or received by the appellant, there would have been ample evidence to support the conviction. But it is strenuously contended that the property was in fact and in law entrusted to or received by the company, and not to or by the appellant. It is not in dispute that the moneys were fraudulently converted, but the appellant says they were fraudulently converted by the company and not by him. The company, it is said, was duly formed and incorporated under the Companies Act and was, therefore, a legal entity, a person: see *Salomon* v. *Salomon* (1). It is contended that the owner of the property intended in each case to entrust it to the company and not to the appellant, and that the property was in fact received by the company and not by the appellant: that, as the property came into the possession of the company and the moneys were paid into the banking account of the company and were entered in the books of the company and were applied to the use and for the benefit of the company, the appellant could not be convicted of any offence under the statute. The question raised is of general importance, for, if the appellant's contention is right, it would follow that, by the interposition of a duly formed company as the person entrusted with the property or by whom it is received, no person could be convicted of offences under the Larceny Act, 1901, nor, indeed, of any offence against the criminal law, notwithstanding the undoubted fraudulent conversion of the property, since the company cannot be indicted and sent to prison. Section 1 of the Larceny Act, 1901, was passed for the purpose of meeting technical difficulties which had arisen in proving offences under s. 75 and s. 76 of the Larceny Act, 1861, and was substituted for those sections. F G H I

The first point to be decided in this case is whether there was evidence that the appellant was "entrusted" with the property in question or whether he received it

for or on account of any other person. This court has no doubt that, if the appellant was entrusted with the property, or if he received it, there was evidence that he fraudulently converted it to his own use or benefit. In the opinion of this court, a person may be entrusted with property or may receive it for or on account of another person within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner, and that, in fact, the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person in circumstances whereby he becomes entrusted or whereby his receipt becomes a receipt for or on account of another person, and fraudulently converts it or the proceeds, then he has committed an offence within the section. For the purpose of determining whether the offence has been committed, the words "being entrusted" should not be read as being limited to the moment of the sending or delivering of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property. Equally, the words "having received" may cover the receipt at any time by a person who receives the property for or on account of another. There cannot, however, be a fraudulent conversion without an attempt to defraud. A company has no mind and cannot have an intention; if the person directing and controlling the affairs of the company, and by whose instructions the property has passed into the possession of the company and has been converted, intended to convert it fraudulently, he would be guilty of an offence whether the property was fraudulently converted to the use and benefit of the company or to his own use and benefit. If he did the acts with an intent to defraud, it would not be an answer to prove that he did them as the agent or servant of another person, whether a company or an individual. Moreover, if the company was used by his directions as the instrument, so as to enable him in the name of the company to become possessed of the property and by means of the company to convert it fraudulently to his own use and benefit, he would be guilty of an offence under this statute.

Having now stated the law applicable, we proceed to examine the evidence. Where there is a conflict of testimony it must be considered by the light of the verdict. The charges made against the appellant, and of which he was convicted, were in respect of (a) a sum of £894 2s. sent by a Miss Miller for the purchase of £1,200 Consols; (b) certain shares sent by one Ranking for sale, with instructions to invest the proceeds in other shares; (c) a sum of £311 6s. sent by Ranking to purchase shares; and (d) a sum of £91 5s. 6d. sent by one Barthrop for the purchase of £100 stock. Olivers & Partners, Ltd., was a company formed under the Companies Acts to carry on the business of stock and share brokers. In 1912, it went into liquidation and the goodwill of the business was purchased by the appellant, who formed a new company in August, 1912, with the name of H. St. John Oliver & Partners, Ltd. This company took over the assets of the old company and carried on the business of stock and share brokers, of 68 St. James Street, Pall Mall, and paid, or agreed to pay, £409 per annum for its offices. The appellant and one officer were the directors. Jones was the managing clerk, and other persons were also employed. According to the evidence of Jones and Oliver, the persons employed were engaged by the appellant. No business was conducted except under his instructions; Oliver superintended the routine of the business and sought customers, but no business of any importance was ever transacted except under the directions of the appellant. The letters were placed before him and were answered or dealt with in pursuance of orders given by him. The appellant was in daily attendance at the office of the company, and the books of the company were also kept and the entries made under his direction. The pass book of the company's banking account and the accounts of the clients with the company were placed before him. Instructions for the purchase or sale of stocks and shares, payments by the company and the dealings with moneys paid to the

company took place under the sole direction and exclusive control of the appellant, who supplied money to the company and financed it. In the words of the managing clerk, "no one else had any control over the business of the firm." In November, 1912, the appellant resigned his position as director of the company because of some law suit in which he was concerned, and one Forde took his place. Forde was a friend of the appellant, and had been some little time in the office of the company to learn the business. From April 7, 1913, to May 7, 1913, there were no directors of the company. No change whatsoever was ever made in the conduct of the business—it continued as before under the exclusive control and direction of the appellant. The company was wound-up in June, 1913, and at that date it appears from the company's books that the company was indebted to the appellant in the sum of £1,245. The company never had sufficient business to make it a paying concern. The moneys paid into its banking account were derived from customers who sent either money to invest or shares to sell, or from the appellant. On Dec. 14, 1912, a Miss Miller forwarded the sum of £894 2s. addressed to Oliver & Partners, Ltd., the old company, with instructions to purchase Consols to the nominal value of £1,200. The letter was answered on Dec. 16 in the name of the new company, H. St. John Oliver & Partners, Ltd., enclosing a contract note showing the purchase by the company on her behalf of £1,200 Consols for the January Consols account. The contract note was a mere sham; no transaction had been executed in Consols. A book entry was made of a purchase of £1,200 Consols for Miss Miller from the T.G.W. Syndicate, Ltd. The T.G.W. Syndicate, Ltd., was another company whose business was conducted at the same address by the appellant. Another entry recorded that the appellant had purchased £1,200 Consols for the T.G.W. Syndicate. These entries were mere fictitious records of transactions which had never taken place. They were made by the instructions of the appellant. The sum of £894 2s. was paid into the company's banking account. At that date the account was overdrawn to the extent of some £400 against securities which had been deposited. The effect of the payment of Miss Miller's money was to put the company's account in credit and to release the securities held by the bank. Subsequently, Miss Miller having complained of the non-receipt of the Consols or interest on the same, a dividend of £7 1s. 3d., purporting to be the amount received on the Consols, was sent to Miss Miller. No such sum had been received; it was debited to the account of the appellant with the company. It was not in dispute that no Consols had ever been purchased for Miss Miller and that the money sent by her had been fraudulently converted. There is abundant evidence that the material acts relative to Miss Miller's money were done by the directions of the appellant. The letters and documents were placed before him, and on various occasions both Oliver and Jones respectively mentioned to the appellant the omission to purchase the Consols on Miss Miller's account. The appellant denied all knowledge of the facts relating to Miss Miller until March, 1913, but it is evident from the verdict of the jury that they preferred the evidence of Oliver and Jones and rejected the evidence of the appellant. In December, 1912, one Ranking forwarded the certificate and transfer of certain shares to the company with instructions to sell them and purchase other shares. Subsequently Ranking forwarded £311 6s. to the company with instructions to purchase shares for the amount. The appellant was aware of all the material facts and gave the directions relating to the dealing with the shares and the money. Fictitious records of transactions which had never taken place were made in the books of the company and sham contract notes were sent in the name of the company, and, according to the evidence of Jones, by the directions of the appellant. Ranking never in fact received either shares or money, and both the shares and the money sent by him were fraudulently converted. Similar transactions and with similar results took place with one Barthrop, who forwarded money to the company with instructions to purchase £100 Japanese stock.

The court is of opinion that there was ample evidence to support the conviction of the appellant in respect of all these charges. Whether the transactions are

regarded as those of the company directed and controlled by the appellant as the agent of the company, or whether they are regarded as the transactions of the appellant using the company as the instrument to carry them out, there is abundant evidence that, although the property was sent to the company, the appellant obtained or assumed exclusive control over the property in question and that it was fraudulently converted by his directions. There was, therefore, evidence to support the conviction, and the appellant's first point fails.

On the argument as to misdirection of the jury by the learned recorder, it is true that there are passages in the summing-up which apparently fail to recognise the existence of the legal entity of the company as a separate person, and which, taken alone, might convey the idea that a one-man company was necessarily a sham or bogus company; but, viewed as a whole and without too minute an examination of the language of the recorder, we are of opinion that it sufficiently directs the attention of the jury to the material question of fact—namely, whether the appellant was the person who, having complete control of the affairs of the company, had become entrusted with or had received the property, although nominally it was delivered to the company or paid into the banking account of the company, and whether the appellant had fraudulently converted the property either to the company's or to his own use and benefit. In our opinion, the passages in the summing-up of which complaint is made have not caused any substantial miscarriage of justice. If these observations had not been made by the recorder, and if the direction had been quite accurate in law, the result on the facts of this case would have been the same, and the appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Good, Good & Co.*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

MAISEL *v.* FINANCIAL TIMES, LTD.

[Court of Appeal (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.), June 19, 1915]

[Reported [1915] 3 K.B. 336; 84 L.J.K.B. 2145; 113 L.T. 772; 31 T.L.R. 510; 59 Sol. Jo. 596]

Libel—Justification—Evidence—Character and reputation—Events happening after date of publication of libel.

In an action for libel where justification of the words complained of as relating to the general character and reputation of the plaintiff is pleaded, evidence of events which have happened within a reasonable time after the date of the publication of the libel and go to show the likelihood of an alleged tendency is admissible.

Notes. As to proceedings before trial of a libel action, see 24 Halsbury's Laws (3rd Edn.) 90 et seq.; and for cases see 32 Digest 90 et seq.

Cases referred to in argument:

R. v. *Rodley*, [1913] 3 K.B. 468; 82 L.J.K.B. 1070; 109 L.T. 476; 77 J.P. 465; 29 T.L.R. 700; 58 Sol. Jo. 51; 23 Cox, C.C. 574; 9 Cr. App. Rep. 69, C.C.A.; 14 Digest (Repl.) 422, *4109*.

Thompson v. *Nye* (1850), 16 Q.B. 175; 20 L.J.Q.B. 85; 16 L.T.O.S. 234; 15 Jur. 285; 117 E.R. 846; 32 Digest 168, *2053*.

Arnold and Butler v. *Bottomley*, [1908] 2 K.B. 151; 77 L.J.K.B. 584; 98 L.T. 777; 24 T.L.R. 365; 52 Sol. Jo. 300, C.A.; 18 Digest (Repl.) 70, 567. A

Appeal from a decision of RIDLEY, J.

On Mar. 1, 1912, an action in the King's Bench Division was commenced by the plaintiff, who was the managing director of the Oil Trust of Galicia, Ltd., against the defendants, who were the printers and publishers of the "Financial Times," to recover damages for an alleged libel published by them in the issue of their newspaper dated Jan. 17, 1912. The words complained of and the meanings alleged were stated by the plaintiff in para. 3 of his statement of claim to be as follows: B

> "'Arrest of Mr. B. P. Maisel.—Warrant executed in Berlin.—Charge of fraud in connection with patents. It is announced that Mr. B. P. Maisel, who is well known in London, has been arrested in Berlin on a warrant issued by the authorities of Hanover, charging him with fraud in connection with a number of transactions relating to patents. Mr. Maisel was identified by means of a drawing which the police had made from descriptions given by a person who claims to have been victimised by the prisoner, among whose luggage were found bills and securities representing a sum of over £75,000 in addition to a considerable amount of jewellery. Mr. Maisel was a director of the Oil Trust of Galicia. . . . Inquiries at the London office [meaning thereby the office of the Oil Trust of Galicia] elicited a statement to the effect that, so far as was known, none of the property found on Mr. Maisel related to the Oil Trust of Galicia, and, on this becoming known, the shares, which had previously been selling at a little over 11s., advanced sharply, and at the close were bid for at 12s. 3d. It is, of course, very difficult to say at present precisely how Mr. Maisel's affairs stand, but it would appear that there was practically no opportunity for him to gain possession of any cash or securities belonging to the company. A board meeting was held yesterday, but no information, beyond what we have already set forth, was forthcoming. It is probable that the directors will issue a statement at an early date.' C D E F
>
> Meaning thereby that the plaintiff had absconded from this country and had taken with him £75,000 in securities and a large quantity of jewellery, of which he was unlawfully in possession, and which were the property of the Oil Trust of Galicia, Ltd., or of some other person or company, and that his affairs were in an involved condition and that he was of doubtful solvency, and that his character and reputation were such that he was likely to have misappropriated funds of companies with which he was connected, and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd., if he had had the opportunity, and that inquiries had been made at the offices of the said company and that the officials thereof had refused to state whether the said property was or was not the property of the said company, but that the board of the said company were investigating its affairs with a view to ascertaining whether the plaintiff had misappropriated its funds." G H

By para. 3 (a) of their defence, the defendants denied the meaning attributed to the words set out in para. 3 of the statement of claim or that they so meant them, and by para. 3 (b) of their defence as finally amended by the Court of Appeal they stated as follows: I

> "In the alternative to what is in this paragraph hereinbefore stated the defendants say that if the said words mean that the plaintiff was of a character and reputation such that he was likely to have misappropriated funds of companies with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd., if he had had the opportunity and that he was an unfit person to be a director of the said or any company, the said words are, in the meaning that the plaintiff was of a

character and reputation such that he was likely to have misappropriated funds of companies with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd., if he had had the opportunity and that he was an unfit person to be a director of the said or any company, true in substance and in fact."

In support of this plea of justification the defendants delivered on Dec. 16, 1913 (inter alia), particulars stating as facts certain events which had taken place after the date of the publication of the libel. By an order of the Court of Appeal dated Jan. 13, 1914, the above particulars were ordered (inter alia) to stand as particulars of the amended defence, and the defendants were given leave to deliver to the plaintiff certain interrogatories based on them. On Feb. 1, 1915, the House of Lords (84 L.J.K.B. at p. 2145) affirmed the order of the Court of Appeal. The defendants applied in chambers that the plaintiff should be ordered to answer certain of the interrogatories which related to events which took place after the publication of the libel. The master directed that so much of the particulars as related to events subsequent to the alleged libel should be struck out, and refused to order the plaintiff to answer the interrogatories. RIDLEY, J., reversed the order of the master and ordered the plaintiff to answer the interrogatories.

The plaintiff appealed.

W. Blake Odgers for the plaintiff.

Gordon Hewart, K.C., and *Hugh Fraser* for the defendants.

LORD COZENS-HARDY, M.R.—This is an appeal which raises a point that has been very fully and very ably argued by counsel for the plaintiff, and which is, whether, having regard to the terms of the innuendo in an action for libel, and having regard to the amendment made by the Court of Appeal, which I assume was made by the consent of both parties, it is open to the defendants in the particulars of justification to refer to matters which took place after the publication of the alleged libel. Speaking generally, in an ordinary case of libel, as was put by PHILLIMORE, L.J., in this very case, if you say of a man, "He stole a hatchet on such and such a day," you must justify that particular allegation, and that is all. It is not relevant to say that he stole a hatchet the day before, or stole a hatchet the day after. But when you get an allegation such as I find here, it seems to me that different considerations apply.

How does the plaintiff put it in his statement of claim? In para. 3, after setting out the libel itself—a libel which, no doubt, made serious charges against the plaintiff—it goes on to say: [HIS LORDSHIP read the innuendo, and continued:] When this matter came before the Court of Appeal, the court allowed or, I think I may go further and say, the court settled, this amendment in para. 3 (b): [HIS LORDSHIP read para. 3 (b), as re-amended, and continued:] In a general allegation by way of justification of general character and general tendency, which are the only words I can think of at the moment as the meaning of the word "likely," I do not see how you can exclude events which happen, I will not say years after, but within a reasonable time from the date of the publication. I instance a case which seems to me to be rather analogous: an allegation that the plaintiff was addicted to drink and would get drunk if he could. Could you exclude evidence that, the day after publication of that libel, he had been found suffering from delirium tremens? It seems to me you could not in answer to a general allegation of what the man was likely to have done if he could. Of course, the acts in question raised by the amendment may be altogether too distant in point of time from the publication of the alleged libel. I do not in the least suggest that they are or are not, but the allegations in the particulars relate to allegations of a similar kind within some two or three months from the publication of the alleged libel. Having regard to the financial nature of these transactions, I do not think it possible to say that they were too remote to be allowed to be evidence of what a man was likely to have done at the date of the publication.

That being so, I think that the view taken by RIDLEY, J., in this case was right. This was not merely a justification of the particular acts he had done at the time, but was an allegation of his being likely to have done these acts if he had the opportunity. In my opinion, the view taken by the learned judge was right, and I think this appeal should be dismissed with costs.

PICKFORD, L.J.—I am of the same opinion. The question is nominally whether answers should be given to interrogatories. But in substance it is whether it is admissible in an action of libel, where there is a plea of justification, to give, in support of that plea, particulars alleging acts which occurred after the libel. It seems to me that, to that proposition, there can be given no direct answer, Yes or No; I think it must depend on the nature of the libel and it must also depend on the nature of the acts.

The nature of the libel here has been defined by the innuendo. When I say "the nature of the libel," I do not say that a jury would necessarily say that it means that; but that is what the plaintiff alleges that it means according to the final amendment of the defence. The defendants say that, if the said words mean that the plaintiff was of a character and reputation such that he was likely to have misappropriated the funds of the company with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd., if he had had the opportunity,

> "the said words are in the meaning that the plaintiff was of a character and reputation such that he was likely to have misappropriated funds of companies with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd., if he had the opportunity and that he was an unfit person to be a director of the said or any company true in substance and in fact."

Those are the particulars as finally settled, and those particulars are taken from the plaintiff's own innuendo.

The innuendo was that it meant that his character and reputation were such that he was likely to have misappropriated the funds of the company with which he was connected, and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd., if he had had the opportunity. Therefore, the particulars of the defence as finally settled follow exactly the innuendo of the plaintiff. That alleges that this libel has three meanings, as I read it: that he was of a character and reputation such that he was likely to have misappropriated; that he would have misappropriated if he had the opportunity, and that he was an unfit person to be a director—the third one I have left out. That being the meaning as alleged and the defence of justification which is set up, it seems to me that it is impossible to exclude, by one general proposition, particulars of any acts that took place after the libel. The allegation is that he was of a character to misappropriate funds, and that he would misappropriate funds if he got the chance. It seems to me that it cannot be irrelevant to show that, very shortly after the libel, as soon as he did get the chance, he did misappropriate.

I wish to adopt entirely what was said by LORD READING, C.J., in his judgment so as to guard myself against being supposed to say that, wherever an allegation is made against a man of having done something, you may give evidence of what has happened during all his life as being evidence to show it was likely to happen. It is expressed perfectly clearly by the Lord Chief Justice thus:

> "Suppose, for example, to use PHILLIMORE, L.J.'s illustration, if you say A.B. stole a hatchet, and then you give particulars, justifying that by a series of acts extending over his life, showing either that he had stolen other articles, or that he was the kind of dishonest person who would steal articles if he had the chance, nothing in our judgment is intended to give effect to any such contention as that. We understood that was the contention put forward by

A Mr. Shearman. It is quite clear that could not be; it has been decided many times, and it is unnecessary to deal further with that."

I wish to guard myself against being supposed to say that, if you want to prove a libel on a man alleging something at a particular date, you may always go and prove anything that happened afterwards in order to show that he was likely to B have done it. I do not think such a proposition can be maintained for a moment. But where, as here, the allegation is that he is a person of a character likely to do a certain act and that he would do the certain act if he got the opportunity, then it seems to me that it cannot be said to be irrelevant to prove that, as soon as ever he got the opportunity, a short time after the libel, he did it. It may be that the act which he did was so long after the libel that it would have no relevance at all C having regard to the time of the libel. If that were so, it would not be admissible.

The only doubt I have had in this case is whether some, at any rate, of these acts are not too remote and, therefore, ought not to be given in evidence in that way. But I think, considering that the libel was published somewhere about the middle of January, 1912, and that these transactions alleged in the particulars began somewhere about the middle of February and continued systematically, D according to the allegation (I do not say whether it is true or not), from that time up to May, 1912, there is not really any reason for excluding them on the ground that they are too remote. Therefore, I agree that this appeal should be dismissed.

WARRINGTON, L.J.—I agree. The plaintiff complains, among other things, that the defendants had said that he would have misappropriated the funds of the E particular company if he had had the opportunity. The defendants have justified that statement. The libel having been in January, they propose to allege that, on several occasions, commencing early in February, and extending to some day in May, of 1912, he had the opportunity and availed himself of it. It seems to me that the series of acts which they propose to allege come so near to the date of the libel that evidence of it would be admissible in support of justification of F the statement that he would have done the acts if he had the chance.

In the Court of Appeal on the previous occasion and in the House of Lords (84 L.J.K.B. at p. 2145), the Court of Appeal and the House of Lords were not dealing with the particular complaint we are dealing with now. They were dealing then with another complaint—namely, that the defendants had said of the plaintiff that he was a man of a certain character and reputation. I read the plaintiff's G complaint contained in the innuendo and, therefore, the plea of justification, as leading to three separate things: the character, the reputation, and the fact that the plaintiff would have done a certain thing if he had the chance, and that, therefore, he was not a fit person to be a director.

I agree that the appeal ought to be dismissed.

Solicitors: *W. G. A. Edwards*; *Nicholson, Graham & Jones.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

WESTMINSTER CORPORATION AND ANOTHER *v.* CHAPMAN

[CHANCERY DIVISION (Younger, J.), November 15, 16, 1915]

[Reported [1916] 1 Ch. 161; 85 L.J.Ch. 334; 114 L.T. 63; 80 J.P. 74; [1916] H.B.R. 12]

B

Company—Winding-up—Preferential debt—Rates—Insufficient general assets—Liability of debenture-holder secured by floating charge—Claim against debenture-holder—Parties—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209 (1), (2) (*b*), (3).

The effect of s. 209 (1), (2) (b), and (3), of the Companies (Consolidation) Act, 1908 [now s. 319 (1) (a) (i), (5) (b), and (6) of the Companies Act, 1948] read together is that the costs and expenses of the winding-up of a company are payable out of the assets of the company not comprised in a debenture security before any payment is made by the liquidator in respect of preferential debts, but that, if the general assets after discharge of the costs and expenses of the winding-up are insufficient for the payment of the preferential debts, then to the extent to which they are insufficient the amount must be made up by a debenture-holder whose security creates a floating charge on the property of the company to the amount necessary out of the property comprised in or subject to that charge. In other words, whether a creditor be an unsecured creditor or a debenture-holder whose only security is that of a floating charge, he is equally to be postponed in respect of any claim against the assets of the company until the preferential debts have been paid, but the free general assets must be exhausted before recourse is had to the secured assets.

C

D

E

In an action by a rating authority and a company being wound-up as joint plaintiffs against a debenture-holder for an amount due for rates, the defendant objected that the trustees of the deed ought to have been made defendants, and also that neither of the plaintiffs was entitled to sue, there being no privity between the defendant and the plaintiff corporation, and no debt due from the defendant for rates to the plaintiff company.

F

Held: although in an ordinary case the trustees should be defendants, yet that was not necessary in this case; while in the ordinary case of a claim in respect of a preferential debt the company would be the proper plaintiffs in the present case either the company or the authority could sue.

G

Notes. As to preferential debts, see 6 HALSBURY'S LAWS (3rd Edn.) 662–668; and for cases see 10 DIGEST (Repl.) 991–997. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to in argument:

H

Re Mannesman Tube Co., Ltd., Von Siemens v. *Mannesmann Tube Co., Ltd.*, [1901] 2 Ch. 93; 70 L.J.Ch. 565; 84 L.T. 579; 65 J.P. 377; 8 Mans. 300; 10 Digest (Repl.) 826, *5399*.

Richards v. *Kidderminster Overseers, Richards* v. *Kidderminster Corpn.*, [1896] 2 Ch. 212; 65 L.J.Ch. 502; 74 L.T. 483; 44 W.R. 505; 12 T.L.R. 340; 4 Mans. 169; 10 Digest (Repl.) 994, *6833*.

I

Action by a local authority and the company to recover from a debenture-holder a sum of £127 4s. 5d. due for rates.

The United Travellers' Club Co., Ltd., was formed in September, 1911, as a company limited by guarantee without any share capital to establish, maintain, and conduct a club to be called the United Travellers' Club and to provide a club-house. By cl. 6 of the memorandum of association every member of the company undertook to contribute to the assets of the company in the event of the same being wound-up during the time he was a member, or within one year afterwards,

for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges, and expenses of winding-up the same, such amount as might be required not exceeding £1, the sum to be set aside out of his first club subscription or entrance fee. On Jan. 16, 1912, the company issued a debenture, promising on Jan. 1, 1915, or such earlier day as the moneys secured became payable, to pay to F. Sammarcelli and G. Leclair, or other the registered holder, £8,000, and the company charged the whole of its property and assets with the payment of the moneys secured. By condition (1) the debenture was the only first debenture issued or to be issued by the company, and was a first charge upon the property of the company, and such charge was to be a floating security. By condition (8) the principal became payable if an order was made or an effective resolution was passed for winding-up of the company. By a deed of the same date, after reciting that a club had been established at No. 134, Piccadilly, aforesaid, called the United Travellers' Club, and that the expenses of and incidental to the formation, establishment, and conduct of the club had been defrayed by F. Sammarcelli and G. Leclair, and that repayment of such advances, amounting to £8,000, was secured by a debenture bond bearing even date therewith, the company assigned the whole of the property and assets in and upon the premises of the club, No. 134, Piccadilly, London, together with all the interest of the company in the same, to certain trustees. It was provided that the trustees should not interfere with the management of the club until default in observance by the company of the covenants and conditions of the debenture bond, but upon such default they might enforce the debenture and take possession of and realise the said property and assets for the benefit of the debenture-holders. By various transfers the debenture bond became vested in July, 1912, in the defendant C. F. Chapman, who was and remained the sole debenture-holder of the company. On May, 1913, an order was made on the petition of a creditor for winding-up the company. The official receiver as liquidator proceeded to wind-up the company, but the only moneys he received were certain sums paid by members of the company as guarantors under the memorandum of association to the amount of £88 7s. 2d., and, after paying thereout the costs, charges, and expenses of the liquidation, the liquidator had in hand only the sum of £1 8s. In his statement of affairs the liquidator stated that the number of members of the company had been 1,683. On July 23 and 24, 1913, the trustees of the debenture trust deed sold the company's interest in their lease of the club premises and the contents of the club premises, and realised, after payment of the expenses of the sale, sums amounting to £1,473 10s. 3d. This amount was received by the defendant or on his behalf, but was much less than the sum still owing to him upon the security of the debenture. The plaintiff corporation, to whom rates to the amount of £127 4s. 5d. were due in respect of the occupation by the plaintiff company of the club premises up to July 23, 1913, claimed this sum from the defendant Chapman, and ultimately they, together with the company as joint plaintiffs, brought this action, claiming a declaration that the amount of the rate had priority over the claims of the defendant as debenture-holder, and was payable out of the property comprised in such debenture, and payment by the defendant to the plaintiff corporation or, alternatively, to the plaintiff company of the amount in question.

By s. 209 of the Companies (Consolidation) Act, 1908 [s. 319 (1) (a) (i), (5) (b), (6), of Companies Act, 1948] :

> "(1) In a winding-up there shall be paid in priority to all other debts (a) all parochial and other rates due from the company at the date hereinafter mentioned [i.e., the date of the winding-up order] and having become due and payable within twelve months before that date.... (2) The foregoing debts shall (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and (b) in the case of a company registered in England or Ireland,

so far as the assets of a company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under a floating charge created by the company, and be paid accordingly, and of any property comprised in or subject to that charge. (3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts shall be discharged forthwith so far as the assets are insufficient to meet them."

E. W. Hansell for the plaintiffs.
Harold S. Simmons for the defendant.

YOUNGER, J. (after stating the facts).—It is not disputed that the rate is due by the company; that it was properly made; that it is properly apportioned; and that the sum of £127 4s. 5d. is the sum which is due from the company. It is also not in substance disputed, and it has been proved in evidence, that the liquidator has in fact received a sum of £88 17s. 2d., and has applied it in payment of the costs and expenses of the winding-up, leaving in his hands a balance of £1 8s. and no more. The sum which he has so applied was not covered by the security, but was paid by the guarantors to the liquidator in respect of their liability under the memorandum of association. The result, therefore, is that, with the exception of £1 8s., the liquidator has no moneys now in hand. He accordingly in the name of the plaintiff company, the corporation being joined as co-plaintiffs, sues the defendant for that sum of £127 4s. 5d., which he says remains payable by him.

Whether it is so payable depends upon s. 209 of the Companies (Consolidation) Act, 1908, which provides in sub-s. (1):

"In a winding-up there shall be paid in priority to all other debts (a) all parochial or other local rates due from the company at the date hereinafter mentioned."

It is, as I have said, conceded that the amount due under that description by this company to the plaintiff corporation was £127 4s. 5d. The section goes on to provide in sub-s. (2):

"The foregoing debts [of which the debt in the present case is one] shall. . . . (b) in the case of a company registered in England or Ireland, so far as the assets of a company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under a floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge."

Subsection (3) is:

"Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them."

The effect of these subsections read together appears to me to be that the costs and expenses of the winding-up of a company are payable out of the assets of the company not comprised in a debenture security before any payment is made by the liquidator in respect of what are called "preferential debts." But that if the general assets after discharge of the costs and expenses of the winding-up are insufficient for the payment of these preferential debts, then to the extent to which they are insufficient the amount must be made up by a debenture-holder whose security creates a floating charge upon the property of the company to the amount necessary out of the property comprised in or subject to that charge. In other words, the effect of the statute appears to me to be, and to be intended to be, that whether a creditor be an unsecured creditor or a debenture-holder whose only security is that of a floating charge, he is equally to be postponed in respect of any claim against the assets of the company until those preferential debts have

A been paid, but that the free general assets must be exhausted before recourse is had to the secured assets.

The defendant in this case is the only debenture-holder. He has, as he admits, received as the result of a sale of which he approved this sum of £1,473 10s. 3d., which is more than sufficient to meet the plaintiffs' claim in this action. The liquidator has only the sum of £1 8s. of general assets in his hands to meet this B claim, and accordingly it appears to me that, subject to a technical question to which I will refer in a moment, he is liable to make good, as being moneys in his hands realised from property comprised in or subject to his floating charge, the amount which is claimed in this action, less the sum of £1 8s.

It is, however, suggested by counsel for the defendant, that the action is improperly constituted. First, as regards the defendant, he said that the only C person who would be a proper defendant to the action, assuming it to be otherwise maintainable, would be the trustees who had in fact received the moneys and had parted with them, and that in an ordinary case it would be extremely inconvenient, if not impossible, after the money had been distributed among debenture-holders, to make all of them defendants in an action like the present—which goes to show that this defendant is not the proper defendant. I quite agree that in an ordinary D action it would be desirable that the receiver for the debenture-holders, or the trustees, or whoever were the persons who actually conducted the sale, should before distribution of the money among the debenture-holders be required to make good a prior claim, such as this, and in nine cases out of ten they would do so; in fact, they would dispose of the money to others at their own risk in view of a claim which they must be taken to have notice of merely from the E existence of the liquidation. But in the present case it seems to me that it would have been the merest formality to have made the trustees defendants to this action because they were bound to, and I have no doubt did, act in all respects under the direction of the defendant who was the sole debenture-holder, and because the defendant as the sole debenture-holder admits that he has in point of fact received from the trustees more than enough to meet this claim out of the property F comprised in the security. Accordingly, it appears to me that in this case the defendant is the proper defendant, and the only reasonably proper defendant to the action.

It is also said that there is a difficulty as to who the plaintiff ought to be. It is said that the plaintiff company is not the proper plaintiff because the money is not due to it, and also that the plaintiff corporation is not a proper plaintiff G because there is no obligation on the part of the defendant to make payment of the money to them. That point is taken quite frankly with a view to leading to the conclusion that in a case like the present there can be no proper plaintiff, and, therefore, there can be no proper claim. I do not think that the Act has reduced the court to such a position. It appears to me that in the present case either the plaintiff company or the plaintiff corporation is the proper H plaintiff. Perhaps they are not both necessary plaintiffs, but one or other of them is the proper plaintiff to make the claim in this action. My own view would be that in an ordinary case the company is the proper plaintiff, because where there are more claimants than one in respect of preferential payments, the Act provides that these payments are to be made and distributed rateably among the claimants. I think it would be extremely inconvenient in I nearly every case for anybody other than the company, suing, of course, at the instance of the liquidator, to be plaintiff, because when money is received it then becomes the duty of the liquidator in the liquidation to make the rateable division which is prescribed by sub-s. (2) (a) of s. 209. The other alternative would be that each of the preferential claimants would be entitled to maintain a separate action against persons in the position of the defendant here, and, if that were done, it would be burdensome on the claimants and equally burdensome on the defendant, especially in cases where the plaintiffs would be working men or persons of that class who would be making claims in respect of wages or payments

of that nature. Therefore, in my view, the proper plaintiff is the plaintiff company; and the company have come here to make the demand. But if it were not, the only other possible person to come is the plaintiff corporation, and it is here also. Under these circumstances I have come to the conclusion that the plaintiffs are entitled to the relief which they seek. I think the proper form of order will be that, the plaintiff company not objecting, the £127 4s. 5d., less the £1 8s., be paid by the defendant direct to the plaintiff corporation. The defendant must pay the costs of the action.

Solicitors: *Allen & Son*; *George R. Cran.*

[*Reported by* N. TEBBUTT, ESQ., *Barrister-at-Law.*]

BLOUNT *v.* BLOUNT

[KING'S BENCH DIVISION (Scrutton, J.), November 24, 1915]
[Reported [1916] 1 K.B. 230; 85 L.J.K.B. 230; 114 L.T. 176]

Income Tax—Annuity free of income tax—Covenant to pay "free of income tax"—Right to deduct tax—Validity of covenant—Income Tax Act, 1842 (5 & 6 *Vict.*, *c.* 35), *s.* 103.

A divorced husband covenanted to pay his wife by way of permanent maintenance "the quarterly sum of £62 10s. (free of income tax)," but deducted income tax from such quarterly sums,

Held, the covenant to pay "free of income tax" was void under the Income Tax Act, 1842, s. 103, and the deduction was lawful. *Re Barry's Trusts, Barry* v. *Smart* (1), [1906] 2 Ch. 358, followed.

Notes. The Income Tax Act, 1842, s. 103, was substantially re-enacted by the Income Tax Act, 1952, s. 506 (2).

Distinguished: *Brooke* v. *Price*, [1916] 2 Ch. 345; *Re Shaw, Smith* v. *Shaw*, [1918] P. 45. Followed: *Re Peck's Settlement, Peck* v. *Hamilton*, [1921] 2 Ch. 237; *Burroughes* v. *Abbott*, [1921] All E.R.Rep. 709. Distinguished: *Booth* v. *Booth*, [1922] 1 K.B. 66. Applied: *Re Gretton's Indenture, Hood* v. *Lady Byron*, [1922] All E.R.Rep. 796. Considered: *Smith* v. *Smith*, [1923] All E.R.Rep. 362. Applied: *South American Stores (Gath and Chaves)* v. *I.R.Comrs.* (1926), 12 Tax Cas. 905. Referred to: *Taylor* v. *Taylor*, [1937] 1 All E.R. 464; *Jaworski* v. *Institution of Polish Engineers in Great Britain, Ltd.*, [1950] 2 All E.R. 1191.

As to avoidance of agreements for payment without deduction of tax, see 20 HALSBURY'S LAWS (3rd Edn.) 366 et seq.; and for cases see 28 DIGEST (Repl.) 177 et seq.

Cases referred to:

(1) *Re Barry's Trusts, Barry* v. *Smart*, [1906] 2 Ch. 358; 75 L.J.Ch. 676; 95 L.T. 165; 54 W.R. 621; 50 Sol. Jo. 615, C.A.; 28 Digest (Repl.) 179, 727.

(2) *Viscount Frankfort de Montmorency* v. *Viscountess Frankfort de Montmorency* (1845), 4 Notes of Cases, 280; 28 Digest (Repl.) 177, 712.

(3) *Warren* v. *Warren* (1895), 72 L.T. 628; 43 W.R. 490; 11 T.L.R. 355; 13 R. 485; 28 Digest (Repl.) 178, 715.

(4) *Countess of Shrewsbury* v. *Earl of Shrewsbury* (1906), 22 T.L.R. 598; 28 Digest (Repl.) 179, 728.

Action.

The plaintiff obtained a decree absolute for the dissolution of her marriage and presented a petition for permanent maintenance. The court ordered the late husband, the defendant, to pay "permanent maintenance at and after the rate of £62 10s. per quarter (free of income tax)." The parties then voluntarily entered into a deed whereby the defendant covenanted with the plaintiff "to pay to her during her life the quarterly sum of £62 10s. (free of income tax)." The defendant deducted income tax from a quarterly payment. The plaintiff sought to recover the amount deducted. The defendant claimed that the deduction was valid inasmuch as the covenant to pay in full was void by s. 103 of the Income Tax Act, 1842, and he was empowered to make the deduction by virtue of s. 102 of the Income Tax Act, 1842, and s. 40 of the Income Tax Act, 1853.

A. M. Latter for the plaintiff.

du Parcq for the defendant.

SCRUTTON, J.—The plaintiff brings this action to recover from the defendant £62 10s. due under an indenture dated Dec. 22, 1910, less £41 13s. 4d. already paid. The defendant denies that he is liable to pay the difference, and, alternatively, brings into court three-quarters of it and says that that is enough to satisfy any sum for which he is liable.

It appears that the parties had matrimonial differences, and that on Dec. 22, 1910, the president of the Probate, Divorce, and Admiralty Division made an order, by consent, that the defendant should pay to the plaintiff "permanent maintenance at and after the rate of £62 10s. per quarter (free of income tax)," and the sum referred to in the writ in this action is one of these quarterly payments. Counsel are agreed that no action could be brought in the King's Bench Division on an order in these terms. The King's Bench Division does not enforce by action orders for maintenance made in the Probate, Divorce, and Admiralty Division. Possibly that was the reason why the parties voluntarily entered into the deed of Dec. 22, 1910, by which the defendant, in pursuance of the agreement and in consideration of the premises, one of which was the order, covenanted with the plaintiff "to pay her during her life the quarterly sum of £62 10s. (free of income tax)." The existence of that covenant enables the plaintiff to sue in the King's Bench Division, and to get the benefit of the summary procedure under R.S.C., Ord. 14 if the £62 10s. were not duly paid, and this action is brought on that covenant.

The answer made to the action is that the court cannot enforce the covenant because it is null and void. There are two sections of the Income Tax Act, 1842, which bear on the matter. By s. 102 it is provided that on all annual payments whatever arising out of, inter alia, "a personal debt or obligation by virtue of any contract" a certain sum, which in 1842 was sevenpence, and has since become much larger, "shall be charged for every twenty shillings of the annual amount thereof," and the person "so liable to make such payment" is authorised to deduct the tax out of the annual payment when the sum is payable out of profits or gains brought into charge by virtue of the Act of 1842, and in case the sum is payable out of profits and gains not brought into charge under the Act of 1842 the Customs and Inland Revenue Act, 1888, s. 24 (3) provides that the person paying is not merely authorised to but "shall" deduct the tax out of the annual payment. It is not suggested that the payment in this case is a payment out of profits not brought into charge, and, therefore, the person paying has a right to deduct the tax but need not do so; and it is quite clear that s. 102 of the Act of 1842 does not in any way interfere with the operation of the covenant in this indenture, because there is nothing in the section to prevent a person who is authorised to deduct the tax from binding himself by contract not to deduct it. As an illustration of that one may refer to the case, not of a contract, but of a will, by which an annuity may be left free of income tax so that the annuity is paid in full and the income tax is paid by the person liable to pay the annuity.

The defendant in this case relied on s. 103, the material part of which is in the last sentence:

> "All contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."

The words "such deduction as aforesaid" refer to the words at the beginning of the section, "any deduction authorised to be made by this Act," and refer, among other things, to the deduction authorised to be made by s. 102. The words "or other annual payment aforesaid" refer to the earlier part of s. 103, in which one finds the words "any annuity or annual payment mentioned . . . in the next preceding clause," which again take one back to s. 102. The contention of the defendant is that this covenant to pay £62 10s. free of income tax is a covenant for the payment of an annual payment arising out of a contract without allowing the deduction of income tax within the meaning of s. 103, and the covenant is, therefore, "utterly void." It is said for the plaintiff that this is not really a covenant to pay £62 10s. free of income tax; it is really a covenant to pay £62 10s., plus such sum, representing the income tax, as, when deducted from the principal sum, would leave a clear £62 10s. for the particular quarter, and it is said that I ought to try to construe the covenant so as to make it legally possible. I am disposed, particularly in view of what I am going to say at a later stage, to give to the covenant, if possible, such a meaning as would give effect to the intention of the parties, but I find very great difficulty in saying that a contract to pay £62 10s. free of income tax means a contract to pay an entirely different sum which, after deducting the income tax, will leave £62 10s. I am inclined to agree with counsel for the plaintiff, that if the covenant had expressed the latter view, it would have been a valid covenant, but it is, in my opinion, impossible to extract that meaning from the language which the parties have used, and, therefore, unless the other point urged on behalf of the plaintiff is good, it appears to me that this contract comes within the exact words of s. 103, and that the covenant in the deed is void.

The other point is this: it is said that for the purpose of construing the covenant one must have regard to the order for permanent maintenance made by the Divorce Court and to the practice of that court in accordance with which the order was made, and that by so doing one arrives at the conclusion that a deduction of income tax has in fact been made, not from the sum of £62 10s., but from some other sum, and that in these circumstances the covenant does not come within the protection in s. 103. In order to decide this point, it becomes necessary to consider the authorities to which I have been referred. The question of the right to deduct income tax from permanent alimony was very carefully considered by Sir Herbert Jenner Fust in 1845 in *Viscount Frankfort de Montmorency* v. *Viscountess Frankfort de Montmorency* (2). In that case there had been a divorce and an order for the payment of £800 a year as permanent alimony. The question then arose whether the sum was to be paid free of income tax. The court laid down that, according to the then practice of the court in fixing the amount of permanent alimony, the gross income of the husband was taken and the income tax which he would have to pay was deducted, and the net income then arrived at was then divided between the husband and the wife in varying proportions according to the case, with the result that from each pound which was to go to the wife or was left to the husband there had been in fact a deduction for income tax, and Sir Herbert Jenner Fust pointed out that the effect of the procedure of the court at that time was that as income tax had already been deducted from the husband's income,

> "it would be the height of injustice to call upon the wife to pay the tax on the sums she receives, for that would be making her pay it twice over."

In 1895 *Warren* v. *Warren* (3) came before KEKEWICH, J. In that case an order had been made by the Divorce Court that the husband should pay to the wife an annuity of £700, and a deed was entered into whereby the payment of the £700 was secured. There were no words either in the order or the deed saying that the annuity was to be paid free of income tax. KEKEWICH, J., took the view that the annuity, being payable under a deed, was governed by the law relating to deeds, and that from the payments made under the deed income tax could be deducted. *Viscount Frankfort de Montmorency* v. *Viscountess Frankfort de Montmorency* (2) does not appear to have been brought to the attention of the learned judge; but in *Re Barry's Trusts* (1), the same question came again before him, and his attention was then called to *Frankfort's Case* (2). In *Re Barry's Trusts* (1) there was no order of the Divorce Court. There was a voluntary deed of separation with a reference to a very distinguished leading counsel to determine the amount of the wifes' alimony, and he named a figure. Nothing was said in the deed as to the alimony being "free of income tax," and the question came before the Chancery Division whether the deduction of income tax was or was not justified. KEKEWICH, J., said that the point was directly covered by his previous decision in *Warren* v. *Warren* (3). He referred to the facts in *Frankfort's Case* (2) and said ([1906] 1 Ch. at p. 772):

> "If I had a case of that kind before me, I should certainly follow it without hesitation."

I do not follow how he could have had a case like that before him unless there was a deed, in which case the point which I am now considering would not arise. Then he says (ibid.):

> "It may be that the rule is not applicable to a covenant—to an obligation by contract. It may be that an entirely different rule is applicable to a case where there is an order of the court, which is made in invitum, and to a case where the obligation is contractual."

He also said—which, of course, was of great importance in that case—that there was no evidence as to how the arbitrator had arrived at the figure, and it appears that the Registrar of the Probate Division had told the learned judge that there was no settled practice on this point, so that he was not able, from the materials before him, to know whether or not income tax had or had not been taken into account. He, therefore, dealt with the matter, as he had done in *Warren* v. *Warren* (3), as being a question of debt which was governed by the provisions of the Income Tax Act, 1842, relating to covenants in deeds. The case went to the Court of Appeal, and the court treated the matter as too clear for argument. VAUGHAN WILLIAMS, L.J., said that the practice of the court as to alimony did not touch the case in the slightest degree; but, as KEKEWICH, J., in the court below had said there was no practice, I do not quite understand what that means. The Court of Appeal seemed to have thought that KEKEWICH, J., was right in dealing with the matter on the basis that a deed, although it arose out of matters in the Divorce Court, was governed by the ordinary law as to deeds by the provisions of the Income Tax Act, 1842, as to deeds.

Lastly, I was referred to *Countess of Shrewsbury* v. *Earl of Shrewsbury* (4), which was not a case arising out of proceedings in the Divorce Court, but a case where a voluntary deed of separation had been entered into, by which the husband undertook to pay to the wife an annual allowance "clear of all deductions." KENNEDY, J., having read the judgments in *Re Barry's Trusts* (1), *Frankfort's Case* (2), and *Warren* v. *Warren* (3), felt himself bound by those decisions and concurred with them, and treated them as making it clear that there was an obligation to deduct the tax in such a case as that. He said the contract

> "fell within ss. 102 and 103. He was not satisfied that the contract would have been void under s. 103 if in some way the plaintiff had come into possession of £4,000 a year after complying with s. 102."

I think that the result of these decisions is that when there is a covenant in a deed for payment of maintenance it must be construed as a deed which is subject to the provisions of the Income Tax Acts as to deeds, without regard to the practice of the Divorce Court, and the authorities appear to justify me in holding—and I think I am bound by the decision of the Court of Appeal in *Re Barry's Trusts* (1) to hold—that if this deed is one which provides for the payment of the instalments in full without allowing the deduction of income tax—and, in my opinion, it is such a deed—it comes within the prohibition of s. 103 of the Income Tax Act, 1842.

An order of the Divorce Court does not seem to me, as at present advised, to come within the section, and I think it is quite possible, if proceedings are taken for the enforcement of the order before the learned President of the Divorce Division, that the defendant, who is able to rely in this action on the provisions of s. 103 as justifying the deduction of income tax in spite of the language of the covenant, may not be able to rely on that section as an answer to an application for the enforcement of the order. It is, I think, to be regretted that one may have an action in one division of this court and a proceeding in another division on substantially the same question which may have a different result; but I think the fault does not lie with the courts, but with the advisers of the parties who were not satisfied with the remedies they might have for the enforcement of the order of the Divorce Court.

The result is that I hold that in this action, based on the covenant, the plaintiff is not entitled to rely on the provision in the deed, and the defendant is entitled to deduct the quarter's income tax which he has deducted. The defendant in fact had deducted a year's income tax, but he does not now contend that he is entitled to deduct more than a year's income tax for one quarter, and he has paid into court three-quarters of the amount claimed with a denial of liability; strictly speaking, the plaintiff would be entitled to be paid the costs up to the time of payment in, and the defendant would have the costs subsequently incurred; but I do not like these complicated taxations, and particularly in view of the prospect, which I think very likely, that these proceedings may turn out to be quite futile. In giving judgment for the defendant, as he has paid enough into court, and the plaintiff fails as to the remaining £4 5s. 2d., I do so without costs.

Judgment for defendant.

Solicitors: *Lewis & Lewis; Henry Mossop & Syms.*

[*Reported by* Wilfrid Price, Esq., *Barrister-at-Law.*]

R. *v.* CLERK OF THE PEACE FOR MIDDLESEX

[KING'S BENCH DIVISION (Avory, Rowlatt and Shearman, JJ.), May 13, 1914]

[Reported [1914] 3 K.B. 259; 83 L.J.K.B. 1773; 111 L.T. 579; 79 J.P. 7]

Compulsory Purchase—Land subject to mortgage—Injurious affection—Right of mortgagee to compensation for injurious affection of adjoined lands not acquired—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, *c.* 18) *ss.* 18, 49, 108–114.

Where a mortgagee has a mortgage upon certain lands with a power of sale and the lands are compulsorily taken under statutory powers the mortgagee is entitled under the general provisions of the Lands Clauses Consolidation Act, 1845, to compensation both for the value of the lands taken and also for the injurious affection of his adjoining lands not taken. In such case the mortgagee is an "owner" within the meaning of the Act, and there is no provision in ss. 108 to 114, which relate to lands subject to mortgage, that deprives him of his right to claim in respect of injurious affection of his lands not taken.

Notes. As to the compulsory purchase of lands subject to mortgage, see 10 HALSBURY'S LAWS (3rd Edn.) 213–217; and for cases, see 11 DIGEST (Repl.) 287–288. For the Lands Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 890.

Case referred to:

(1) *Cowper Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153; 58 L.J.Q.B. 597; 38 W.R. 209; 5 T.L.R. 395; sub nom. *Essex* v. *Acton District Local* Board, 61 L.T. 1; 53 J.P. 756, H.L.; 11 Digest (Repl.) 143, *229*.

Also referred to in argument:

Hill v. *Great Northern Rail. Co.* (1854), 3 Eq. Rep. 324; 24 L.J.Ch. 212; 24 L.T.O.S. 332; 1 Jur.N.S. 102, 3 W.R. 39; 11 Digest (Repl.) 189, *556*.

Martin v. *London, Chatham and Dover Rail. Co.* (1866), 1 Ch. App. 501; 35 L.J.Ch. 795; 14 L.T. 814; 12 Jur.N.S. 775; 14 W.R. 880, L.C.; 11 Digest (Repl.) 287, *1931*.

Cooke v. *L.C.C.*, [1911] 1 Ch. 604; 80 L.J.Ch. 423; 104 L.T. 540; 75 J.P. 309; 9 L.G.R. 593; 11 Digest (Repl.) 188, *542*.

Holt v. *Gas Light and Coke Co.* (1872), L.R. 7 Q.B. 728; 41 L.J.Q.B. 351; 27 L.T. 442; 37 J.P. 20; 11 Digest (Repl.) 138, *204*.

Pile v. *Pile, Ex parte Lambton* (1876), 3 Ch.D. 36; 45 L.J.Ch. 841; 35 L.T. 18; 24 W.R. 1003, C.A.; 11 Digest (Repl.) 288, *1936*.

Rule Nisi for a certiorari to quash an inquisition.

The rule called upon the Temperance Permanent Building Society to show cause why a writ of certiorari should not issue directed to the clerk of the peace for the county of Middlesex to remove into the King's Bench Division an inquisition, verdict and judgment had and taken before the sheriff of the county on Feb. 13, 1914, touching the claim to the amount of purchase money and compensation made by the Temperance Permanent Building Society against the London Electric Railway Co. for the purchase of the society's estate and interest in certain lands and hereditaments described in the schedule to the notice to treat of Feb. 14, 1913, given by the company to the society, and for the injurious affection of other lands described in the schedule. The rule was obtained at the instance of the London Electric Railway Co. The facts as appearing on affidavit were as follows: Pursuant to their statutory powers contained in the London Electric Railway Act, 1912, with which were incorporated the Lands Clauses Acts, the London Electric Railway Co. (herein called "the company") served upon the claimants on Feb. 15, 1913, a notice to

treat dated Feb. 14, 1913, stating that the company required to purchase and take under the Act the lands and hereditaments described in the schedule thereto and delineated on the plan thereto annexed, and that the company were willing to treat with the claimants for the purchase of the same, and as to the compensation to be made to them for the damage that might be sustained by them by reason of the execution of the works authorised by the Act. The notice had reference to twenty houses known as Nos. 109 to 147 (inclusive—odd numbers only) Brondesbury Villas, in the parish of Willesden. The company were empowered by their Act to require the houses and thereon to construct a railway to be worked by electrical power. The houses were situate upon a strip of land abutting on the north side of the London and North Western Railway Co.'s main line. The claimants claimed to be entitled as mortgagees in possession with a power of sale to these houses, Nos. 109 to 147 (odd numbers) for various terms of years under four mortgages executed in their favour by one Davis. The first of these mortgages comprised the houses Nos. 109 to 119; the second, the houses Nos. 121 to 127; the third, the houses Nos. 129 to 135, and the fourth, the houses Nos. 137 to 147. These mortgages comprised no other houses. The claimants were also mortgagees in possession with power of sale of certain other lands and hereditaments known as Nos. 114 to 144 (even numbers), Brondesbury Villas, under mortgages executed in their favour by Davis, and these mortgages comprised the last-mentioned houses only (namely, the even numbers). These houses were held by Davis under separate and distinct leases from the houses Nos. 109 to 147 (odd numbers). The claimants claimed £13,411 in respect of the value of their leasehold interest in the houses Nos. 109 to 147 (odd numbers); and they also claimed £2,953 as damage by reason of the severing of the houses Nos. 109 to 147 (odd numbers) from the even number houses or otherwise injuriously affecting such houses. The houses Nos. 109 to 147 (odd numbers) were situate on the south side of the road: and the houses Nos. 114 to 144 (even numbers) were situate on the north side and were opposite to and faced the houses taken by the working of the railway authorised by the Act.

The inquiry was held before the under-sheriff of the county and a special jury. Counsel for the claimants stated that there was due to them upon the mortgages on Nos. 109 to 147 (odd numbers) over £11,000, and they claimed in respect of their interest in such houses a sum in excess of £11,000; and the claimants also claimed a sum in excess of £2,600 for damage done to the houses Nos. 114 to 144 by the execution of the works and the working of the railway authorised by the Act. The company's counsel contended that the claimants could only claim as mortgagees under ss. 108 to 114 of the Lands Clauses Consolidation Act, 1845; that the case did not come within s. 112 of that Act and that the claimants could not claim compensation for injurious affection to the houses Nos. 114 to 144 owing to the working of the railway, but were only entitled to claim the value of their interest in Nos. 109 to 147 (the odd numbers). It was agreed that the jury should make separate assessments in respect of the two sets of houses. Evidence was called at the inquiry not only as to the value of the claimants' interest in the houses Nos. 109 to 147, but also as to the damage to the houses Nos. 114 to 144, which were situate on the north side of the road and faced the houses taken by the working of the railway authorised by the Act and the removal by the company of the houses Nos. 109 to 147 and the consequent increase of noise to the houses Nos. 114 to 144 from the existing London and North-Western Railway Co. There was no evidence of any damage or injurious affection to the Nos. 114 to 144 by the construction of the works authorised by the Act. The jury returned a verdict of £8,258 as the value of the claimants' interest in the houses Nos. 109 to 147, and £1,680 as the compensation to be paid in respect of the damage to the houses Nos. 114 to 144. No objection was taken as to £8,258 awarded by the jury in respect of the claimants' interest in the houses taken which were the odd numbers; but objection was taken to that part of the verdict which awarded as compensation the sum of £1,680 for injurious affection of the houses which were the even numbers and which were not taken, and it was submitted that the claimants were not entitled to the £1,680

awarded in respect of the even numbers, and the application was for a writ of certiorari to set aside that portion of the verdict of the jury which awarded the sum of £1,680 in respect of the even numbers.

The rule was granted on the following grounds: (i) That the claimants being mortgagees of Nos. 109 to 147 (odd numbers) could only claim compensation under ss. 108 to 114 of the Lands Clauses Consolidation Act, 1845, and under those sections they could only claim for the value of their interest in the houses taken, and could not claim compensation in respect of damage to houses Nos. 114 to 144 (even numbers) of which they are mortgagees under different and distinct mortgages. (ii) That there was no evidence of any damage or injurious affection to Nos. 114 to 144 (even numbers) by the construction of the works. (iii) That there was no evidence of any damage or injurious affection to Nos. 114 to 144 (even numbers) by the construction of the works for which apart from the company's statutory powers, an action could have been maintained against the company by the claimants; and (iv) that the verdict for the sum of £1,680, as it awarded and included compensation for damages to the Nos. 114 to 144 for which, apart from the company's statutory powers, no action could have been maintained against the company by the claimants and also damage by reason of the working of the railway, was wrong as a matter of law and was in excess of jurisdiction.

Sir Edward Clarke, K.C., and *Micklem*, K.C., (*Courthope-Munroe* and *William Clarke* with him) for the claimants.

Roskill, K.C., and *F. K. Archer* (*Macassey*, K.C., and *Tyldesley Jones* with them) for the London Electric Railway Co.

AVORY, J.—In my opinion this rule must be discharged. The ground upon which it was granted, and the ground on which it has been argued before us, was that a series of sections of the Lands Clauses Consolidation Act, 1845, beginning with s. 108, and, for the present purpose, ending with s. 112, forms a complete code dealing with the rights of mortgagees in a case where land, the subject of the mortgage, is being taken compulsorily by a public authority like a railway company. I believe I am stating quite fairly the point, when I say that that is the whole point—that these sections form a complete code exhausting all the rights of mortgagees in such circumstances. On the other hand, it is said that these sections are only supplemental to the ordinary rights of owners as defined by the Lands Clauses Consolidation Act in s. 3, namely, that "owner" shall be understood to mean

> "any person . . . who, under the provisions of this or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking."

It is said in answer to this rule that these mortgagees are "owners" within the meaning of this Act; that they have the rights conferred upon owners by s. 19 supplemented by s. 49. That is the real point which we have to determine here. In my opinion, apart from any question which affects this particular case, these particular mortgages of the land on both sides of the road having been consolidated, apart from that question altogether I prefer to rest my judgment upon the footing that there has been no consolidation, that there have been merely mortgages of the land on both sides of the road, and that there has been a finding that the land has in fact been injuriously affected, and on that footing I come to the conclusion that the provisions in s. 108 and s. 110 do not exclude the right of these mortgagees as owners to claim and recover compensation for the injurious affecting of the lands which have not been taken. It appears to me that ss. 108 to 112 are mere provisions enabling the promoters, the undertakers, to deal in a convenient way with mortgagees if they choose to avail themselves of those provisions; and I cannot believe that the effect, as suggested, of s. 108 is that in such a case as the present if the railway company chose to pay off the mortgage upon the land upon one side of the road, the land which they proposed to take, they could by taking that step thereby deprive the mortgagee of the rights which he has already

acquired as soon as the notice to treat is given, the right to compensation as an owner under ss. 18 and 49 of the Act. Upon that short ground I think that the contention which has been put forward in support of the rule fails.

ROWLATT, J.—I agree. The point taken in support of the rule is one which would certainly have very extraordinary results if the claimants were to fail merely because we have here mortgagees who have a number of mortgages. I do not think it matters for this purpose for the application of the *Cowper Essex Case* (1) whether the claimants have come under one title or under several titles, or whether the mortgages are consolidated or not. The claimants have mortgages on all these houses. Some are taken, and the others are injuriously affected. In those circumstances if the houses were unmortgaged there could be no question, and it is not questioned, that the undertakers would have to pay for the value of the houses taken and also pay for the injurious affection of the houses which are not taken. The owner would receive all that compensation in respect of the property all of which is, as a security, in the hands of the mortgagees. It certainly startles one very much to find it suggested that in some way or other the mortgagees are to fail to collect all that compensation which their mortgagor could have collected in respect of the mortgaged property, and one looks with distrust upon any argument which leads to that result. It seems to me that the Lands Clauses Consolidation Act has not interfered in the least with the rights of a mortgagee in this respect. It ought to be remembered that the cases have long ago shown that if the undertakers deal with a mortgagor and pay him compensation and incur the expense of a compensation inquiry as between themselves and the mortgagor, they are still subject to its being said at the last moment by the mortgagee that that does not affect him in the least, that his rights are not touched and that he would get an injunction against them and stop them from carrying out their undertaking unless they paid the value of the land to him in the first instance. If there were any surplus over, the mortgagee would, of course, have to account to the mortgagor. It seems to me that if and so far as recourse is to be had in any case to those sections of the Act which specially deal with mortgages, the language of those sections themselves is wide enough to enable the mortgagee to do what the mortgagees in this case are doing. Taking s. 110 and the group of sections which begin with these words: "And with respect to lands subject to mortgage, be it enacted as follows"—s. 110 says: "If any such mortgaged lands shall be of less value than the principal," and so on, then they are to be valued or compensation is to be assessed in the usual way. I see no reason at all why the words "any such mortgaged lands" in that section should not include mortgaged lands which have been injuriously affected, just as much as mortgaged lands which have been taken. If that is so, then there is no difficulty at all in the case. If that section is the appropriate section to apply in any case, then it seems to me that the mortgagee can get the value of the injurious affection of the lands as well as the value of the lands taken; and the same result would follow under s. 112. It has been suggested that a difficulty arises under s. 108, because it is said that under s. 108 the undertakers can pay off the mortgage on a piece of land taken, and that that undermines the whole position of the mortgagee within the Cowper Essex doctrine; and because he has been paid off he ceases—it is said—to be in the position of having lands taken and other lands held therewith which have been injuriously affected. I think the answer given by counsel for the claimants is quite obvious. The lands still are taken and the mortgagee's interest has been expropriated under the Act, and his lands held with the lands injuriously affected have been taken within the *Cowper Essex Case* (1), although they have been taken under s. 108, just as much as if it had not been a case between mortgagee and mortgagor. For these reasons I agree that the rule should be discharged.

SHEARMAN, J.—I am of the same opinion. I think this application was launched by the promoters with the laudable object of protecting themselves if they

could by getting a valid receipt once and for all in respect of this particular claim. As I understand it both the mortgagees in possession and the mortgagor sent in claims for the injurious affection of part of this land, and the railway company are naturally desirous of not being harassed by a second claim, but of getting a perfectly good receipt as regards the first claim, and in order to enable them to get a good receipt they say that they are willing to pay the mortgagor but they say that they are not bound to pay the mortgagee. In support of that contention they raise the argument that ss. 108 to 113 of the Lands Clauses Consolidation Act, are compulsory upon the promoters with regard to any claims to mortgaged land. In my opinion, that contention is wrong. First of all, I think we can infer that from the language of those sections themselves. They are a group of sections, and are headed "Lands subject to mortgage." Section 108 begins with the words "It shall be lawful for the promoters of the undertaking to purchase or redeem the interest of the mortgagee." That seems to me to point to a power given to the promoters at their option, and not to be a section which deprives a mortgagee, who is in equity an owner of the property, of any rights he might have in equity. Section 109 is tacked on to s. 108 by the words: "If in either of the cases aforesaid." Section 110 does not allude to mortgaged lands generally, but to "such mortgaged lands," which I understand are the mortgaged lands referred to in s. 108. Section 111, again, says, "Upon such payment or tender as aforesaid," and s. 112 says, "If a part only of any such mortgaged lands be required." Section 113 begins with the words, "If upon payment or tender to any such mortgagee," and then, in s. 114, which is the last of the group, there is a proviso, "Provided always, that in any of the cases hereinbefore provided with respect to lands subject to mortgage." The whole of the language there used seems to me to provide a group of sections which gives a certain optional power to the promoters, of which they are at liberty to avail themselves, if they think fit, and I think that the general scheme of the Act also points in the same direction. I agree that one of the difficulties of promoters under this Act is that there are no provisions in the Act when the entire interest in the property is grouped in a number of different people for the promoters to call for one assessment of value once and for all, leaving the different people who share the different interests to divide the total sums between themselves. It would, no doubt, be more advantageous for the promoters if such a power existed, but I do not think it is to be found within the sections of this Act.

The result is that the promoters are put under an onerous obligation, but people who compulsorily acquire property must not complain at being put under onerous obligations, one of which is that they may be called upon to assess the value of different interests at different times. That may be found in various sections of the Act. Section 18, with regard to serving notices to treat, says that a notice shall be sent to all the parties interested in such lands. When we turn to s. 38, with regard to claims, it says that the promoters are to state in the notices what sum they are willing to give for the interests in such lands, and when we come to s. 49, which is another section to which we have been referred, with regard to the inquiry before a jury, it says that the jury are to deliver their verdict separately for the sums of money to be paid for the purchase of the lands, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen. I think it is quite clear that parties who have different interests are entitled to come up at different times and have those interests assessed; but I think in a case where a mortgagee whose mortgage is larger than the value of the property is likely to prove, the difficulty of the promoters is rather an illusory one. Once the mortgagee, who can give a perfectly good title, has come up and has had the entire interest both for compensation for the lands taken and for injurious affection to his rights under the earlier sections of the Act, I do not think in practice that the promoters are likely to be harassed by the mortgagor, because it is quite clear that the interest which is left in him is illusory and they are not likely to be troubled again with a second claim, although it is impossible under the section of the Act, as I read the Act, that they can prevent it from being made. I think

this application was launched with a laudable desire to get a protection for the promoters which the Act does not afford them. In my judgment, those sections of the Act, which are in question, are not compulsory sections; they are merely optional sections, and therefore this application fails.

Rule discharged.

Solicitors: *Bircham & Co.*; *Shaen, Roscoe, Massey & Co.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

LEAVETT *v.* CLARK

[King's Bench Division (Lord Reading, C.J., Avory and Low, JJ.), May 7, 1915]

[Reported [1915] 3 K.B. 9; 84 L.J.K.B. 2157; 113 L.T. 424; 79 J.P. 396; 31 T.L.R. 424; 13 L.G.R. 894; 25 Cox, C.C. 44]

Fishing—Offence—Taking fish in private waters—"Fish"—Winkles—Larceny Act, 1861 (24 *& 25 Vict., c.* 96), *s.* 24.

By s. 24 of the Larceny Act, 1861, it is provided "Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having the right of fishing therein, shall be guilty of a misdemeanour; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justices shall seem meet: provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall by angling between the beginning of the last hour before sunrise and the first hour after sunset unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned shall, on conviction before a justice of the peace, forfeit and pay" a penalty.

The appellant was picking up winkles on mud flats at a place in a tidal river within the limits of an exclusive fishery enjoyed by the Maldon Corporation by virtue of a grant before Magna Charta. Some of the winkles were picked up on land after the tide had receded, and some were taken from the water. Upon an information being laid against the appellant under the above-named section, the justices were of opinion that a winkle was a fish within the meaning of the section and convicted the appellant. On appeal it was contended that the term "fish" should be confined to vertebrates, and that in any case the section only applied to fish taken by angling.

Held: dismissing the appeal, that the court were bound by the decision in *Caygill* v. *Thwaite* (1) (49 J.P. 614), and must hold that a winkle was a fish, and that the section was not confined to the case of fish caught by angling.

Notes. As to larceny of fish, see 17 Halsbury's Laws (3rd Edn.) 315–317; and for cases, see 25 Digest 31. For the Larceny Act, 1861, see 5 Halsbury's Statutes (2nd Edn.) 727.

Case referred to:

(1) *Caygill* v. *Thwaite* (1885), 49 J.P. 614; 33 W.R. 581; 1 T.L.R. 386, D.C.; 25 Digest 32, *303*.

Also referred to in argument:

Maldon Corpn. v. *Woolvet* (1840), 12 Ad. & El. 13; 4 Per. & Dav. 26; 9 L.J.Q.B. 370; 113 E.R. 714; 25 Digest 56, *490*.

Case Stated by the justices of Maldon. The appellant, Harry Levitt, was summoned under s. 24 of the Larceny Act, 1861, upon an information charging him that he did on a certain date—namely, Dec. 2, 1913, unlawfully take otherwise than by angling certain fish, to wit, winkles, then being in a certain water, to wit, the river Blackwater, in which the corporation of Maldon had a private right of fishery. The following facts were admitted or proved on the hearing of the information: (i) The respondent, Clark, was the fishery bailiff of the Maldon Corporation. (ii) On Dec. 2, 1913, the appellant Leavett together with four other men were found picking up winkles. (ii) The place where the winkles were being picked up was known as Goldhanger Spit, which is situate in a creek of the tidal river Blackwater. (iv) Goldhanger Spit is within the limits of an exclusive fishery enjoyed by the corporation of Maldon. (v) The exclusive fishery is enjoyed by the Maldon Corporation by virtue of certain Royal Charters, the first of which dates from 1155. (vi) The place in question where the winkles were picked up is a mud flat in the bed of the river about halfway between high and low water marks, and it was practically low water at the time when the appellant and his companions were found there. (vii) The mud flat gradually slopes towards the channel of the river, and the receding tide leaves rills or small creeks by means of which the water left by the tide drains into the river. (viii) The receding tide also leaves pools of water, or "panholes" as they are called locally. Winkles are found in the rills or panholes and also in and under the weeds and on the mud. On behalf of the appellant it was contended that a winkle, especially in view of the fact that it cannot be taken by angling, was not a fish within the meaning of s. 24 of the Larceny Act, 1861, and also that the rills and panholes from which the winkles were taken were not water to which the Maldon Corporation had a private right of fishery. The justices, however, held that a winkle was a fish, and that the rills and panholes were water in which the corporation had a private right of fishery. They therefore convicted the appellant and fined him 2s. 6d., together with 2s. 6d. costs, but stated a case in the point of law. The Case Stated first came before the Divisional Court on July 17, 1914, but it was sent back to the justices in order to obtain a finding on their part whether the winkles were picked up on land after the tide had receded or whether they had been taken in the water. The justices found that at the time and place charged the appellant took winkles from the water in the rills and panholes as well as from under the weeds and from the mud.

A. W. Ganz (*E. H. Tindal Atkinson* with him) for the appellant. The proviso contained in s. 24 of the Larceny Act, 1861, that the enacting part of the section was not to apply to persons angling at certain named times, made it clear that the fishing was restricted to those fish which could be taken by angling. Winkles were certainly not such fish. They were not fish within the meaning of the section at all. Molluscs were not included in the section, and this was shown by the reference made to oysters in s. 26 of the Act. When it was intended to include molluscs and crustaceans under the heading of fish in any statute, the statute clearly stated so. Thus in s. 3 of the Thames Conservancy Act, 1894, it was provided: "The word 'fish' includes oysters and shellfish, and also the spawn, brood, and fry of fish, oyster and shellfish." Again, by s. 14 of the Sea Fisheries Regulation Act, 1888, the definition section:

"The expression 'sea fish' shall not include salmon as defined by any Act relating to salmon, but, save as aforesaid, shall mean fish of all kinds found in

the sea, and shall also include lobsters, crabs, shrimps, prawns, oysters, mussels, cockles, and other kinds of crustaceans and shellfish."

These statutes demonstrated that molluscs and crustaceans were not to be included as fish unless the Act in question defined them as such, and this the Larceny Act, 1861, most certainly did not. The meaning, therefore, which was to be applied to the word "fish" was that which would be applied by educated persons. In scientific language the term "fish" was limited to vertebrate animals having gills throughout the whole of their life, and did not include molluscs and crustaceans: (see OXFORD ENGLISH DICTIONARY). It was in this sense that the legislature must be presumed to have used the word, as speaking in the language of educated people. It was not for the court to extend the meaning. The Larceny Act, 1861, was a penal statute and must be strictly construed. If winkles were included in the term "fish," then the statute might be made to apply to other things which were never contemplated at all. *Caygill* v. *Thwaite* (1), in which crayfish were held to be fish within the section, was wrongly decided. That was a case of trespass, and the arguments were unconvincing. In that case MATHEW, J., said (49 J.P. at p. 614): "It is, perhaps, difficult to give any definite reason except that crayfish are fish." This expression of the learned judge seemed to imply that he had taken a wrong view as to the etymology of the word. It was generally admitted that the word crayfish was derived from or was a corruption of the French écrevisse, and the introduction of the word "fish" into the latter part of the word had nothing to do with fish at all. Under the circumstances the court ought not to hold itself bound by that decision. But even if the court held that winkles were included in the term fish, these particular winkles were not taken in any "water" within the meaning of the language of s. 24. The rights of the Maldon Corporation were confined to the flowing water of the river. The justices had found where the winkles were picked up, and the rills or panholes which were left when the tide went out were not the water in which the corporation had a private right of fishery.

C. E. Jones for the respondent. The case was important to the Maldon Corporation, as they cultivated the winkles in the place where they were taken. The word "fish" as used in s. 24 was not to be restricted to its scientific meaning, but was to be applied in its popular sense, that is, as meaning all animals living in water. The proviso to the section did not restrict its general application. There was no ground for suggesting that because an extended definition was given in the Acts of 1888 and 1894, which had been referred to on behalf of the appellant, the term was to be restricted in the construction of the Act of 1861. This case was covered by the decision in *Caygill* v. *Thwaite* (1), and the decision of the justices on that point was correct. As to the second point, the rills were none the less water over which the private rights of fishery extended because they existed in small detached parts when the tide had receded. They were still portions of the tidal river Blackwater over which the corporation enjoyed their private rights of fishery.

LORD READING, C.J.—When this came before the court as originally stated by the justices there was no finding as to whether the winkles which were found in the possession of the appellant had been taken by him from any water in which the Maldon Corporation had a private right of fishery. The case was, therefore, remitted to the justices in order to ascertain the facts upon this particular point. It is now stated, and the justices have found, that some of the winkles were picked up on land after the tide had receded, and some were taken from water in which the corporation had a private right of fishery, the evidence being that they were taken out of the rills or panholes left by the receding tide. The question which now remains for our decision is whether, under all the circumstances of the case, the conviction can stand.

The first point is whether winkles are fish within the meaning of s. 24. Speaking for myself, I must confess that I am still just as much puzzled to-day as I was on the former occasion. In the absence of any authority upon the subject, I should be inclined to hold that winkles are not fish. But the matter is not open for us. We are bound, I think, by the decision of the court in *Caygill* v. *Thwaite* (1), where it was held that a crayfish was a fish within the meaning of the section which is now under consideration. With the greatest respect for the learned judges who decided that case, I must say that I do not find that the reasoning is very convincing, and even MATHEW, J., stated that he found it difficult to give any reason for his conclusion, "except that crayfish are fish." It is not open to us, however, to question the decision in that case, as it is binding upon us; and if crayfish are fish, then winkles are also fish. We have been invited to read the general words in the section as being limited by the reference to angling which is contained in the proviso. I do not think that we are entitled to do so. The consequence is that I am of opinion that we cannot say that the word "fish" is limited to fish taken by angling, and this appears to be the true view on referring to other sections of the Act which give the owners of a private right of fishery special rights in the case of anglers.

The remaining question to be decided is whether the rills or panholes are "water" within the meaning of the section. That is a question of fact for the justices, and in view of their finding it is not for us to say that the winkles were not taken from water. For the reasons which I have given I am of opinion that the conviction must be affirmed and the appeal dismissed.

AVORY, J.—I agree, but I do so with great reluctance, and solely upon the ground that for the last thirty years the law has been assumed to be that which was laid down in *Caygill* v. *Thwaite* (1). That decision is binding upon us. But for that case I should most certainly have held that winkles picked up from a mud flat were not fish taken from water within the meaning of s. 24 of the Larceny Act, 1861.

LOW, J.—I also agree. The justices have found that winkles are fish. We are asked to reverse their finding, and to say that shellfish are not included in the word "fish" as used in s. 24 of the Act of 1861. Personally I cannot see why shellfish should not be regarded as fish. I am of the same opinion as my Lord that there is no limitation in the meaning of the general words in the enacting part of the section by the reference to angling which is made in the proviso. The question as to whether the winkles were taken in "water"—"in any water" to quote the exact words of the section—is one entirely for the justices. There is a finding of fact by them upon this point, and we cannot interfere with it.

Appeal dismissed.

Solicitors: *Doyle, Devonshire & Co.*, for *Jones & Son*, Colchester; *Beaumont, Son & Rigden*, for *F. H. Bright*, Maldon.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

Re GEIGER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), October 23, 26, November 6, December 10, 1914]

[Reported [1915] 1 K.B. 439; 84 L.J.K.B. 589; 112 L.T. 562; 59 Sol. Jo. 250; [1915] H.B.R. 44]

Bankruptcy—Costs—Taxation—Right of bankrupt to appear and take part—All creditors paid—Trustee—Employment of solicitor—No committee of inspection—Need to obtain authority of Board of Trade—Unauthorised appointment of solicitor—Effect on subsequent proceedings.

Where all creditors have been paid and the only person really interested in the taxation of costs is the bankrupt an order should be made permitting him to appear and take part in the taxation.

By s. 22 (9) of the Bankruptcy Act, 1883 [now s. 20 (10) of the Bankruptcy Act, 1914]: "If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade." Although the word "may" is used in this subsection, if there is no committee, the trustee must obtain the authority of the Board to do those things which a committee could direct or permit, e.g., the employment of a solicitor. The fact that there is no committee does not give the trustee an unlimited discretion in such a matter, nor can a sole creditor sanction any matter which would require the sanction of the committee if there were one.

The unauthorised appointment of a solicitor to act for the trustee is not a "formal defect" or an "irregularity" within s. 143 of the Act of 1883 [s. 147 of the Act of 1914] so as not to invalidate consequent proceedings. Costs incurred by solicitors so appointed **held** not to be payable out of the bankrupt's estate.

Notes. Followed: *Re Salmon, Ex parte Official Receiver*, [1916] 2 K.B. 510; *Re Yeatman, Ex parte Yeatman*, [1916] 1 K.B. 780. Distinguished: *Re Yeatman*, [1916] 1 K.B. 461. Referred to: *Re Bulmer, Greaves* v. *I.R.Comrs.*, [1937] 1 All E.R. 323.

As to powers and duties of trustees in bankruptcy and committees of inspection, see 2 HALSBURY'S LAWS (3rd Edn.) 379 et seq.; and for cases see 4 DIGEST (Repl.) 226 et seq. For Bankruptcy Acts, 1883 and 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 303, 321.

Cases referred to:

(1) *Re Nash & Sons, Ex parte Crofton, Craven and Worthington*, [1896] 1 Q.B. 13; 65 L.J.Q.B. 65; 73 L.T. 477; 44 W.R. 112; 12 T.L.R. 16; 40 Sol. Jo. 13; 2 Mans. 503, D.C.; 4 Digest (Repl.) 219, *1969*.

(2) *Re Marsh, Ex parte Marsh* (1885), 15 Q.B.D. 340; 54 L.J.Q.B. 557; 53 L.T. 418; 34 W.R. 620; 2 Morr. 232, C.A.; 4 Digest (Repl.) 566, *5018*.

(3) *Re Duncan, Ex parte Duncan*, [1892] 1 Q.B. 331; 65 L.T. 681; 40 W.R. 159; 36 Sol. Jo. 45; 8 Morr. 297; 4 Digest (Repl.) 216, *1936*.

(4) *Re Duncan, Ex parte Official Receiver*, [1892] 1 Q.B. 879; 61 L.J.Q.B. 712; 66 L.T. 508; 40 W.R. 409; 8 T.L.R. 412; 36 Sol. Jo. 330; 9 Morr. 61, C.A.; 4 Digest (Repl.) 219, *1967*.

Appeal from an order made by the Divisional Court in Bankruptcy (HORRIDGE and LUSH, JJ.).

The following statement of the facts is taken from the judgment of SWINFEN EADY, L.J.: Frank Geiger was adjudicated bankrupt on April 3, 1914, on the petition of Partridge, a creditor for £941 7s. 7d. Partridge was the bankrupt's

only creditor. The bankrupt's wife, Mrs. Caroline Geiger, died on Dec. 7, 1913, and under her will the bankrupt became entitled to property worth nearly £20,000. In any case it was much more than sufficient to enable him to pay his debt and all costs and obtain an annulment of the bankruptcy. After some correspondence, on Jan. 21, 1914, £941 7s. 7d. was paid out of the wife's estate to the trustee as the amount of the petitioning creditor's debt, and on Jan. 30, 1914, the further sum of £558 12s. 5d. (making together £1,500) as a deposit in respect of costs, and on Feb. 3, 1914, the executors of Mrs. Caroline Geiger gave to the trustee an undertaking in writing to pay out of her assets any further sum which might be necessary to provide for payment in full of any debts, interest (if any), and costs of the bankruptcy. On April 7, 1914, an order was duly made annulling the bankruptcy.

The question arising on this appeal has reference to the costs incurred in the bankruptcy. When the bankrupt had come into property sufficient to secure the annulment of the bankruptcy, his solicitors evinced an anxiety to keep down costs as much as possible. On Feb. 28 they wrote objecting to the trustee appearing by counsel on the application to annul, and stating that their client would object to bearing the expense of it. On April 24, 1914, his solicitors wrote to the trustee's solicitors asking when they expected to carry in their costs for taxation, saying that they should require a copy of them on the usual terms. They also asked when the trustee intended applying for his remuneration to be fixed, saying they would require to be present on the application, and meantime asking what he claimed. Not receiving any answer to that letter, they wrote again on April 29, asking for a reply. They were then informed that the costs had been carried in some time ago and had been taxed by the registrar, and that the trustee's remuneration had been fixed some months ago, and that no further application to the court would be necessary. There are two allocaturs for costs of the trustee: one dated Mar. 12, 1914, for £218 10s. 5d, and the other dated April 29, 1914, for £27 1s. 10d. On May 7 the amount of the taxed costs was paid by the Board of Trade. On May 11 the bankrupt's solicitors wrote to the trustee's solicitors that they were instructed to take proceedings to re-open the matter. They added:

> "Knowing, as of course you did, that our client had all along claimed the right to tax your costs, and to a voice in the settlement of the amount of the trustee's remuneration and his expenses, and that you never gave us a hint that such right was questioned, we are surprised that you and the trustee should have thought fit to proceed as you did, without any notice to Mr. Geiger or ourselves. The suggestion that the person or persons who have to pay the trustee's remuneration and costs are not to have a voice in the amounts proper to be allowed, appears to us to be most unreasonable, and is one that cannot possibly be maintained."

On May 18 the applicant gave notice of an application in the county court to re-open the matter, but the registrar refused the application. On appeal, the Divisional Court took a different view and said that the matter must go back to the registrar to be fully inquired into and dealt with. Various questions which arise were referred to. HORRIDGE, J., drew attention to the fact that the creditor consisted of one gentleman who appointed himself to the committee of inspection, and then purported to fix the remuneration of the trustee and to give authority to the trustee to employ solicitors, and that when the question of taxing the solicitor's costs came before the registrar in the first instance, a letter from the Board of Trade (dated June 25, 1908) was produced saying that where there was one creditor only, he could exercise the functions of the committee of inspection. LUSH, J., said that, having regard to the authorities, it was clear that a bankrupt was a person who under some circumstances ought to have leave to attend the taxation of costs, and if there could be a case in which the bankrupt ought to have leave this certainly was one, as the bankrupt was the only person concerned in the question, first of all, whether any costs were payable—which involves the

question whether the solicitors were properly employed—and, secondly, in the question of the amount of costs. The trustee now appeals from the decision of the Divisional Court, referring the matter back to the registrar that the whole question may be re-considered by him.

Clayton, K.C., and *Tinsdale Davis* for the trustee.
Gore-Browne, K.C., and *Frank Mellor* for the bankrupt.
Hansell for the Board of Trade.

Cur. adv. vult.

Dec. 10, 1914. The following judgments were read.

LORD COZENS-HARDY, M.R.—The facts in this case are stated so fully and accurately by SWINFEN EADY, L.J., in his judgment that I propose to confine myself to the questions of law which arise for our determination.

It is the settled practice not to allow a bankrupt to intervene in or take part in the bankruptcy proceedings, unless there are circumstances which justify a special order in his favour. That there is jurisdiction to make such an order is settled: *Re Nash & Sons, Ex parte Crofton, Craven and Worthington* (1) and *Re Marsh, Ex parte Marsh* (2). Where, as in the present case, all creditors have been paid and the only person really interested in taxing the costs is the bankrupt, it seems to me obviously just that such an order should be made in his favour. This was the view of the Divisional Court, and I think their decision was right.

There is, however, a further and important question which was not decided in the Divisional Court, although it was referred to. There was only one creditor who proved in the bankruptcy. On April 23, 1913, at a general meeting of creditors a resolution was passed purporting to appoint Mr. F. C. Lewis general proxy for the sole creditor, the committee of inspection, with power to fix the trustee's remuneration. This was plainly invalid, as was pointed out by the Board of Trade in their letter of May 6, which is as follows:

> "Sir,—Re Geiger.—With reference to your letter of the 25th ult. with inclosure, I am directed by the Inspector-General in Bankruptcy to inform you that, having regard to s. 22 of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, s. 20 (2)], a committee of inspection cannot consist of less than three members. I am to add that the creditor can, of course, give sanction to any matter requiring the sanction of the committee of inspection."

Meetings of "Mr. F. C. Lewis, 'Committee of Inspection,'" were from time to time held. On April 23 it was resolved that the trustee

> "be and he is hereby sanctioned to employ Messrs. Munns and Longden as his solicitors in terms of specific resolutions to be passed by the committee of inspection from time to time, with authority to employ counsel as and when instructed by the trustee, the trustee not to be personally liable for costs in any way."

On Jan. 9, 1914, a meeting of the committee of inspection was held, and it was resolved as follows:

> "That on the amount of all assets realised by the trustee a commission of 10 per cent. be and is hereby voted to the trustee as a remuneration, with a further remuneration of £2 10s. per cent. to be paid upon the amounts to be distributed in dividends."

All these proceedings were in direct conflict with the provisions of s. 22 (9) of the Bankruptcy Act, 1883 [now s. 20 (10) of Act of 1914], which enacts that where there is no committee of inspection the Board of Trade are to do any act or give any direction which might be done or given by the committee if there had been one. By s. 57 (3) [s. 56 (3) of Act of 1914] the permission of the committee of inspection is required to the employment of a solicitor; and by s. 15 (3) of the Act of 1890 [s. 83 (3) of the Act of 1914], such sanction must be obtained before

A the employment. And similar observations apply to the remuneration of the trustee under s. 72 (1) [s. 82 of Act of 1914], although the remuneration need not be fixed before appointment.

In my opinion, there was no retainer of Messrs. Munns and Longden, and their bill of costs cannot be taxed as against, or paid out of, the bankrupt's estate. They may or may not have a claim against the trustee personally. The view expressed B by the Board of Trade in their letter of May 6 that the sole creditor can, of course, give sanction to any matter requiring the sanction of the committee of inspection is, in my opinion, wrong. It is contrary to the express language of s. 22 (9) [see note supra]. Moreover, in principle it is impossible to maintain the proposition. The statute is full of provisions recognising the fiduciary position of members of a committee of inspection and imposing restrictions upon their powers, none of C which would apply to a sole creditor.

Then it is contended that this is a "formal defect" or "irregularity" within s. 143 [s. 147 of the Act of 1914], and that the retainer ought not to be invalidated. In my opinion, this is by no means a formal matter. Parliament has enacted that a solicitor shall not be entitled to be paid unless the sanction required is given before the employment, and that a subsequent sanction will avail nothing. The D prior sanction is substance and not form. In my opinion, it is not necessary to go through the form of allowing the bankrupt to attend the taxation. He would at once raise the point of no retainer, and that point would be fatal. The proper order will be to declare that the necessary permission to employ solicitors was not obtained, and that the two sums of £218 0s. 5d. and £27 1s. 10d. already paid out of the estate to the solicitors must be disallowed to the trustee and the allocaturs E may be rescinded. The trustee must pay the costs of the appeal and also the costs in the county court and in the Divisional Court.

KENNEDY, L.J.—There are two questions to be dealt with in this case.

The Divisional Court, upon the application of the bankrupt, has decided in substance that it was right that the matter of the taxation of the costs of the trustee F in bankruptcy should go back to the registrar of the county court of Surrey, holden at Kingston, in order that the taxation should be re-opened, and that leave ought to be given to the bankrupt to attend the taxation. The first question which this court has had to consider is the propriety of that decision. I agree entirely with the judgments of the Master of the Rolls and Swinfen Eady, L.J., that that decision ought to be upheld for the reasons which they give. The bankrupt had G no statutory right to be present at the taxation of the costs of the trustee, but the registrar, or, on appeal, the court, may in a proper case and in special circumstances give him leave to attend, and the special circumstances do exist in the present case.

The second question raised before us is, in my judgment, a more difficult one. By s. 22 (1) of the Bankruptcy Act, 1883 [s. 20 (1) of Act of 1914], the creditors H "may" (not "must") appoint a committee of inspection. If they do appoint a committee of inspection it must consist of not less than three members. Under s. 57 [s. 56 (3) of Act of 1914] it is for the committee of inspection, if appointed, to authorise the trustee, if they think proper, to employ a solicitor and generally to take such steps as they may approve in the administration of the bankrupt's estate in reference to the matters specified in that section. If there is no com- I mittee of inspection, s. 22 (9) [s. 20 (10) of Act of 1914] applies. That section is worth referring to, to make the judgment clear. It is as follows:

> "If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee."

In the present case there was only one creditor, a Mr. Partridge, who had been the petitioning creditor, and at what is called a "general meeting of creditors"

held on April 23, 1913, a Mr. Frank Crossly Lewis, special proxy for Mr. Partridge, the creditor, who, with the exception of Mr. Bowles, who represented the trustee, constituted the meeting, is recorded as having carried a unanimous resolution that Mr. Frank Crossly Lewis, general proxy for Mr. Partridge, be appointed the committee of inspection with power to fix the trustee's remuneration. This appears to me to have been a plainly improper proceeding. A quarter of an hour later a meeting of the committee of inspection is recorded. Again only Mr. Frank Crossly Lewis and Mr. Bowles, representing the trustee, were present, and resolutions (which I need not quote at length) were passed by Mr. Lewis empowering the trustee to employ Messrs. Munns and Longden as his solicitors, authorising the employment of counsel, and sanctioning certain other legal proceedings. All this appears to me to have been done in contravention of the statute, because there was no valid committee of inspection. The retainer of the solicitors was, in point of law, not a legal retainer. The trustee never had the authority to give it, which the Bankruptcy Act requires.

The hesitation which I have felt in agreeing with the other members of this court as to the consequent disallowance of the trustee's costs, although (as it is only fair to say) the Board of Trade, in answer to an inquiry suggested by this court, saw no ground for thinking them improper or excessive, has been due to the fact that the trustee in this case appears to have received from the Board of Trade a communication, dated May 6, 1913, which, though, of course, it did not influence the earlier proceedings of April 23, which I have stated, may, from and after its receipt, not unreasonably be supposed to have operated upon the mind of the trustee so as to lull any doubt in his mind as to the validity of the authority under which he was acting in incurring costs. The communication sent by the Board of Trade on May 6 in reply to his letter ran thus:

> "Sir,—Re Geiger.—With reference to your letter of the 25th ult., with inclosure, I am directed by the Inspector-General in Bankruptcy to inform you that, having regard to s. 22 of the Bankruptcy Act, 1883 [s. 20 (2) of Act of 1914], a committee of inspection cannot consist of less than three members. I am to add that the creditor can, of course, give sanction to any matter requiring the sanction of the committee of inspection."

I do not know how much of the costs were incurred after May 7, when, presumably, he received the letter from the Board of Trade, but very probably the greater part was incurred after that date. The trustee had written on April 25 to the Board of Trade in the following terms:

> "I send you herewith certified copy of the minutes of a general meeting of the creditors, held herein on the 23rd day of April, 1913, a certified copy of which has been duly placed on the file at Kingston Court.—I am, Sir, your obedient servant, T. H. W. Biddle, Trustee. P.S.—Upon the bankrupt's statements and the information before me there appears to be only one creditor."

With all respect to the official who wrote that letter, which I have read, of May 6, the advice contained in the last sentence was somewhat misleading advice. The intention of the legislature according to the language of the Bankruptcy Act appears to me to be that if there is no committee of inspection, the authority for certain acts (of which the employment of legal assistance is one) which the committee of inspection, if the creditors have appointed such a committee, may give, should be obtained by the trustee from the Board of Trade: s. 22 (9) of Act of 1883 [s. 20 (10) of Act of 1914]. It is true that the word used in the subsection is "may," but it is clear that it cannot be intended that the trustee, because there is no committee of inspection, should have an unlimited discretion, and I see no other method of his obtaining authority elsewhere in the Act of Parliament. The view of the Board of Trade, apparently, is that if there is a creditor—be it only one or more—he can give sanction to every matter which, under s. 57 [s. 56 of Act of 1914], requires the sanction of the committee of inspection. The only provision

which might lend colour to this view appears to me to be s. 89 [s. 79 (1) of Act of 1914], giving power to creditors by a resolution to override the directions given by a committee of inspection. But this is limited to the administration of the property of the bankrupt and the distribution thereof among his creditors, and no inference drawn from this can, as it appears to me, be preferred to that which arises from s. 57 read with s. 22 (9) and the absence of any provision in terms authorising a creditor or creditors to sanction the action of the trustee in respect of the matters mentioned in s. 57. If this be so, the advice of the Board of Trade in the letter of May 6, 1913, was incorrect, and the trustee had no authority under the statute for retaining a solicitor as he did. It is a minor point, but I will add that, even if as representing in his single person a "general meeting" of creditors, the one creditor could have given the requisite sanction to the trustee, he did not in fact so act, but purported by his general proxy to give the authority as a committee of inspection at a meeting of the committee of inspection.

Having regard to the fact that the Board of Trade have signified through their counsel that they find no fault with the items in the bill of costs, and to the Board of Trade's letter of May 6, 1913, I should myself have been glad if I had felt justified in applying in favour of the trustee the provisions of s. 143 of the Bankruptcy Act, 1883 [s. 147 of Act of 1914]. But the employment of a solicitor and the consequent expenditure in legal proceedings must be regarded as a serious matter, and the employment of the solicitor by the trustee being in this case, in my view, not merely irregular but ultra vires, as there was no sanction given either by a committee of inspection or by the Board of Trade, I do not think that the court would be justified in treating it as merely a "formal defect or irregularity" which can be cured under this section. I concur, therefore, in the judgment pronounced by the Master of the Rolls and in the order which he has stated.

SWINFEN EADY, L.J., stated the facts, and continued: Upon the question whether the registrar had jurisdiction to give the bankrupt leave to attend the taxation, I am of opinion that he had jurisdiction, and that it was a proper case in which to exercise the jurisdiction, and give leave. The bankrupt having received ample means to pay all his liabilities in full, he is interested in keeping the costs as low as possible. He is the person really paying the costs, and should certainly be allowed to have a voice in considering the amount proper to be allowed. He is not entitled as of right to attend; he cannot do so without special leave. But it is well settled that the court can under special circumstances give leave to a person to attend who would have no right otherwise to do so. Thus, in *Re Marsh, Ex parte Marsh* (2) the wife of the bankrupt, who had been admitted as a creditor upon his estate, obtained an order giving her leave to attend the taxation of costs, and she was heard on appeal. In *Re Duncan, Ex parte Duncan* (3) a bankrupt whose debts had been paid in full applied to the court to review the taxation, and succeeded. On appeal by the official receiver the court heard counsel for the bankrupt and dismissed the appeal. It appears from the report of the case in 8 MORRELL, 297, that leave to attend the taxation of the costs was given to the bankrupt by Mr. Registrar GIFFARD. Again, where an official receiver had no right to attend a taxation, it was held that the court could give him leave to do so. In *Re Nash & Sons, Ex parte Crofton, Craven and Worthington* (1), VAUGHAN WILLIAMS, J., said ([1896] 1 Q.B. at p. 17):

> "I have no doubt that it is within the inherent power of the court to order that he shall attend at a taxation if the court thinks it right."

I agree with the view expressed by LUSH, J., that if there could be a case in which the bankrupt ought to have leave, this was such a case.

But the further question raised in the Divisional Court has been fully argued before us—namely, whether the solicitor was properly employed. This in turn depends on the question whether one creditor can appoint himself to be the committee of inspection; or whether where there is only one creditor, he can exercise

the functions of a committee of inspection. By the Bankruptcy Act, 1883, s. 57 (3) [s. 56 (3) of Act of 1914], the trustee may, with the permission of the committee of inspection, employ a solicitor to take any proceedings or do any business which may be sanctioned by the committee of inspection. By the provision at the end of this section the permission shall not be a general permission to do all or any of the things mentioned in the section, but shall only be a permission to do the particular things or things for which permission is sought in the specified case or cases. By s. 73 (3) [s. 83 of Act of 1914] the taxing master is to satisfy himself before passing a solicitor's bill that the employment of such solicitor in respect of the particular matters out of which the charges arise, has been duly sanctioned. And by r. 117, before taxing the bill of any solicitor, the taxing officer shall require a copy of the resolution or other authority sanctioning the employment. Great care was thus taken by the legislature that bankrupts' estates should not be wasted by any unauthorised costs being allowed out of them. But the practice was made still more stringent in 1890. Section 15 (3) of the Bankruptcy Act, 1890, enacts that the sanction required under s. 73 of the principal Act, for the employment of solicitors, must be a sanction obtained before the employment, except in cases of urgency, and in such cases it must be shown that no undue delay took place in obtaining the sanction [s. 83 (3) of Act of 1914].

The question then arises: Did the trustee in the present case obtain the sanction of any committee of inspection before employing a solicitor? By s. 22 (1) of the Act of 1883 [s. 20 (2) of Act of 1914] the committee of inspection shall consist of not less than three persons. Here, what happened was that on April 23, 1913, at a general meeting convened of the bankrupt's creditors, Mr. F. C. Lewis, who was special proxy for Mr. Leonard Partridge, the sole creditor, purported to appoint Mr. Leonard Partridge the committee of inspection. He had no power to do this; nor could Mr. Partridge alone become or constitute a committee of inspection. The authority purporting to be given by Mr. Partridge as committee of inspection was of no value. There was in fact no committee of inspection. The Act then provides by s. 22 (9) [s. 20 (10) of Act of 1914]:

> "If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee."

But in this case there was no permission of the Board of Trade to the employment of a solicitor. Reliance was then placed by the trustee on s. 89 (1) of the Bankruptcy Act, 1883 [s. 79 (1) of Act of 1914], which enables the creditors to override any directions of the committee of inspection, and it was urged that, even if there had been a committee of inspection, the direction of Mr. Partridge as sole creditor would in case of conflict prevail, and he sanctioned the employment of a solicitor. The answer to this argument is that there is not any case of conflict. There was no committee of inspection, and moreover the subsection begins: "Subject to the provisions of the Act," and one of these provisions is that where there is not any committee of inspection the permission of the Board of Trade is necessary to the employment of a solicitor.

It was then urged that the absence of the necessary permission was merely a formal defect, and was covered by s. 143 of the Act [s. 147 (1) of Act of 1914]. In my opinion, the absence of the necessary permission to employ a solicitor is not a mere formal defect or irregularity, but a matter of substance and of great importance. It is a material check and safeguard against costs being necessarily or improperly incurred. The decision of the Court of Appeal in *Re Duncan, Ex parte Official Receiver* (4) shows with what strictness the provisions of the Bankruptcy Acts and rules will be enforced. Permission has been given there to incur costs not exceeding £250, and a bill of costs amounting to upwards of £500 had been incurred. It was held that as against the bankrupt's estate not more than

£250 could be allowed, although all creditors had been paid in full and the bankruptcy annulled. FRY, L.J., said ([1892] 1 Q.B. at p. 889):

> "If anything can show the importance of keeping a strict hand upon this kind of employment, this case is a proof of it."

In my opinion, it would be most inexpedient to introduce or sanction any laxity of practice in bankruptcy, or gloss over irregularities and condone them as merely "formal defects." This would be to abolish these safeguards which the Acts and Rules founded on long bankruptcy experience have set up to promote speedy and economical administration in bankruptcy. In my opinion, the proper order to make in this appeal is to say that permission has not been duly given to the trustee to employ a solicitor, and that the payment already made out of the estate must be disallowed to the trustee. It is clear that neither the payment to the solicitors of the amount of the allocaturs, nor the audit of the trustee's accounts, nor the annulment of the bankruptcy, prevents this court from having full jurisdiction to deal with the matter on the present application.

Order varied.

Solicitors: *Manns & Longden*; *Williams & James*; *Solicitor to the Board of Trade.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

ATKINSON *v.* SHAW

[KING'S BENCH DIVISION (Lord Reading, C.J., Avory and Low, JJ.), May 5, 6, 1915]

[Reported [1915] 2 K.B. 768; 84 L.J.K.B. 1748; 113 L.T. 485; 79 J.P. 376; 31 T.L.R. 421]

Coal Mine—Coal dust prevention—Systematic clearing to prevent accumulation—Clearing done so far as was reasonably practicable—Exemption from penalty—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 62 (3), *s.* 102 (3).

An information was preferred against the manager of a colliery for an offence under s. 62 (3) of the Coal Mines Act, 1911, for not causing the floor, roof and sides of the roads in the mine, they not being naturally wet throughout, to be systematically cleared so as to prevent, as far as practicable, coal dust accumulating. The justices found that the roof and the sides of the roads in the colliery had not been systematically cleared for some months past, but that it was not practicable to carry out the provision of s. 62 (3) of the Act of 1911 in this particular mine, and that the manager had done all that was reasonably practicable to prevent coal dust accumulating.

Held: the manager came within the protection given by s. 102 (3) of the Act of 1911, and he was exempt from any penalty in respect of non-compliance with s. 62 (3) of that Act.

Notes. Section 62 and s. 102 of the repealed Coal Mines Act, 1911 (16 HALSBURY'S STATUTES (2nd Edn.) 139, 161), have been replaced with amendments by s. 74 and s. 157, respectively, of the Mines and Quarries Act, 1954: 34 HALSBURY'S STATUTES (2nd Edn.) 573, 627.

Distinguished: *Charlton* v. *Jacob* (1925), 94 L.J.K.B. 855. Referred to: *Brown* v. *National Coal Board*, [1960] 1 All E.R. 108.

As to statutory defences to offences and legal proceedings relating to the statutory regulation of mines, see 26 HALSBURY'S LAWS (3rd Edn.) 630, 631; and for cases see 34 DIGEST 745.

Case Stated by justices for the county of Glamorgan.

An information was preferred by the appellant, William Nicholas Atkinson, one of His Majesty's inspectors of mines, against the respondent, Edward Shaw, for that the respondent on or about Oct. 14, 1913, being the manager of the Universal Colliery, this not being a mine the floor, roof and sides of the roads whereof are naturally wet throughout, did not cause to be systematically cleared such floor, roof and sides of the roads of the mine so as to prevent as far as practicable coal dust accumulating, conformably with the provisions of s. 62 (3) of the Coal Mines Act, 1911. At the hearing of the information it was proved or admitted in evidence before the justices: (i) That the respondent had been duly appointed pursuant to s. 2 of the Coal Mines Act, 1911, and was at all material times the manager of the Universal Colliery. (ii) That the floor, roof and sides of the roads of the Universal Colliery were not naturally wet throughout, but were of a dry and dusty nature. (iii) That danger attached to the presence of coal dust in the roads of the mine, and particularly to that which attached to the sides and roof. (iv) That the respondent had caused the floor of the roads to be systematically cleared and to be well watered. (v) That the respondent had endeavoured by means of brushing, by compressed air blowing, and by watering to clear the roof and sides of the roads from coal dust; that the brushing and compressed air blowing were abandoned by the respondent for some four or six months prior to Oct. 14, 1913, because these methods were not found to be satisfactory. (vi) That the respondent had from time to time arched considerable lengths of roadway with stone arching, but that the arching had got crushed by the natural squeeze of the ground. (vii) That watering the roof and sides in the Universal Colliery would have been dangerous and was impracticable owing to the nature of the strata, which would have been pulverised by the action of the water, and was consequently abandoned. (viii) It was admitted by the appellant as a practical man and apart from the Act of Parliament, that the adoption in the colliery of the methods of brushing or compressed air blowing, though effective in carrying out what he understood to be the meaning of the Act, would not have been effective in preventing the accumulation of coal dust, and might conceivably under certain circumstances have been dangerous.

It was contended on behalf of the respondent that sub-s. (3) of s. 62 only required him to cause the floor, roof and sides of the roads to be cleared as far as practicable, and pursuant to this contention he called evidence to show that it was not practicable to systematically clear the sides and the roof of the roads. On the other hand, it was contended by the appellant that sub-s. (3) required the respondent to cause the roof and sides, as well as the floor of the roads, to be systematically cleared, and that the words "as far as practicable" did not govern "systematically cleared," but did govern the words "so as to prevent coal dust accumulating," and that the duty imposed upon the respondent was a direct obligation and an absolute duty to systematically clear the roofs and sides of the roads in the colliery. The appellant called evidence to show that it was practicable to cause the roofs and sides to be "systematically cleared." The justices were satisfied (i) that the roof and sides of the roads in the Universal Colliery had not been systematically cleared for some months prior to Oct. 14, 1913; (ii) that it was not practicable to carry out this provision of s. 62 (3) of the Act in this particular mine. They were of opinion that the respondent had done all that was reasonably practicable under the circumstances to prevent coal dust accumulating, and they therefore dismissed the information.

The Coal Mines Act, 1911, provides, by s. 62:

"In every mine, unless the floor, roof, and sides of the roads are naturally wet throughout . . . (3) the floor, roof, and sides of the roads shall be

A systematically cleared so as to prevent, as far as practicable, coal dust accumulating; (4) such systematic steps, either by way of watering or otherwise, as may be laid down by the regulations of the mine shall be taken to prevent explosions of coal dust occurring or being carried along the roads. . . ."

Section 102 (3) provided:

B "Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control, and against the happening of which it was impracticable for him to make provision."

C *Ivor Bowen, K.C.*, and *Clement Edwards* for the appellant.
Disturnal, K.C. (*Lincoln Reed* with him), for the respondent.

LORD READING, C.J.—The appellant, one of His Majesty's inspectors of mines, laid an information against the respondent for that the respondent, being the manager of the Universal Colliery at Senghenydd, Glamorganshire, and that D mine, the Universal Colliery, not being a mine the floor, roof and sides of the roads whereof were naturally wet throughout, did not cause the floor, roof and sides of the roads to be systematically cleared so as to prevent, as far as practicable, coal dust accumulating, in accordance with the provisions of s. 62 (3) of the Coal Mines Act, 1911. By that Act of Parliament, which was an Act passed to consolidate and amend the law relating to coal mines, it was provided that in E every mine, unless the floor, roof and sides of the roads are naturally wet throughout, the floor, roof and sides of the roads should be systematically cleared so as to prevent, as far as practicable, coal dust accumulating.

In this case it was proved that the respondent had caused the floor of the roads to be systematically cleared and well watered, but although he had endeavoured by means of brushing, by compressed air blowing, and by watering, to clear the F sides and roof of the roads of coal dust, the brushing and compressed air blowing were abandoned by him for some four or six months prior to October, 1913, because it was found that these methods were not satisfactory. It is found as a fact in this case that watering the roof and sides of the colliery would have been dangerous, and that that course would have been impracticable owing to the nature of the strata, which would have been pulverised by the action of the water, and conse- G quently that course, which had been adopted for some time, was abandoned. The appellant, one of the inspectors of mines, admitted that, viewing the matter as a practical man and with knowledge and experience of mines, and of the difficulties of dealing with the accumulation of coal dust in mines, he was of opinion that the adoption in the colliery of these methods of brushing or of compressed air blowing would not be effective in preventing the accumulation of coal dust; and H he was further of opinion that they might conceivably under certain circumstances have been dangerous. I understand that to mean that if this course were pursued the result would be that the coal dust would not be prevented from being accumulated without being damped so as not to be blown about and have its particles disseminated throughout the atmosphere in the coal mine, but that it would have the contrary effect, and therefore that in his opinion it would indeed be dangerous.

I It is said, however, on behalf of the inspector that there is an obligation imposed by the Act of Parliament under sub-s. (3) of s. 62 which makes it necessary that steps should be taken however impracticable they may be or may appear to be, and, indeed, however dangerous they may be. And it is said that when once Parliament has imposed the obligation there is a duty on every person to carry it out, and that if he fails to do so a breach of the statute has been committed; that it may be that the breach is only a technical one for which a nominal fine would be imposed, but still there has been a breach of the Act of Parliament. Assuming for the moment that to carry out this obligation with reference to the

roof and sides of the mine would be more dangerous than to neglect the duty, if that were true that it would be more dangerous it would lead to a curious state of things if provisions which were imposed for the protection of the men who were working in the coal mine and for guarding as far as possible against explosions should be used to enforce the doing of acts which would increase the dangers of the mine. But on examining the Act we find in s. 102 (3) the provision that,

> "Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision."

That subsection applies to s. 62, and equally to sub-s. (3) of s. 62, and I take that to mean that the legislature was passing an Act of Parliament which was to apply to all coal mines throughout the kingdom. Coal mines vary, of course, in character, and precautions which may be quite salutary in one colliery may be highly dangerous in another. There are possibilities of such a state of things happening, as is shown apparently by the evidence in this case, and Parliament, therefore, though it imposed this obligation generally on all coal mines, said that it quite recognised that there might be cases in which it would not be possible to carry out the provisions it imposed, and therefore it has said that if the owner, agent, or manager can satisfy the justices that the contravention has happened through circumstances over which he had no control, or that it was impracticable for him to make the provisions required by the Act of Parliament, then he has not committed the offence.

On the facts of this case as found by the justices, it seems to me quite plain that they meant to find, and did find, that in this case they were of opinion that the respondent had done all that was reasonably practicable under the circumstances to prevent the accumulation of coal dust; and they thought and they found as a fact in these words that it was not practicable to carry out this provision of s. 62 (3) in this particular mine. That brings us therefore to a case provided for under sub-s. (3) of s. 102, and the justices, having come to the conclusion that it had been proved to their satisfaction that it was not practicable to carry out the provisions of the Act in this respect, were perfectly right in coming to the conclusion that the information should be dismissed. It may be under the circumstances that this is a casus omissus, and that some provision ought to have been made, upon which I express no opinion, because the facts stated in the case are not sufficiently stated to enable me to come to any conclusion with regard to it. I do not know whether in point of fact there were any means that could in any possible way be devised, and which it would be practicable to devise, to prevent the accumulation of coal dust in a colliery such as the Universal Colliery. If there are provisions to be made not to be found in this Act, they are for the legislature to make, and not for us. It is sufficient for this case to say, though I am of opinion that the inspector very properly brought this case before the justices, that on the facts as found by the justices they came to a right conclusion, and therefore the appeal must be dismissed.

AVORY, J.—I agree that this appeal must be dismissed. At first I was considerably impressed by the argument of counsel for the appellant, which appears to be the same as that presented to the justices, that the duty imposed upon the respondent was a direct obligation and an absolute duty to systematically clear the roofs and sides of the roads in the colliery. It was suggested, and at first it appeared with some force, that the words "as far as practicable" in sub-s. (3) of s. 62 do not govern the duty to systematically clear the roof and sides of the roads, but that they only govern the words so as to prevent coal dust accumulating. On further consideration I have come to the conclusion that this is a fallacious argu-

ment, and that this subsection ought really to be read as if it were in these words: As far as practicable the floor, roof and sides of the roads shall be systematically cleared of coal dust so as to prevent such coal dust accumulating. If it is read in that way, as I think it ought to be, then the findings of the justices in this case are conclusive—namely, the findings that it was not practicable to carry out these provisions of s. 62 in this particular mine, and that the respondent had done all that was reasonably practicable under the circumstances to prevent coal dust accumulating. Those findings clearly bring the respondent within sub-s. (3) of s. 102, as my Lord has pointed out. It is immaterial whether that subsection was in fact presented to the eye or to the mind of the justices at the time when they gave this decision. It seems unlikely that by accident they should have hit upon a finding which exactly brings the respondent within that subsection; but, if it is true that they hit upon that finding by accident, we are bound by it nevertheless if we come to the conclusion that that finding has brought the respondent within the protection of that subsection.

There is only one thing further I wish to add. Subsection (4) of s. 62 may possibly have an application to this particular case, and it will, of course, be for the inspector and the authorities to consider whether it has. Subsection (4) provides that such systematic steps, either by way of watering or otherwise, as may be laid down by the regulations of the mine shall be taken to prevent explosions of coal dust occurring or being carried along the roads; and I find, by turning to s. 87, which deals with the application of the general regulations, that there is power to make special regulations in the case of any particular mine, and it may be, therefore, that this is a case where special regulations may be required and may be made to prevent the danger which is aimed at by sub-s. (3) of s. 62.

LOW, J.—I agree with both the judgments which have been delivered. It especially appears to me that this is a case in which the last observations made by AVORY, J., should be very carefully considered by the authorities with the view to making special regulations if they should be of opinion that occasion has arisen for making special regulations with regard to this mine. As far as the case before us at present is concerned, it is enough to say that we are bound by the findings of the justices, which appear to have been based upon evidence, and that we have no power to review those findings.

Appeal dismissed.

Solicitors: *Treasury Solicitor*; *Bell, Brodrick & Gray*, for *C. & W. Kenshole & Prosser*, Aberdare.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

Re DEBTOR (No. 1 of 1914). Ex Parte DEBTOR *v.* PETITIONING CREDITOR

[KING'S BENCH DIVISION (Horridge, and Atkin, JJ.), March 9, 1914]

[Reported [1914] 2 K.B. 758; 83 L.J.K.B. 1176; 110 L.T. 944; 58 Sol. Jo. 416; 21 Mans. 155]

Solicitor—Retainer—Retainer to conduct action—Authority to compromise action after judgment—Assent to execution by defendant of deed of assignment for benefit of creditors.

A retainer to a solicitor to conduct an action does not include an authority to compromise the action after judgment by assenting to the execution by the defendant of a deed of assignment for the benefit of his creditors.

Notes. As to a solicitor's retainer and the limits of his authority to act for his client, see 31 HALSBURY'S LAWS (2nd Edn.) 103 et seq., and for cases see 42 DIGEST 65 et seq.

Cases referred to in argument:

Prestwich v. *Poley* (1865), 18 C.B.N.S. 806; 6 New Rep. 175; 12 L.T. 390; 144 E.R. 662; sub nom. *Pristwick* v. *Poley*, 34 L.J.C.P. 189; 11 Jur.N.S. 583; 13 W.R. 753; 42 Digest 66, *581*.

Re Newen, Carruthers v. *Newen*, [1903] 1 Ch. 812; 72 L.J.Ch. 356; 88 L.T. 264; 51 W.R. 297; 19 T.L.R. 247; 47 Sol. Jo. 300; 42 Digest 66, *582*.

Butler v. *Knight* (1867), L.R. 2 Exch. 109; 36 L.J.Ex. 66; 15 L.T. 621; 15 W.R. 407; 42 Digest 67, *585*.

Lovegrove v. *White* (1871), L.R. 6 C.P. 440; 40 L.J.C.P. 253; 24 L.T. 554; 19 W.R. 823; 42 Digest 68, *600*.

James v. *Ricknell* (1887), 20 Q.B.D. 164; 57 L.J.Q.B. 113; 58 L.T. 278; 36 W.R. 280; 4 T.L.R. 169, D.C.; 42 Digest 62, *546*.

Appeal from the county court of Oldham.

In July, 1913, the husband of the respondent, Mrs. Sharples, was knocked down and killed by a taxicab belonging to the debtor. On Aug. 7, 1913, Mrs. Sharples retained a solicitor named Challinor to take proceedings against the debtor, and the retainer was in the following form:

> "Please take the necessary proceedings on my children's and my own behalf to recover compensation for the loss of my husband through the negligence of Mr. S. through one of his employees.—Mabel Sharples.

Challinor brought the action on Mrs. Sharples' behalf and succeeded in recovering judgment for £850. Execution was then issued, but the sheriff's officer was met by a deed of assignment to a trustee for the benefit of the debtor's creditors. Mrs. Sharples had no knowledge of such a deed having been executed, but a clerk in Challinor's employment named Christian attended the meeting of creditors as representing Mrs. Sharples, but without instructions from her to do so. At the meeting Christian voted against the appointment of the trustee put forward by the debtor, and procured the appointment of his own nominee. A form of assent to the deed was subsequently sent to Mrs. Sharples, who refused to sign it and repudiated Challinor's authority to assent to it on her behalf. Mrs. Sharples thereupon instructed other solicitors, Messrs. Sharratt & Saxon to present a bankruptcy petition against the debtor, alleging, as the act of bankruptcy relied on, the execution of the deed of assignment. The petition came on for hearing in the Oldham county court, and the registrar held that the retainer to Challinor was a retainer to act for Mrs. Sharples in the course of the action, and that it did not entitle him to represent her at the meeting of the creditors, nor to acquiesce

on her behalf in the execution of the deed; and he therefore made the receiving order asked for. From this decision the debtor appealed.

Dehn for the appellant, the debtor.
Ridgway Bennett for the respondent.

HORRIDGE, J.—This is an appeal from the decision of the registrar of the county court at Oldham, granting a receiving order against the debtor.

The act of bankruptcy relied upon was, that on Dec. 18, 1913, the debtor had executed a deed of assignment of his property to a trustee for the benefit of his creditors. The act of bankruptcy as such was not denied, but it was said before the registrar that the petitioning creditor had, through her solicitor, so acted as to preclude her from taking advantage of that deed as an act of bankruptcy. The registrar believed the evidence of Mrs. Sharples, and found as a fact that she never assented to the deed of assignment, either before or after its execution. That means that her solicitor never had authority to act in the way suggested, and thus deprive her of the right to rely upon the deed. I think we are prepared to hold that if the solicitor had authority, what he did would have precluded his client from relying on the deed as an act of bankruptcy, and the only question is whether or not he had authority. The registrar believed the evidence of Mrs. Sharples. Now, the evidence of Mrs. Sharples, apart from one passage which I will refer to later, certainly negatives the contention that the solicitor had authority to act in such a way as to preclude her from taking bankruptcy proceedings. Now, does this passage, "I told him to do everything necessary to get the money," necessarily mean that she gave him authority to attend at the meeting and assent to the deed of assignment? Because I think it is necessary to clothe the solicitor with that authority, in order to clothe him with sufficient authority to act in such a way as to preclude her from relying on the deed as an act of bankruptcy. I do not think that she clothed him with that authority. I think that she merely authorised him to take the ordinary proceedings by way of execution to get the money in respect of which she had recovered judgment. Then, again, did the original retainer, dated Aug. 7, 1913, extend to authorising such conduct as was relied upon in answer to the petition in this case? [HIS LORDSHIP then read the letter of that date.] Now that retainer, to my mind, is clearly drawn with a view to Lord Campbell's Act (The Fatal Accidents Act, 1846), which gives the wife and the children a remedy against the person whose negligence caused the death of the husband. It might be that those proceedings might be taken in the county court or the High Court, but when once the proceedings were taken in the High Court in respect of the rights of the mother and children, that retainer, except for the purposes of being worked out in that action, was exhausted.

Hitherto I have been speaking entirely of questions of fact and not of law, but it has been contended before us by counsel for the debtor that the mere retainer of a solicitor in an action entitles him, after judgment, to compromise that action, and therefore entitles him to enter into an agreement with creditors in the nature of a compromise and to affect his client's position by substituting rights under a deed for her rights under the judgment. I do not think it is necessary in this case to decide whether or not a solicitor has, by virtue of his retainer, authority to compromise an action after judgment as between the parties to it. In my view, such authority would not extend even during the action to an agreement with the defendant's other creditors. The authority, I think, must be an authority to compromise as between the plaintiff and the defendant. What was done in this case was to enter into an agreement not merely between the plaintiff and the defendant, but with the other creditors also. The effect of a creditor's assent to such a deed would be to make its execution operate as an act of bankruptcy and to put other creditors who had not assented to it in the position of being able to take bankruptcy proceedings against the estate, and it would further operate to prevent the assenting creditor from taking bankruptcy proceedings. It was not

disputed by counsel for the debtor that the original retainer would not authorise the solicitor to institute bankruptcy proceedings against the defendant, and equally I do not think it could authorise him to enter into an agreement which would prevent his client from taking bankruptcy proceedings in respect of this act of bankruptcy. I cannot regard such an arrangement as a compromise of a claim in the action as between the parties, but I think that it is entering into an independent arrangement quite apart from the action and extending beyond the rights of compromise in respect of the claim between the parties, and whatever the authority might be to compromise in the action after judgment—as to which I say nothing—I do not think such authority could, in any case, extend to entering into a deed of assignment on behalf of the client, or to acting in such a way as to preclude the client from relying upon the deed entered into—to which she would not otherwise assent—as an act of bankruptcy against the defendant.

For these reasons I think the registrar's finding is one we cannot interfere with, and there is no rule of law which compels us to hold that the solicitor had any implied authority after judgment so to act as to preclude the client from presenting this bankruptcy petition. This appeal must therefore be dismissed.

ATKIN, J.—I agree. I think to succeed here the debtor would have to show that the petitioning creditor had so acted as to preclude herself from relying upon the execution of this deed as an act of bankruptcy, and in order to establish that I think that the debtor would have to show that the petitioning creditor's agent had authority in fact to do the acts which are said to estop the petitioning creditor from relying upon the act of bankruptcy. I cannot conceive that there could be ostensible authority to do such acts unless there were authority in fact to assent to them, and I think, therefore, it would have to be shown that the solicitor of the petitioning creditor had authority in fact to consent to the deed of assignment.

On the question as to whether or not there was a particular authority given to do these particular acts, I think that question is determined by the finding of fact by the registrar. I think there was evidence on which he could find there was no particular authority given, and that finding we cannot interfere with; and therefore the question remains whether or not the solicitor had general authority to enter into a compromise which involved execution of the deed of assignment. It does not seem to me to be necessary to determine whether, after judgment, a solicitor has power to compromise the judgment he has obtained for his client. I think, if he has such authority, it would not extend to such a compromise as entering into a deed of arrangment which involves entering into relations, not merely with the debtor but with the trustee and with the other creditors of the debtor, involving a mutual relation between the plaintiff, the petitioning creditor, and with persons who are strangers to the action in which the judgment was obtained. Such a contention would further involve—and this is a matter of some consequence—that the solicitor would be deemed to have authority to assent to the debtor committing an act of bankruptcy, which might alter his whole status if some other creditor chose to treat it as an act of bankruptcy. I do not think the power to compromise involves a right to assent to contracts which involve consequences such as these. I think there was no authority on the part of the solicitor to assent to the deed of assignment, and therefore I think that his client was not bound by his act, and that the registrar was right in making the receiving order.

Appeal dismissed.

Solicitors: *Bailey, Redman, & Co.*, Manchester; *Maw, Redman, & Co.*, for *Sharratt & Saxon*, Manchester.

[*Reported by* D. W. Corrie, Esq., *Barrister-at-Law.*]

BRANDON HILL, LTD. *v.* LANE

[KING'S BENCH DIVISION (Horridge and Rowlatt, JJ.), November 3, 6, 1914]

[Reported [1915] 1 K.B. 250; 84 L.J.K.B. 347; 112 L.T. 346; 59 Sol. Jo. 75]

Bill of Sale—Form—Joinder of person having no interest in chattels—Recitals stating origin of liability for which security given—Validity—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.*, *c.* 43), *s.* 9.

Husband and wife were made parties to a bill of sale and both executed it although the wife had no interest in the chattels comprised in the security and the husband alone actually assigned the chattels. The deed contained recitals stating how the liability arose in respect of which the security was given.

Held: neither the joinder of the wife as a party nor the insertion of the recitals invalidated the bill of sale under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the statutory form.

Notes. Referred to: *Westen* v. *Fairbridge* [1923] 1 K.B. 667; *Gordon* v. *Goldstein*, [1924] All E.R.Rep. 775.

As to the form of a bill of sale by way of security, see 3 HALSBURY'S LAWS (3rd Edn.) 287; and for cases see 7 DIGEST (Repl.) 55 et seq. For s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 580.

Cases referred to:

(1) *Melville* v. *Stringer* (1884), 13 Q.B.D. 392; 53 L.J.Q.B. 482; 50 L.T. 774; 32 W.R. 890, C.A.; 7 Digest (Repl.) 56, *294*.

(2) *Re Barber, Ex parte Stanford* (1886), 17 Q.B.D. 259; 55 L.J.Q.B. 341; 54 L.T. 894; 34 W.R. 507; 2 T.L.R. 557, C.A.; 7 Digest (Repl.) 56, *290*.

(3) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506; 58 L.J.Q.B. 66; 60 L.T. 114; 37 W.R. 353; 4 T.L.R. 683, H.L.; 7 Digest (Repl.) 56, *291*.

(4) *Re Simpson, Ex parte Morgan* (1876), 2 Ch.D. 72; 45 L.J.Bcy. 36; 34 L.T. 329; 24 W.R. 414, C.A.; 21 Digest 281, *964*.

(5) *Fraser* v. *Pendlebury* (1861), 31 L.J.C.P. 1; 10 W.R. 104; 21 Digest 280, *963*.

(6) *Re Storey, Ex parte Popplewell* (1882), 21 Ch.D. 73; 52 L.J.Ch. 39; 47 L.T. 274; 31 W.R. 35, C.A.; 7 Digest (Repl.) 44, *222*.

Also referred to in argument:

Saunders v. *White*, [1902] 1 K.B. 472; 71 L.J.K.B. 318; 86 L.T. 173; 50 W.R. 325; 18 T.L.R. 280; 9 Mans. 113, C.A.; 7 Digest (Repl.) 58, *308*.

Davis v. *Burton* (1883), 11 Q.B.D. 537; 52 L.J.Q.B. 636; 32 W.R. 423, C.A.; 7 Digest (Repl.) 63, *348*.

Appeal from the decision of the county court judge sitting at Birkenhead on an interpleader issue.

The plaintiffs obtained judgment in the High Court against the defendants Charles John Lane and his wife, Lily Alice Lane, and execution was levied upon certain furniture and effects belonging to the male defendant in which the female defendant had no interest. The claimants, G. H. Jones and Fred Harling, who were the grantees of a bill of sale of certain of the goods in question, took out an interpleader summons claiming the goods. The bill of sale was in the following form:

"This indenture made Dec. 23, 1913, between Charles John Lane, of . . . fruit merchant, of the first part, Lily Alice Lane, his wife, of the second part, and George Henry Jones, of . . . glover and general outfitter, and Fred Harling . . . solicitor, of the third part. Whereas by an indenture of mortgage made Jan. 10, 1913, between the said Lily Alice Lane of the first part, the said

Charles John Lane of the second part, and George Henry Jones and Fred Harling of the third part the said Lily Alice Lane and Charles John Lane for the consideration therein mentioned did, amongst other things, jointly and severally covenant with the said George Henry Jones and Fred Harling to pay to the said George Henry Jones and Fred Harling immediately and forthwith upon notice in writing so to do all moneys which during the continuance of that security the said George Henry Jones and Fred Harling shall be called upon to pay and should pay to Edward Whitley, his executors, administrators, or assigns, and also all moneys which might be paid to or advanced for or on account of the said Lily Alice Lane and the said Charles John Lane or either of them by the said George Henry Jones and Fred Harling or become owing by the said Lily Alice Lane and the said Charles John Lane or either of them to the said George Henry Jones and Fred Harling in respect or on account of or in connection with (inter alia) a policy of assurance in the Equitable Life Assurance Society of the United States numbered 1,799,135 comprising or forming the security or any part thereof intended to be affected by the now recited presents. And whereas default having been made in payment of a premium due under the said policy of assurance notice in writing was given to the said George Henry Jones and Fred Harling by or on behalf of the said Edward Whitley to pay the said premium. And whereas the said George Henry Jones and Fred Harling upon receiving the notice calling upon them to pay the said premium requested the said Lily Alice Lane and Charles John Lane to pay the same but they were unable so to do and the said George Henry Jones and Fred Harling threatened that if and when they should pay the said premium they would institute legal proceedings against the said Lily Alice Lane and Charles John Lane to enforce and compel payment thereof by the said Lily Alice Lane and Charles John Lane in pursuance of their liability to do so under the hereinbefore recited indenture. And whereas to avoid such legal proceedings the said Charles John Lane agreed at the request of the said George Henry Jones and Fred Harling that if they should pay the said premium the said Charles John Lane would give to the said George Henry Jones and Fred Harling the security hereinafter contained. And whereas in pursuance of the premises the said George Henry Jones and Fred Harling on Dec. 11 instant paid to the said Equitable Life Assurance Society the sum of £90 15s. 11d., being the amount of the said premium after deducting a dividend then due in respect of the said premium. Now this indenture witnesseth that in pursuance and consideration of the premises he the said Charles John Lane hereby assigns unto the said George Henry Jones and Fred Harling, their executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £90 15s. 11d. and interest thereon at the rate of £10 per cent. per annum, and the said Charles John Lane doth further agree and declare that he will duly pay to the said George Henry Jones and Fred Harling on June 23 next the principal sum of £90 15s. 11d. aforesaid with interest thereon in the meantime at the rate of £10 per cent. per annum from the date of these presents, and further if the said moneys shall not be so paid will pay to the said George Henry Jones and Fred Harling interest at the rate aforesaid by equal half-yearly payments on Dec. 23 and June 23 in every year on the principal moneys for the time being remaining due on this security, provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said George Henry Jones and Fred Harling for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written.—Signed, sealed, and delivered by the said Charles John Lane and Lily Alice Lane in the presence of me, W. H. Hill, clerk to Messrs. Harling, Fisher, and Houghton, solicitors."

It was contended on behalf of the judgment creditors that the bill of sale was void under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form annexed to the schedule of the Act, by reason of the fact that Mrs. Lane, who had no interest in the goods, was made a party to the bill of sale and executed it. A further point was taken that the affidavit accompanying the bill of sale did not specify the residence and occupation of the wife. The county court judge held that the bill of sale was valid, and gave judgment for the claimants. The judgment creditors appealed.

H. Simmons for the appellants, the judgment creditors.
Compston, K.C., and *W. Procter* for the respondents, the claimants.

Nov. 3, 1914. **HORRIDGE, J.,** read the following judgment: This was an appeal from the judge of the county court of Cheshire holden at Birkenhead whereby he decided in favour of the claim of G. H. Jones and Fred Harling, who were grantees under a bill of sale of goods seized by the bailiff of the Birkenhead County Court. In order to ascertain whether the decision was correct or not, we have to determine what is the true construction to be placed upon s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, which enacts that a bill of sale made by way of security for the payment of money is to be void unless made in accordance with the form in the schedule. The appellants alleged the bill of sale in question was not in accordance with the form for the following reason. The wife of Charles John Lane, the person actually assigning the chattels, was made a party and executed it, and the deed contained recitals stating how the liability in respect of which the security was given arises.

In my view the test of whether or not the bill of sale was in accordance with the form may be extracted from the decisions of *Melville* v. *Stringer* (1), *Ex parte Stanford* (2), and *Thomas* v. *Kelly* (3). In *Melville* v. *Stringer* (1) BRETT, M.R., says (13 Q.B.D. at p. 397):

> "Whatever may be thought of the wisdom of this legislation, I feel myself bound to come to the conclusion that the object of the statute was twofold; first, that the borrower should understand the nature of the security which he was about to give for the debt due from him; and, secondly, that a creditor upon merely searching the register should be able to understand the position of the borrower, and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower."

In *Ex parte Stanford* (2) BOWEN, L.J., says (17 Q.B.D. at p. 270):

> "But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect"

In *Thomas* v. *Kelly* (3) LORD HALSBURY, L.C., says (13 App. Cas. at p. 54):

> "Further, I think that s. 9 must be construed to enact not only what a bill of sale must contain, but also what it must not contain, so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the statute is not appropriate."

To deal with the form of the bill of sale in this case, the wife, Lily Alice Lane, does not in any way purport to grant the chattels in question. It was said that the deed being under seal, the recitals contained in it would operate by way of estoppel against her.

In *Ex parte Morgan* (4) and *Fraser* v. *Pendlebury* (5) it seems clear such recitals would only operate by way of estoppel when relied upon for the purpose of enforcing any right created by the bill of sale, but in this case she entered into no

contract, and I cannot see why such recitals can be used by way of estoppel against her. The true view of her being joined in the deed seems to me to be the view expressed by JESSEL, M.R., in *Ex parte Popplewell* (6), where, dealing with the son James Storey, who in no way was a grantor, he says (21 Ch.D. at p. 82): "The joinder in it of a person who had no interest is mere surplusage." I am therefore of opinion that the joining of the wife was mere surplusage in this case, and did not, within the words of BOWEN, J., in *Ex parte Stanford* (2), give the bill of sale a legal consequence or effect, either greater or smaller than would attach to it if drawn in the form which has been sanctioned, nor do I think the joining of the wife in this case would prevent the borrower understanding the nature of the security, nor a creditor who searched the register from understanding the position of the borrower. I think, within the words of LORD HALSBURY, L.C., the transaction is one in respect of which the form in the schedule is appropriate, and the addition of the wife does not in any way prevent the document being substantially in the form required by the statute. It may be truly said the recitals and the fact of the wife joining might be used as evidence of aquiescence so as to prevent her at any future time disputing the validity of the document, but I do not think that this affects the operation of the document in any way as a bill of sale so as to render it different from what it would be if it was in the exact form required by statute.

A further objection was taken that the affidavit did not set out the residence and occupation of the wife, but she was not a person making or giving the same within s. 10 (2) of the Bills of Sale Act, 1878, nor was she a grantor within s. 10 of the Bills of Sale Act (1878) Amendment Act, 1882. I do not think there was any occasion to put her residence or occupation in the affidavit. The decision of the county court judge was in my view correct and ought to be affirmed and the appeal dismissed with costs.

ROWLATT, J.—I have read the judgment of HORRIDGE, J., and agree with it.

Appeal dismissed.

Solicitors: *H. Moore*; *Harling, Fisher, & Houghton*, Liverpool.

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

WATKINS *v.* COTTELL

[KING'S BENCH DIVISION (Avory and Rowlatt, JJ.), November 4, 5, 1915]

[Reported [1916] 1 K.B. 10; 85 L.J.K.B. 287; 114 L.T. 333; 32 T.L.R. 91; 60 Sol. Jo. 404]

B

Carriage of Goods—Common carrier—Furniture remover—Special contract—Previous inspection of goods—No special stipulations as to carriage—Goods destroyed by accidental fire.

The defendant, a furniture remover, undertook to remove the plaintiff's furniture for an agreed price, having previously inspected the goods. Apart from the stipulation as to price there were no other terms regarding the removal. On the journey the furniture was destroyed by an accidental fire. In an action by the plaintiff for the loss, it was admitted that the defendant was not a common carrier, but it was contended that he was exercising a public employment of carrying goods for hire, and thereby impliedly undertook the same liability as a common carrier.

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Held: (i) in the absence of any express term in the contract rendering the defendant liable as a common carrier, the admission that he was not a common carrier was sufficient to defeat the plaintiff's claim; (ii) *Liver Alkali Co.* v. *Johnson* (1) ((1874) L.R. 9 Exch. 338) was no authority for the contention that a furniture remover who makes a special contract on each occasion after inspecting the goods impliedly undertakes the liability of a common carrier.

E

Notes. *Belfast Ropework Co.* v. *Bushell*, [1918] 1 K.B. 210.

As to the characteristics of a common carrier, see 4 HALSBURY'S LAWS (3rd Edn.) 130 et seq.; and for cases see 8 DIGEST (Repl.) 5 et seq.

Cases referred to:

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(1) *Liver Alkali Co.* v. *Johnson* (1872), L.R. 7 Exch. 267; 41 L.J.Ex. 110; 26 L.T. 805; 1 Asp.M.C. 380; affirmed (1874), L.R. 9 Exch. 338; 43 L.J.Ex. 216; 31 L.T. 95; 2 Asp.M.L.C. 332, Ex. Ch. 8 Digest (Repl.) 10, *38*.

(2) *Nugent* v. *Smith* (1876), 1 C.P.D. 423; 45 L.J.Q.B. 697; 34 L.T. 827; 41 J.P. 4; 25 W.R. 117; 3 Asp.M.L.C. 198, C.A.; 8 Digest (Repl.) 18, *95*.

(3) *Scaife* v. *Farrant* (1875), L.R. 10 Exch. 358; 44 L.J.Ex. 234; 33 L.T. 278; 23 W.R. 840, Ex. Ch.; 8 Digest (Repl.) 41, *244*.

G

Also referred to in argument:

Brind v. *Dale* (1837), 8 C. & P. 207; 2 Mood. & R. 80, N.P.; 8 Digest (Repl.) 6, *13*.

Hill v. *Scott*, [1895] 2 Q.B. 713; 65 L.J.Q.B. 87; 73 L.T. 458; 12 T.L.R. 58; 8 Asp.M.L.C. 109; 1 Com. Cas. 200, C.A.; 8 Digest (Repl.) 9, *31*.

H

Electric Supply Stores v. *Gaywood* (1909), 100 L.T. 855; 8 Digest (Repl.) 6, *19*.

Appeal from the Bath County Court.

The defendant, a furniture remover, undertook to remove the plaintiff's furniture from Bath to Melksham for the sum of £2 10s. Before agreeing to remove the furniture, the defendant, in accordance with his practice, first inspected the furniture and then submitted his estimate of the cost. On the journey a fire broke out in one of the vans and destroyed some of the furniture. The plaintiff thereupon sued the defendant for the loss. It was admitted that the defendant was not a common carrier, but it was contended that as he was prepared to carry anyone's goods subject to a special price being arranged in each case according to the nature of the furniture and the distance it was to be taken, he was carrying on the public employment of a carrier, and was consequently under the same liability as a common carrier. Apart from the fixing of the price, no other special term was entered into. It was found as a fact at the trial that the fire was not caused

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by any negligence on the part of the defendant, nor was it caused by the plaintiff improperly putting any inflammable articles in the van. The learned county court judge gave judgment for the plaintiff, holding that the case was governed by *Liver Alkali Co.* v. *Johnson* (1), and that the defendant was liable on the ground that he was carrying on the public employment of a carrier, and was, therefore, under the same liability as a common carrier. The defendant appealed.

Bromley Eames for the defendant.
Croom-Johnson for the plaintiff.

AVORY, J.—The plaintiff in this case employed the defendant to remove some furniture from Bath to Melksham. Before undertaking the work the defendant inspected the furniture, and, having done so, agreed to remove it for £2 10s. There was no other express term of the contract. The defendant proceeded to remove the furniture, and in the course of removal, while the van was upon the road, fire from some unexplained cause broke out among the goods, causing damage to them. Thereupon the plaintiff brings this action for the loss of or injury to the goods.

It was found as a fact by the county court judge that the fire did not originate through any negligence of the defendant; but it was contended on behalf of the plaintiff that he was entitled to recover, not upon the ground that the defendant was a common carrier—that is to say, an insurer of the safety of the goods—but upon the ground that he had, in performance of this contract, incurred or undertaken the liability of a common carrier. At the trial in the county court and in the argument before us it was admitted on behalf of the plaintiff that the defendant was not carrying on the business of a common carrier. It is not suggested that there was in this case any express contract that the defendant should be liable as a common carrier, and I was disposed to think that the admission that he was not a common carrier put the plaintiff out of court. But it was contended that this defendant, although not a common carrier, had under the circumstances of this case undertaken the liability of a common carrier. In giving judgment for the plaintiff, the county court judge relied mainly on *Liver Alkali Co.* v. *Johnson* (1) as an authority which governed the matter in favour of the plaintiff.

Before turning to the judgment, I think it is necessary that one should have a clear idea of what constitutes a common carrier. The following definition in MACNAMARA ON CARRIERS BY LAND (2nd Edn.), p. 11 [see now (3rd Edn.), p. 11], is, I think, an accurate one:

> "A common carrier is a person who undertakes for hire to transport from a place within the realm to a place within or without the realm the goods or money of all such persons as think fit to employ him. To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation pro hac vice."

That being the definition of a common carrier, a "private carrier" (i.e., everyone who carries for hire who is not a common carrier) is defined in the same textbook (ibid. at p. 6) as

> "a person whose trade is not that of conveying goods from one person or place to another, but who undertakes upon occasion to carry the goods of another and receives a reward for so doing."

As I have said, I doubt whether the plaintiff in this case can succeed when once he has admitted that the defendant was not a common carrier, unless he could prove that there were express terms in this contract rendering the defendant liable as a common carrier; and it is not suggested that there were any such express terms in this agreement.

But it is suggested that there is a third class of persons who are under the liability of a common carrier, and as far as I am able to understand the suggested definition of this third class it is this—namely, persons exercising a public employment of carrying goods for hire. Counsel for the plaintiff says that although they are not common carriers, they are persons who, when they do carry goods, fall under the same liability. I doubt very much whether there is any such class as distinguished from common carriers. I will now proceed to examine the judgment of the county court judge before I deal with the authorities. Having found that the defendant is a furniture remover, he proceeds:

> "It is admitted that the defendant is not a common carrier, but it is submitted on behalf of the plaintiff that the defendant has so exercised his employment as to incur the liabilities of a common carrier, and therefore is liable, although the goods have been lost without negligence on his part."

Unless this means that he has entered into a special contract under and by virtue of which he incurs the liability of a common carrier, I doubt, as I have already said, whether there is any distinction between a man who so exercises his employment as to incur the liability of a common carrier and a common carrier. In other words, if he exercises his employment so as to incur the liability of a common carrier, in my opinion he is a common carrier. The county court judge says he relies mainly for his decision in favour of the plaintiff upon the judgment of BLACKBURN, J., in *Liver Alkali Co.* v. *Johnson* (1). BLACKBURN, J. said (L.R. 9 Exch. at pp. 340, 341):

> "the defendant . . . carried for anyone who chose to employ him, but that an express agreement was always made as to each voyage or employment of the defendant's flats, which means, as we understand the evidence, that the flats did not go about plying for hire, but were waiting for hire by anyone. We think that this describes the ordinary employment of a lighterman, and that, both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries."

The county court judge then says that he adopted that principle in the present case, but, with all respect, I do not think that the decision in *Liver Alkali Co.* v. *Johnson* (1) was really based on that ground. He then proceeds to quote the passage on which the defendant relied from the judgment of KELLY, C.B., in the Court of Exchequer, where he said (L.R. 7 Exch. at p. 269):

> "If each particular voyage had been made under a special contract containing stipulations applicable to that voyage only the case would have been different."

The county court judge says that this dictum does not support counsel for the defendant, as there is a distinction between an express agreement, which there must be in every contract and one containing stipulations applicable to the particular voyage only, and there were, in the present contract, no stipulations applicable to the particular voyage only. The stipulations were the ordinary stipulations of carriage. There was an express stipulation as regards price and therefore the present case is not brought within the dictum of KELLY, C.B., because there were no stipulations applicable to that voyage only.

I differ from the county court judge. I think there was something more important in this case than a mere stipulation as to price. There was a preliminary agreement between the plaintiff and the defendant that before agreeing to carry the goods the defendant should, in this case, as apparently in all others in the course of his business, first of all inspect the goods to see if he would undertake the work of carrying. That is, he was not a person ready to carry anybody's goods to anywhere from any place at a fixed rate, but a man who first inspected before he undertook to carry any goods at all. The county court judge says that the defendant's course of business was to accept a contract from anyone who applied for removal of furniture, subject to the estimate as to price being accepted.

In this court we have power to draw inferences such as might be drawn in the court below. I think the county court judge was drawing wrong inferences from the facts. He says the terms of business were to accept anyone's goods. There is not a particle of evidence of this. The evidence showed that the defendant himself first of all inspected the goods and exercised his discretion whether he should agree to take them or not.

The judgment is obviously based upon the *Liver Alkali Case* (1), and it is necessary, therefore, to examine that case to see whether it supports the proposition put forward on behalf of the plaintiff. I think that the view put before the court has been rather misleading owing to want of attention to the original judgment in the Court of Exchequer. It is quite clear to my mind that in the original judgment the whole court, consisting of KELLY, C.B., MARTIN, BRAMWELL, and CLEASBY, B.B., decided the case upon the ground that the defendant was a common carrier; and it is important to see what the facts were on which it was so decided. There the defendant was a flat or lighter owner, and let out his vessels for the conveyance of goods to any person who applied to him. The vessels did not ply between fixed points, but a separate bargain was made on each occasion, the customer paying a specified rate per ton—not a contract price. It is significant to note that any person could hire a vessel for the purpose of carrying goods on paying a specified rate per ton. KELLY, C.B., said (L.R. 7 Exch. at p. 269):

> "Different persons did hire them at different times, and no evidence was given of any refusal on the part of the defendant to allow any applicant to hire."

The evidence also showed that there was no contract in writing between the parties. In other words, there was no special contract applicable to the particular voyage. The arguments in the case turned entirely on the question whether the defendant was a common carrier. KELLY, C.B., in giving the judgment of the court said (ibid.):

> "I feel constrained to assent to the neat and precise argument of counsel and to hold that there was evidence that the defendant was a common carrier. Without going through all the authorities which have been referred to, it is enough to say that we have the clearest authority that 'hoymen, ferrymen, and masters of ships who carry goods for hire' are common carriers."

He then proceeds to discuss the question whether the fact that the defendant only carried for one person at a time deprived the defendant of the character of a common carrier, and he decided that it did not.

This being the decision of the Court of Exchequer, the case went to the Exchequer Chamber, and there BLACKBURN, J., gave judgment, with which the majority of the other judges concurred; and I think that the true reading of that judgment is a concurrence with the court below that the defendant was a common carrier. It is true that in the course of his judgment BLACKBURN, J., said (L.R. 9 Exch. at p. 340):

> "We have purposely confined our expressions to the question 'whether the defendant has the liability of a common carrier,' for we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him."

That passage might appear to support the plaintiff's contention in this case, but he proceeds, after stating the facts of the case (ibid. at pp. 340, 341, 343),

> "We think that this describes the ordinary employment of a lighterman, and that, both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries. . . . We think, therefore, that the judgment below was right, and should be affirmed."

BRETT, J., who concurred in the result, put his judgment on another ground. He thought the defendant was not a common carrier, but that he was liable by reason of a custom which, he said (ibid. at p. 344), was

> "a recognised custom of England . . . every shipowner who carries goods for hire in his ship . . . undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions."

In my view, the true meaning of the judgment of BLACKBURN, J., is that the defendant was a common carrier, and it does not appear to be any ground for holding that a furniture remover, who makes a special contract on each occasion for the removal of furniture, is a common carrier. It is to be noted that the view I have expressed about the true effect of that judgment has been already taken by COCKBURN, C.J., in the later case of *Nugent* v. *Smith* (2), where he said (1 C.P.D. at p. 433):

> ". . . it is obvious that as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier, the decision is no authority for the position taken in the court below, that all shipowners are equally liable for loss by inevitable accident."

However that may be, it is sufficient to say that the *Liver Alkali Co. Case* (1) is no authority for holding that a furniture remover who does not carry for all indifferently, but who makes a special contract after inspecting the goods, is a common carrier. In these circumstances, I have come to the conclusion, first, that there was no evidence that the defendant undertook or incurred the liability of a common carrier; and, secondly, that the county court judge misdirected himself in holding that he was bound by the *Liver Alkali Co. Case* (1) to decide in the way he did. The judgment must, therefore, be set aside.

ROWLATT, J.—I agree. It is admitted that the defendant was not a common carrier, but it is said that he is responsible because he had contracted on the footing of assuming the liability of a common carrier. That doctrine is traceable to *Liver Alkali Co.* v. *Johnson* (1). Now that was a case, as I understand the facts, in which the defendant was ready to carry anyone's goods at a specified rate per ton. He only carried one person's goods at a time, but no special contract was made as to the terms and conditions of carriage apart from the separate bargain as to the price. This is what KELLY, C.B., lays stress on in the Court of Exchequer in deciding that the defendant was a common carrier. He said (L.R. 7 Exch. at p. 269):

> "No doubt, if each particular voyage had been made under a special contract containing stipulations applicable to that voyage only, the case would have been different."

He means, as I understand him, that as the terms, apart from the bargain as to the price, on which the goods were to be carried were left unexpressed, the ordinary conditions which govern a contract of carriage applied.

When the case came before the Exchequer Chamber there was some difference of opinion as to the grounds on which the case should be decided. BRETT, J., took one view and BLACKBURN, J., and the majority of the court another. BLACKBURN, J., after referring to the facts, said (L.R. 9 Exch. at p. 340):

> "We think that this describes the ordinary employment of a lighterman, and that, both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries."

As I understand him, he means that a man who lets the whole of a ship at a price for a voyage to carry the goods of a particular person is not in the position of a common carrier; but that once he has made a bargain as to the price, if he says nothing as to the other terms of carriage, he is merely fulfilling the functions and so assuming the role of a common carrier. Therefore you may say that by contracting on the footing of a common carrier he incurs the liability of a common carrier, if that is a more accurate way of putting it than saying that he is a common carrier; to my mind, it is merely a matter of words. It is to be observed that when that case was considered in the Court of Appeal in *Nugent* v. *Smith* (2) COCKBURN, C.J., who presided, took the view that the *Liver Alkali Co. Case* (1) really proceeded on the footing that "the defendant was a common carrier and liable as such." But he added (1 C.P.D. at p. 433):

> "I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such a vessel or vehicle if required to furnish it."

He points out that that would be calling someone a common carrier who is not a common carrier, because he is not obliged to carry for everyone; and he goes on to say (ibid. at p. 434):

> "At all events, it is obvious that as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier, the decision is no authority for the position taken in the court below, that all shipowners are equally liable for loss by inevitable accident."

It is said by counsel for the defendant that, even if the *Liver Alkali Co. Case* (1) was not decided on the ground that the defendant was a common carrier, the doctrine that all carriers by sea are subject to the liability of a common carrier has never been applied to carriers by land—that is to say, it has never been held that a carrier by land is liable as a common carrier if he is not, in fact, a common carrier. Some cases might arise in the future in which this doctrine might be applied to a carrier by land, and I express no opinion as to whether it is restricted to carriage by sea. But we must look at this case and see whether there is any pretence for saying that this man took upon himself the role of a common carrier. It seems to me that that is a question of law. What are the words of a contract is in every case a question of fact; the construction and legal effect of those words is a question of law. In this case there is no dispute about the words or terms of the contract; the facts are quite clear from the evidence. This was an ordinary case of a small household removal into the country. The defendant, before agreeing to undertake the removal, first inspected the goods and then fixed the price at which he was willing to undertake the removal. That being the character of the contract, one sees at once how entirely artificial the argument is that suggests that he was acting as a common carrier. The defendant did more than simply agree to carry the goods. The contract included the removal of the furniture from one house and the placing of it in another; the transit over the road was a mere incident of the contract. I think that a great deal of light is thrown on the question by *Scaife* v. *Farrant* (3), which was decided in the interval between *Liver Alkali Co.* v. *Johnson* (1) and *Nugent* v. *Smith* (2). That was a case of removal of furniture, and the defendant, who held himself out as a furniture remover, accepted the plaintiff's goods for removal on the terms that he would undertake "risk of breakages (if any) not exceeding £5 on any one article." The furniture in the present case was destroyed by fire without any negligence on the defendant's part. The argument for the plaintiff was that the defendant was a common carrier, that his liability was limited in amount only

A in the event of breakage, and that he was still liable as a common carrier. It was held that in case of fire he was not liable, on the ground that the special contract was intended to limit the defendant's liability to loss by breakage or by the defendant's negligence, and excluded any question of liability as a common carrier. LUSH, J., held (L.R. 10 Exch. at p. 362) that it was impossible to construe the contract

B

> "as merely limiting the amount which should be payable by the defendant in the event of damage by breakage, leaving him by implication liable to the full extent for all other casualties."

DENMAN, J., referring to *Liver Alkali Co.* v. *Johnson* said (ibid. at p. 363):

C

> "If that case were identical in its material facts with the present, I should hold myself bound by it so far as to say that, whether a common carrier or not, to all intents and purposes the defendant must be held liable, as having undertaken a business imposing upon him the same liabilities as those of a common carrier. But I am of opinion that the mode of dealing adopted by the defendant in this case differs in many most important particulars from that of the defendant in *Liver Alkali Co.* v. *Johnson* (1)."

D

He then reviewed the facts of the case and continued (ibid. at p. 364):

> "I come to the conclusion that the defendant did not so deal with the public as to undertake to carry goods in the absence of an agreement as to terms of carriage."

E

COCKBURN, C.J., said (ibid. at p. 366) that he entirely agreed that this was a special contract, and that the question of the liability of the defendant as a common carrier could not arise; had it not been for this he would have felt himself "bound to enter into the question whether the defendant was a common carrier at all." I think, therefore, that this case shows that the judges there considered that a contract of furniture removal was not simply a contract of carriage open as to its terms save as to price, but a different kind of contract altogether, and that such a contract was not one which put the remover in the position of a common carrier. For these reasons it seems to me that this action entirely fails and the appeal must succeed.

F

Appeal allowed.

Solicitors: *Church, Adams & Prior*, for *A. E. Withy*, Bath; *H. G. Kenyon*, for *Ricketts, Son & Vezey*, Bath.

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

FOLKESTONE CORPORATION *v.* BROCKMAN AND OTHERS

[HOUSE OF LORDS (Earl Loreburn, Lord Kinnear, Lord Dunedin and Lord Atkinson), October 28, 30, 1913, February 6, 1914]

[Reported [1914] A.C. 338; 83 L.J.K.B. 745; 110 L.T. 834; 78 J.P. 273; 30 T.L.R. 297; 12 L.G.R. 334]

Highway—Dedication—Common law—Intention to dedicate—Question of fact—Evidence of user—Presumption of intention.

Whether or not land has been dedicated to the public as a highway is a question of fact for the jury or other tribunal of fact and not one of law for the court, and the decision of the tribunal of fact cannot be set aside by the court unless there is no evidence to support it. To constitute a valid dedication an intention to dedicate by the owner of the soil must be proved. While user of the way by the public may be evidence tending to show dedication it will have that effect only when it is exercised under such conditions as to imply the assertion of a right with the acquiescence of the owner of the fee. Evidence of user, however long and uninterrupted, does not at common law raise a presumption of intention to dedicate which, in the absence of rebutting evidence, must necessarily entitle the litigant alleging dedication to succeed. No matter how strong the evidence of user, all the evidence should be left to the jury, who should be asked to consider it as a whole and to determine whether the owner of the soil intended to dedicate to the public a way over it.

Where the owner of waste land over which the public were in the habit of wandering in all directions made an unfenced road across it leading from one public highway to another, and by erecting gates or barriers on the road prevented the passage of unauthorised horses and carriages over it, but took no measures to prevent the public from wandering over it or walking along it as they had theretofore done over the land on which it had been made,

Held: there was evidence on which justices, dealing with an objection to an apportionment under the Private Street Works Act, 1892, could find that the owner of the land had no intention to dedicate the land as a public way.

Notes. Considered: *South Eastern Rail. Co.* v. *Warr* (1923), 21 L.G.R. 669; *A.-G.* v. *Tasker* (1928), 92 J.P. 157; *A.-G.* v. *Manchester Corpn.*, [1930] All E.R.Rep. 653. Followed: *Williams-Ellis* v. *Cobb*, [1934] All E.R.Rep. 465; *Merstham Manor, Ltd.* v. *Coulsdon and Purley U.D.C.*, [1936] 2 All E.R. 422. Referred to: *A.-G.* v. *Sewell* (1918), 88 L.J.K.B. 425; *Jones* v. *Bates*, [1938] 2 All E.R. 237; *A.-G. and Newton Abbott R.D.C.* v. *Dyer*, [1947] Ch. 67; *Fairey* v. *Southampton County Council*, [1956] 2 All E.R. 843.

As to dedication as a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 43 et seq.; and for cases see 26 DIGEST (Repl.) 290 et seq. As to statutory dedication, see now Highways Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 402), ss. 33, 34, 35, 37, 71.

Cases referred to:

(1) *Turner* v. *Walsh* (1881), 6 App. Cas. 636; 50 L.J.P.C. 55; 45 L.T. 50, P.C.; 26 Digest (Repl.) 297, *189*.
(2) *Mann* v. *Brodie* (1885), 10 App. Cas. 378, H.L.; 26 Digest (Repl.) 289, *149*.
(3) *Poole* v. *Huskinson* (1843), 11 M. & W. 827; 152 E.R. 1039; 26 Digest (Repl.) 294, *166*.
(4) *Macpherson* v. *Scottish Rights of Way and Recreation Society* (1888), 13 App. Cas. 744, H.L.; 26 Digest (Repl.) 304, *242*.
(5) *Young* v. *Cuthbertson* (1854), 1 Macq. 455, H.L.; 26 Digest (Repl.) 275, *40*.
(6) *Rishton* v. *Haslingden Corpn.*, [1898] 1 Q.B. 294; 67 L.J.Q.B. 387; 77 L.T. 620; 62 J.P. 85; 14 T.L.R. 155, D.C.; 26 Digest (Repl.) 615, *2682*.

(7) *Barraclough* v. *Johnson* (1838), 8 Ad. & El. 99; 3 Nev. & P.K.B. 233; 1 Will. Woll. & H. 162; 7 L.J.Q.B. 172; 2 Jur. 839; 112 E.R. 773; 26 Digest (Repl.) 294, *165*.

(8) *Simpson* v. *A.-G.*, [1904] A.C. 476; 74 L.J.Ch. 1; 91 L.T. 610; 69 J.P. 85; 20 T.L.R. 761; 3 L.G.R. 19, H.L.; 26 Digest (Repl.) 295, *168*.

(9) *R.* v. *Inhabitants of the Tithing of East Mark* (1848), 11 Q.B. 877; 3 New Mag. Cas. 36; 17 L.J.Q.B. 177; 11 L.T.O.S. 63; 12 J.P. 504; 12 Jur. 332; 3 Cox, C.C. 60; 116 E.R. 701; 26 Digest (Repl.) 297, *188*.

(10) *R.* v. *Petrie* (1855), 4 E. & B. 737; 3 C.L.R. 829; 24 L.J.Q.B. 167; 24 L.T.O.S. 271; 19 J.P. 483; 1 Jur.N.S. 752; 3 W.R. 243; 6 Cox, C.C. 512; 119 E.R. 272; 26 Digest 292, *159*.

(11) *Winterbottom* v. *Lord Derby* (1867), L.R. 2 Exch. 316; 36 L.J.Ex. 194; 16 L.T. 771; 31 J.P. 566; 16 W.R. 15; 26 Digest (Repl.) 302, *226*.

(12) *Steel* v. *Houghton* (1788), 1 Hy. Bl. 51; 126 E.R. 32; 2 Digest (Repl.) 42, *225*.

(13) *Blount* v. *Layard* (1888), [1891] 2 Ch. 681, n.; 4 T.L.R. 512, C.A.; 25 Digest 10, *66*.

(14) *Greenwich Board of Works* v. *Maudslay* (1870), L.R. 5 Q.B. 397; 39 L.J.Q.B. 205; 23 L.T. 121; 35 J.P. 8; 18 W.R. 948; 26 Digest (Repl.) 300, *210*.

Also referred to in argument:

Eyre v. *New Forest Highway Board* (1892), 56 J.P. 517; on appeal, 8 T.L.R. 648, C.A.; 26 Digest (Repl.) 271, *5*.

Cababé v. *Walton-on-Thames U.D.C.*, [1913] 1 K.B. 481; 82 L.J.K.B. 133; 107 L.T. 738; 77 J.P. 141; 57 Sol. Jo. 158; 11 L.G.R. 211, C.A.; affirmed, [1914] A.C. 102; 83 L.J.K.B. 243; 110 L.T. 674; 78 J.P. 129; 58 Sol. Jo. 270; 12 L.G.R. 104, H.L.; 26 Digest (Repl.) 393, *1000*.

R. v. *Inhabitants of St. Benedict, Cambridge* (1821), 4 B. & Ald. 447; 106 E.R. 1001; 26 Digest (Repl.) 314, *309*.

Kingston-upon-Thames Corpn. v. *Baverstock* (1909), 100 L.T. 935; 73 J.P. 378; 7 L.G.R. 831, D.C.; 26 Digest (Repl.) 381, *907*.

R. v. *Inhabitants of Leake* (1833), 5 B. & Ad. 469; 2 Nev. & M.K.B. 583; 1 Nev. & M.M.C. 544; 110 E.R. 863; 26 Digest (Repl.) 298, *198*.

Leigh U.D.C. v. *King*, [1901] 1 K.B. 747; 70 L.J.K.B. 313; 83 L.T. 777; 65 J.P. 243; 17 T.L.R. 205; 45 Sol. Jo. 220, D.C.; 26 Digest (Repl.) 382, *912*.

Farquhar v. *Newbury R.D.C.*, [1909] 1 Ch. 12; 78 L.J.Ch. 170; 100 L.T. 17; 73 J.P. 1; 25 T.L.R. 39; 53 Sol. Jo. 46; 7 L.G.R. 364, C.A.; 26 Digest (Repl.) 298, *197*.

R. v. *Lloyd* (1808), 1 Camp. 260, N.P.; 26 Digest (Repl.) 274, *43*.

A.-G. v. *Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647; 70 L.J.Ch. 808; 85 L.T. 414; 66 J.P. 71; 50 W.R. 22; 26 Digest (Repl.) 289, *150*.

Portsmouth Corpn. v. *Smith* (1885), 10 App. Cas. 364; 54 L.J.Q.B. 473; 53 L.T. 394; 49 J.P. 676, H.L.; 26 Digest (Repl.) 587, *2458*.

Montgomerie & Co., Ltd. v. *Wallace-James*, [1904] A.C. 73; 73 L.J.P.C. 25; 90 L.T. 1, H.L.; 17 Digest (Repl.) 10, *72*.

American Thread Co. v. *Joyce* (1911), 104 L.T. 217; 27 T.L.R. 272; affirmed (1912), 106 L.T. 171; 28 T.L.R. 233; 56 Sol. Jo. 306; 6 Tax Cas. 1, C.A.; affirmed (1913), 108 L.T. 353; 29 T.L.R. 266; 57 Sol. Jo. 321; 6 Tax Cas. 163, H.L.; 28 Digest (Repl.) 257, *1137*.

Appeal by Folkestone Corporation from an order of the Court of Appeal reversing an order of the Divisional Court upon a Case Stated by justices of the borough of Folkestone.

The appellants, pursuant to the Private Street Works Act, 1892 [repealed by Highways Act, 1959, of which see s. 174 et seq.], made a provisional apportionment of expenses to be incurred in executing works in a portion of the Lower Sandgate Road lying between the eastern boundary fence of Cliff House and a

point 170 yards east of St. Paul's Church Schools, Sandgate. The respondents, who were owners and occupiers of premises situate there, objected to the apportionment on the ground (inter alia) that this portion of the street was a highway repairable by the inhabitants at large. The justices disallowed the objections, but, at the request of the respondents, stated a Case for the opinion of the King's Bench Division. The Divisional Court of the King's Bench Division (LORD ALVERSTONE, C.J., and HAMILTON and BANKES, JJ.) ordered that the matter should be remitted to the justices to say whether they found that there was no dedication of the road in question as a highway for foot passengers before the year 1836, or whether they had only negatived dedication of a highway for horses and carriages, and that, if they found no dedication of a highway for foot passengers, their decision should be affirmed, but that if they had found that there was such a dedication their decision should be reversed. The justices stated that they had found that there was no dedication of the road in question as a highway for foot passengers before the year 1836, and their decision accordingly was affirmed. The Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., FLETCHER MOULTON, L.J., dissenting) reversed the decision of the Divisional Court and of the justices, and the corporation appealed.

Sir Robert Finlay, *K.C.*, *Ryde*, *K.C.*, and *R. W. Turner* for the appellants.
Cave, *K.C.*, and *R. A. Glen* for the respondents.

Their Lordships took time for consideration.

Feb. 6, 1914. The following opinions were read.

EARL LOREBURN.—In this appeal the question of substance is whether upon the facts found by the justices they were justified in coming to the conclusion that there was no dedication of a certain road near Folkestone before 1836. Treating these findings in the Special Case as the evidence upon which the conclusion of the justices was based, is there any evidence to support that conclusion? If I relied upon my own unaided judgment I should assent to the order of the Court of Appeal, because I have not myself been able to see any such evidence. But I know that FLETCHER MOULTON, L.J., and your Lordships think otherwise, and in those circumstances I feel that I cannot insist upon a view which would import that there was no evidence upon which a reasonable man could act. I take it, therefore, that there is such evidence, and if so, then the conclusion of the justices cannot be lawfully disturbed. I desire to say only a few words upon the law of the case, which was discussed at the Bar. I believe that the doctrine enunciated in the Privy Council in *Turner* v. *Walsh* (1) has been uniformly accepted—that dedication may be and, indeed, ought to be presumed in the absence of anything to rebut the presumption from long continued user of a way by the public. Two things have to be made good—that the user has been sufficient in its duration and character, and that the presumption then arising has not been rebutted. The two questions are usually, or at all events often, put to the jury in a composite form. For example, they are told that if they think the user is sufficient, dedication ought to be presumed, unless they think it is rebutted by the evidence. In that or in any other case where there is not any evidence to support a verdict, it may be set aside, and the proper judgment may be entered against the party whose case has nothing to support it. As for the presumption, I do not think it makes much difference whether it be called a presumption of law or fact, though I think it is the former.

LORD KINNEAR.—The question to be considered in this case is whether a certain road had, before Mar. 20, 1836, been effectually dedicated to the public as a highway for foot passengers. The importance of the date is owing to the Highways Act, 1835, because after that Act came into force roads could not be lawfully dedicated so as to be deemed public highways repairable by the inhabitants at large except in accordance with statutory requirements which have not been

complied with in this case. It does not follow that use by the public since 1836 may not be so connected with prior user as to be treated as evidence, so far as it goes, to prove an earlier dedication. But the fact to be proved is that the road was dedicated before the Act, at a time when such dedication, if accepted by the public, would have been lawful. The question arises on a Special Case stated by the justices of the borough of Folkestone for the opinion of the King's Bench Division. The justices have decided that there has been no dedication in fact; and on matter of fact it is not disputed that their decision is final, the jurisdiction of the court, and, therefore, of this House on appeal, being confined to the determination of questions of law. The particular question of law which the justices propose for consideration of the court is not formulated with precision. But in the Special Case they state distinctly certain specific facts relating to the history and use of the road, and the question seems to be whether, when the facts so specified had been proved, it was still open to the tribunal to draw a further inference of fact one way or the other, or whether the necessary conclusion was already fixed by a rule of law.

I do not think it necessary to recapitulate the facts in detail. But the main points may be briefly stated in order to see how the question of law arises. The road was made in 1827 by Jacob, Earl of Radnor, over lands of which he was a life tenant. The ground over which it was constructed lies between the base of the cliff and the beach, at some little distance from the highway between Sandgate and Folkestone. Before the road was made it was open and waste, and people were allowed to wander over it at pleasure. Immediately upon completion of the road in 1827, houses of a residential character were erected along its course on building plots leased by Lord Radnor; and the road in question was constructed, and was necessary for the use of the occupiers, their servants, and tradespeople. There was no evidence that it was required for any other purpose, although it was in fact used, as the justices say, "to some extent" by the inhabitants of Folkestone and Sandgate other than Lord Radnor's lessees. It was constructed as a horse and carriageway, and was never open to the public in that character. But while the passage of horses and carriages was regulated by the erection of barriers and toll bars, no barrier of any kind was erected to exclude foot passengers. There was no defined footpath, and people who traversed it on foot used the whole width of the road and the adjacent banks at pleasure. The result was that the public, who had been accustomed to stray over the waste ground before the road was made, were allowed to do so after its completion, and nothing was done to prevent their entering upon it at any point in its course, or to prevent their using it as a means of passage between two points on the highway from Sandgate to Folkestone. This public enjoyment of the road had continued, when the present question arose, for more than eighty years. In the meantime, the road was repaired, when necessary, by the owner of the soil, and never by a public authority. Along with these facts there must be taken into account another of a different description, as throwing light on the probable intention of the landowner. The lands were held by Earl Jacob in strict settlement, and as tenant for life he had no power to dedicate a right of way to the public. His disability was so far removed by a private Act of Parliament in 1825 as to enable him to "allot and set out a competent part of the ground for public squares, roads, streets, ways, avenues, or otherwise for the use and convenience of" such houses as might be built on part of the estate over which he was authorised to grant building leases. But during the short period between 1827 and 1835 he made no actual allotment, and did nothing to set out a competent part of the ground for a footpath unless his submission to the public user is enough to satisfy these conditions, and after 1835 the Highways Act made dedication impossible.

On consideration of these facts the justices say that they came to the conclusion that it was not the intention of Jacob, Earl of Radnor, in 1827, or later, to make and dedicate the road in question as a public highway; that there was in fact no dedication of such road as a highway prior to Mar. 20, 1836; and that since that

date there has been no dedication as prescribed by s. 23 of the Highways Act, 1835 [see now s. 39 of Highways Act, 1959]. They "therefore decided that the road in question is not, nor is any part thereof, a highway repairable by the inhabitants at large, and that it is a street within the meaning of the Act," Private Street Works Act, 1892 [repealed by Act of 1892], and the question they propose for the opinion of the court is whether, upon the above statement of facts, they had come to a correct determination in point of law. It is unnecessary to consider the final decision which is deduced from the findings I have quoted, that the road is a street within the Private Streets Act, 1892, because that point is not now in controversy; and it is common ground that the Special Case is so framed as to raise the question really in dispute—namely, whether the conclusion that there has been no dedication can be set aside as erroneous in law. On this question it appears to me, in the first place, that the three propositions embraced in this conclusion are, all of them, affirmations of fact within the exclusive jurisdiction of the justices. This was evidently the view of the King's Bench Division, because after certain procedure the judgment of the justices was affirmed, although in the course of the procedure it is indicated clearly enough that the learned judges would probably have come to a different conclusion if it had been open to them to determine the question of fact for themselves. They thought it doubtful whether the justices had not meant to decide, only that there was no public carriageway, without having addressed their minds to the question of the existence of a public footway, and accordingly they remitted the matter to the justices who had stated the Case in order that they might say whether they had found that there was no dedication of the road in question as a highway for foot passengers before the year 1836; if they had so found, it was ordered that their judgment should be affirmed, and if they had not come to any decision on the said question, it was ordered that they were to determine whether the road was dedicated as a highway for foot passengers before 1836 or not. It is evident that no such remit could have been made if the learned judges had not been satisfied that dedication or no dedication was a question of fact for the justices, and not one of law for the court, and, accordingly, when the justices reported that they had found that there was no dedication of the road as a highway for foot passengers before 1836, their judgment stood affirmed. I think this was perfectly right. Dedication, in my opinion, is matter of fact, and whatever their view of the evidence might have been, the learned judges, as they properly held, had no power to overrule the decision of the justices.

It is said that they should have come to a contrary conclusion in law, because user creates a presumptio juris in favour of dedication. This proposition is too vague to be helpful in argument, since each of its terms is ambiguous. The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by LORD BLACKBURN in *Mann* v. *Brodie* (2) (10 App. Cas. at p. 386). He begins by citing the doctrine laid down by PARKE, B., in *Poole* v. *Huskinson* (3) (11 M. & W. at p. 830):

> "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, there must be an animus dedicandi, of which the user by the public is evidence and no more."

Then he adds more particularly with reference to the effect of user, that

> "where there has been evidence of a user by the public so long, and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was a dedication by the owner, whoever he was."

The points to be noted are, first, that the thing to be proved is intention to dedicate, and, secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee. The cases in which the law is stated in the same way are numerous, but I refer to one in particular in which it was so laid down by LORD HALSBURY, L.C.: *Macpherson* v. *Scottish Rights of Way and Recreation Society* (4), because I think his Lordship's observations bring out very sharply the determining fact of which in a case like the present the judges of fact must be satisfied, before they can find room for the application of any presumption of law. The law of Scotland as to rights of way differs from that of England in this respect, that the public right, as LORD WATSON more fully explains in *Mann* v. *Brodie* (2), is not rested upon any theory of dedication, but upon acquisitive prescription; but the two laws agree in this, that the public use from which a right of way is to be inferred must be had as of right. With reference to this difference, the Lord Chancellor says (13 App. Cas. at p. 746):

> "The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer that the owner has a real intention of dedicating that way to the use of the public. That, however, is not the law of Scotland, and if it can be established that for the necessary period there has in fact been such a use of the way as negatives a mere licence or permission, then, as I understand the law of Scotland, that establishes the right of way in question."

He goes on to point out (ibid. at p. 747) that a question had been asked by a dissentient judge in the court below, which required an answer if the judgment was to be supported.

> "A question is put by LORD YOUNG to which, if I were not able to give an answer, I should feel that the respondents ought to be able to furnish it to me. LORD YOUNG, quoting the Lord Ordinary, says, 'The question is whether such use as has been proved is to be ascribed to tolerance or right. Why, I venture to ask,' says LORD YOUNG, 'is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it or interfered with it by appealing to a court of law to prevent such use of it upon any of the occasions which have been referred to? Why, he would have been thought very ill of by his neighbours, and I think deservedly.' Now I say [continued the Lord Chancellor] that if no answer could be given to that question, I should take a different view from that which I have been at last compelled to take."

I think LORD YOUNG's question is exactly that which would have required an answer in the present case, if we had been concerned with matter of fact. But it was for the justices to answer it; and their answer is final. It appears from the Special Case that the law laid down by PARKE, B., had been cited to them, and they followed it correctly, when they put to themselves, as the first question to be decided, whether the facts proved before them justified the inference that Lord Radnor intended to dedicate a highway. They answer that question of fact in the negative, and I see no ground in law upon which it can be held that a court, which is forbidden to interfere with their decisions of fact, is nevertheless entitled to declare that that conclusion is wrong. No power to disturb it can be drawn from the doctrine that from sufficient user dedication is to be presumed, because the question is whether the facts are sufficient to raise the presumption.

It is admittedly presumptio juris and not juris et de jure, or in other words, it is not an absolute and inflexible rule of law which imposes a pre-ordained conclusion upon the judges of fact, but an inference of fact which is allowed by law if, upon clear evidence or a balance of conflicting evidence, it is reasonable that

it should be drawn. It is conceded by the learned lords justices in the majority that the presumption may be disproved; but, with great respect, it seems to me to be so treated in the argument as to give it all the effect of an absolute rule. I think it fallacious to assume dedication on a partial view of the evidence, and only after that has been done to inquire whether conflicting facts are strong enough to dislodge a conclusion already reached. I concede that a presumption of law, once it has been established, throws the onus of proof upon the party who disputes it; and when it rests upon a definite fact which may be proved with certainty or may be admitted, it may be easy to determine at what stage the onus has been shifted. But in the simplest case rules for fixing the onus of proof do not determine the value of conflicting evidence when the proof has been completed; and in the present case no presumption of law can arise until the basis of fact upon which it rests has been established, and that cannot be done until the whole body of evidence has been considered. It is manifest that the facts tending to prove dedication cannot be weighed until they are brought into connection with and checked by the facts tending in the opposite direction. It is, however, not only by the balance of conflicting facts, but by the interpretation of ambiguous facts that the true conclusion is to be reached. This must be the office of the judges of fact, and it seems to me impossible that the presumption should be held to be established in law at any particular stage of the proof, until the fact upon which it rests has been definitely fixed with due reference to all the circumstances, by the proper tribunal. I admit that if it is given without evidence, or against evidence, the decision of the justices, like the verdict of a jury, may be set aside, not because it is erroneous, but because it is arbitrary. That is a rule of law which is well settled. But it has no application to the present case. The burden of proof lies in the first place on the respondents, who allege dedication, because he who affirms must prove. They adduce a body of evidence which makes it highly probable that the owner of the fee should have intended to dedicate. But ex hypothesi it is not conclusive evidence, for if it were, there would be no room for presumption, and presumption which the law allows may be stronger or weaker; and if the tribunal which has to judge of the fact think that in all the circumstances of the particular case it is not strong enough, they may be right or wrong, but they are not chargeable with arbitrary excess of jurisdiction if they decline to draw the inference.

The result is that the respondents have failed to prove their case. But the appellants do not by any means rest their own case upon this negative conclusion. They say, and I think with great force, that all the facts connected with the origin and history of the road are in favour of a presumption of tolerance, and against a presumption of dedication. The public, or such of them as chose to go there, were already in enjoyment of the locus over which the road was made; it was constructed and maintained as a private road for horses and carriages, and it never was dedicated as a public highway for these purposes; it made no special provision for the use of foot passengers, and nothing was done by Lord Radnor to suggest that he intended to dedicate it in the only way in which, as a limited owner, he could properly create such a burden upon an estate held in strict settlement. It is true that he did not interfere to obstruct the way for foot passengers, but to do so would have been churlish in the highest degree; and it may well be supposed that he did not believe he had any interest to do so, since during the short time when dedication was lawful his estate was sufficiently protected by a private Act, and thereafter by the Highway Act, 1835. They argued that, on the one hand, no reasonable proprietor would have interfered with foot passengers in these circumstances, and that, on the other hand, no one would have dreamed of creating, without necessity, so anomalous a right as a public footway repairable by the inhabitants at large superimposed without delimitation, upon a private carriage-way repairable by the proprietor. Why, then, to apply LORD BLACKBURN'S test, must it be held that he knew that the foot passengers who came upon his road were

A acting in the belief that a way had been dedicated, or why should the public have believed anything so improbable?

I express no opinion as to the weight which should be given to these considerations, because I am not deciding the question of fact. But I do not understand how they can be supposed to be irrelevant to the question whether the public user is to be ascribed to the permission or licence allowed by successive proprietors or B to the deliberate intention of Lord Radnor formed and carried into effect before 1836 to dedicate a highway to the public. The question is one of fact, turning upon probabilities of conduct, which cannot be estimated by antecedent rules of law. I think it a very fair test of the argument to inquire how the question would have been treated if it had been tried by a jury. I was impressed by the observation of my noble and learned friend LORD ATKINSON during the argument, when C he asked whether there was any case in which a jury had been directed that they were bound in law to presume dedication. No such case was cited, and I think that *Turner* v. *Walsh* (1) in the Privy Council, on which the respondents' counsel relied, is a high authority to the contrary. It was held to be a right direction to a jury that user might be relied on in New South Wales in the same way as in England for the purpose of raising the presumption of a dedication of a road over D Crown lands, and that the evidence was sufficient to entitle them to presume dedication by the Crown. This left it for the jury to determine whether the facts raised the presumption. The plain meaning of the words is not that they were bound by law to presume, but that it was within their competence to do so, and that implies that they must judge for themselves whether to make the presumption or not. This is even more clearly brought out by the observation of SIR MONTAGUE E SMITH on the main point on which the appeal appears to have been taken. After a user of twenty-one years, an Act had been passed in 1861 which was said to exclude dedication by the Crown, except by a certain prescribed method. Assuming this to be the effect of the Act, SIR MONTAGUE SMITH says it is proper to look at the whole evidence together to see whether there had been such a continuous and connected user as was sufficient to raise the presumption of dedication prior F to the statute at a time when the Crown had power to dedicate, and he adds (6 App. Cas. at p. 642):

> "It may be that in this case the evidence of user prior to 1861 was alone sufficient to establish the presumption of dedication; but the strength of that presumption is increased by the subsequent user, and would certainly have G been much diminished if the user had been discontinued after 1861."

But then if the strength of the presumption may be increased or diminished according to circumstances, it is for the jury to determine the weight which should be given to it in the particular case. This is entirely in accordance with the general rule laid down by SIR MONTAGUE SMITH when he says (ibid. at pp. 639, 640):

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> "From long continued user of a way by the public, whether the land belongs to the Crown or a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may, and indeed ought, to be presumed."

I This does not mean that it must be presumed even in the absence of rebutting evidence, but that the sound inference in the case supposed would be in favour of the presumption. It still remains a question of fact whether the presumption has been established. The phrase "ought to be presumed" has been construed by CRANWORTH, L.C., in *Young* v. *Cuthbertson* (5), where it had been used by LORD JUSTICE-CLERK HOPE in charging a jury; and LORD CRANWORTH, criticising what he describes as "looseness" in the mode of directing juries, says (1 Macq. at p. 460):

> "I should add, however, that I understand the learned judge when he used the expression 'the jury ought to presume,' not to be stating a proposition in

law on which the jury were bound to act, but merely to be pointing out what was almost an irresistible inference in point of fact."

I take it, therefore, that the application of the presumption in a particular case is a question of fact for the jury and not a question of law for the court.

BUCKLEY, L.J., says that the justices have decided a question of mixed fact and law. If so, it was within their competence so to decide. But the case cannot be treated in the same way by a court of law, which has no jurisdiction to decide questions of fact. It became necessary, therefore, for the King's Bench Division to disentangle the law from the fact so far as necessary to explicate their own limited jurisdiction. I think they did so successfully when they decided, as HAMILTON, J., puts it, that, as the matter was one of fact and there was some evidence in it, it must go back to the justices for their determination. It does not appear to me, with great respect, that the issues of fact and law are so clearly distinguished when the learned lord justice says that the justices have found facts which amount in law to dedication. He fails to advert to the critical fact with which they introduce their conclusions—namely, that it was not the intention of Lord Radnor to dedicate the road as a public highway, and I assume that, in speaking of the facts they have found, he refers to the detailed facts which are really no more than evidence from which the fact in issue—to wit, dedication—may or may not be inferred. On the question so raised, as I have already said, I am of opinion that the decision of the justices is final and conclusive as a decision of fact, that the court below had no authority to inquire whether in fact it was right or wrong, and that no ground has been brought forward for setting it aside as contrary to law. I think, therefore, that the order of the Court of Appeal must be reversed, and that of the King's Bench Division restored.

LORD DUNEDIN.—In this case the only question before us is whether there was evidence before the justices which reasonably entitled them to come to the conclusion which they embodied in their finding—"that there was, in fact, no dedication of the road in question as a highway prior to Mar. 10, 1836," as amplified by the further finding "that there was no dedication of the road in question as a highway for foot passengers before the year 1836." The reason of the findings being in two branches is to be found in this. Upon the first finding coming before the Divisional Court, and on consideration of the Case as stated, that court held that it was not certain whether the justices had considered the whole possibilities of the circumstances, or, in other words, that the first finding as it stood might mean that the road had not been dedicated as a carriage road, leaving undetermined the fact whether it had or had not been dedicated as a foot road. So they sent it back to the justices to state precisely whether they had found the latter matter, and, if they had found as regards the foot road also against the dedication, their judgment was to stand. Accordingly, the justices, on remit, added the finding second quoted, and their judgment stood.

It is true that the actual judgment which was allowed to stand was expressed thus (after making the finding first quoted, and adding "that since 1836 there has been no dedication as prescribed by s. 23 of the Highway Act, 1835"): "We, therefore, decided that the road in question is not, nor is any part thereof, a highway repairable by the inhabitants at large." The question was put: "whether upon the above statement of facts we came to a correct determination in point of law." Nevertheless, however the question is framed, the Divisional Court—and necessarily the Court of Appeal in their turn reviewing the judgment of the Divisional Court—has only a right to review law, and so far as a judgment depends on facts the only question of law arising thereon is: Was the evidence reasonably sufficient to justify the finding? I find this very clearly expressed by CHANNELL, J., in *Rishton* v. *Haslingden Corpn.* (6), where he says ([1898] 1 Q.B. at p. 301):

"The magistrates ask, 'Were we justified in finding?' It is contended that as the magistrates can only state a Case upon a point of law, and must them-

A selves decide a question of fact, this question means, 'Was there any evidence upon which we could find as we did?' and this we think is so."

Such was also clearly the view of the Divisional Court in this case, for they allowed the decision to stand. That necessarily meant that they considered the question one for the justices to determine, and that whichever way they determined it there B was some evidence on which that judgment could be supported. As Hamilton, J., puts it at the close of his judgment:

> "As the matter is one of fact, and there is some evidence for the justices on it, it must go back for their determination."

When the case came before the Court of Appeal, two of the learned judges took C the view that there was no evidence upon which the finding of the justices could be supported; Fletcher Moulton, L.J., dissented. I am not going to recite the judgments of the majority, but I hope I do them no injustice when I say that they seem to me to be rested on this view. They fasten upon certain of the series of separate conclusions in fact which the justices set out in the Case, and which run:

> D "(h) . . . But there was evidence before us, and we found that from the year 1831 the road was to some extent used by inhabitants of Folkestone and Sandgate other than the said lessees, &c., for business and other purposes." "(j) That spaces are, and have been, since a period antecedent to 1836, left on either side of the toll gate for foot passengers." "(p) That prior to 1836 the road in question was never kept in proper repair, but was open for foot passengers without interruption, and has so continued to the present time." E "(q) That there was no evidence before us of any made footpath on the road before 1836, but we found that foot passengers used the whole width of the road, and the banks by the sides of the road (when practicable) without let or hindrance."

These findings, say they, amount to a finding of user by the public. User by F the public raises a presumption of dedication, and in the other facts found by the justices (which exhaust the letters of the alphabet from a to t, exclusive of the letters above quoted), there is nothing sufficient to rebut the presumption. With deference to the learned judges, I do not think that is the proper way to approach the question, and its defect, to my mind, consists in regarding "user" as an inflexible term, which, if found to apply, can lead to only one legal result. User G is evidence, and can be no more, of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question, no one can see into a man's mind, and, therefore, dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as matter of inquiry what was the user, and to what did it point. And H this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication.

I I can make my meaning clear by illustration. If you know nothing about a road except that you find it is used, then the origin of the road is, so to speak, to be found in the user, and in such cases it is safe to say, whether strictly accurate or not, that the user raises a legal presumption of dedication. That really means no more than that the evidence points all one way. Hundreds of highways are in this position. But suppose, on the other hand, you do know the origin of a road. Suppose it is the avenue to a private house, say, from the south. But from that house there leads another avenue to the north which connects with a public road different from that from which the south avenue started. This is not a fancy case.

The situation is a common one in many parts of the country. Would the mere fact that people could be found who had gone up the one avenue and down the other—perhaps without actually calling at the house—raise a presumption that the landholder had dedicated his private avenues as highways? The user would be naturally ascribed to good nature and toleration.

Now, what were the surrounding circumstances in this case? The origin of the road was known. It was not a case where the mere user discovered the existence of the road. It was made as an estate work, and it was in its origin and up to the critical date indubitably not only labelled private, but kept private, for the greater uses for which its construction was designed—viz., horse and carriage traffic. It was only repaired by the proprietor, never by the parish, and a transaction was entered into at a later date (1852) which showed on the face of it that in the view of the proprietor and of the commissioners of Folkstone at that time the road was a private road. Further than that, there was the light to be got from the legal position of the proprietor. He was admittedly a limited owner, and it is conceded that a limited owner cannot dedicate. But before the road was made his disability was removed by an Act of Parliament—provided always that he acted in the way that the Act of Parliament directed. In other words, looking at the terms of s. 5 of the private Act, the Earl of Radnor could only dedicate if he "set out ground for public squares, roads, ways, or otherwise." He admittedly did not set out this as a public carriageway. Did he set it out as a public way for foot passengers?

I must here pause to say that the strenuous criticism which was directed in the argument against the judgment of FLETCHER MOULTON, L.J., in the Court of Appeal to my mind missed its mark. It was argued that that learned judge insisted that unless it could be shown that the Earl of Radnor formally "set out" this particular highway as for passengers, the case for dedication must fail, and it was added that upon the view of omnia præsumuntur rite sollemniter acta, the direct evidence of such formal dedication after such a lapse of time could not be insisted on. I do not think that is at all a fair view of the learned judge's opinion. All I think he meant and said was that, inasmuch as to be valid at all the dedication must have had its origin in a setting out under s. 5, you were bound to consider, under the whole circumstances of the case, whether such a dedication as is here sought to be shown was a thing to be inferred as a likely thing for the estate owner to do. In the long run it all comes to this: Which is the more probable alternative? Did the Earl of Radnor lay out this road as private and mean to keep it private as of right, although he did not take any active steps to prevent foot passengers going over it any more than he took active steps to prevent them straying over the waste surrounding ground, or did he, when laying out a private carriage road, which he meant to and did keep private, at the same time dedicate to the public a footway on the top of the said private carriageway? The circumstances which I have detailed may be said to point to the former, those included in the lettered findings above quoted may be said to point to the latter. If I had been one of the justices I say frankly I should have come to the same conclusion as they did. In that I may be wrong. I cannot be sure I am right, for I see that several learned judges, who are just as competent to weigh evidence as I am, if they had been in that position, would have come to a different conclusion. But the question is not whether I am wrong or right, the question is whether there is any evidence to support such a conclusion. I am willing not to be dogmatic in saying that my conclusion is the right one, but I am not equal to such a height of modesty and altruism as to say that the conclusion which I have reached in common with the justices and FLETCHER MOULTON, L.J., is a conclusion to which, on the evidence, no reasonable man ought to have come. It follows that, in my opinion, this appeal must prevail.

LORD ATKINSON.—The question for decision in this case is raised by the justices of the peace of the borough of Folkestone, on a Case stated by them under

A the provisions of the Summary Jurisdiction Acts, 1857 and 1879, for the opinion of the King's Bench Division of the High Court of Justice. It is admitted that under these statutes such a Case can only be stated in reference to their determination on a point of law, and that the court whose opinion is asked for can only determine the question or questions of law arising on the Case. The proceedings in which the determination of the justices took place were brought under B the Private Street Works Act, 1892 [repealed by Highways Act, 1959, of which see s. 174 et seq.], which the appellants, the mayor, aldermen and burgesses of the borough of Folkestone, had adopted. This body, asserting that about 7,000 ft. in length of a certain road within their borough, called the Lower Sandgate Road, from a point immediately east of St. Paul's School, Sandgate, where it joins the main highway, to a point to the westward of the Folkestone bathing establishment, C was a street, or if not, that the portion of it between two points lettered B and D on the Ordnance sheet given in evidence in the case, was a street, within the meaning of this statute, proposed, in exercise of the powers conferred upon them by s. 6 of the Act [see s. 174 of the Act of 1959], to execute certain works upon it and to charge the cost thereof upon the premises fronting or abutting upon it. The expression "street" is defined in s. 5 of the Act [see s. 213 (1) of Act of 1959] D to mean (unless the context otherwise requires)

> "a street as defined by the Public Health Acts and not being a highway repairable by the inhabitants at large."

The respondents, who are frontagers, in exercise of the powers conferred upon them by the statute, served upon the appellants notices setting forth their objec- E tions to the proposal of the latter on the following grounds, among others, (i) that the portion of the street upon which the works were proposed to be executed did not form part of a street within the meaning of the Act of 1892, and (ii) that the said part of the same is a "highway repairable by the inhabitants at large." During the hearing before the justices a question was evolved upon which the case turned—namely, whether the lord of the soil, Jacob, Earl of Radnor, the F owner of the land upon which this street was made, had before the year 1836 effectually dedicated to the public a right of way over it for passengers on foot. It was conceded on both sides that if he was found to have done so, and the dedication had, by user, been accepted by the public, then the street would have been repairable by the inhabitants at large, at least to the extent necessary for the exercise by the public of their limited right of way, and would by the definition G clause have been excluded from the operation of s. 6 of the Act. The justices found that there was no dedication by the said earl of the said road, or the portion of it already mentioned, to the public as a highway for foot passengers before the year 1836, and in the Case stated by them they set forth that the question they referred to the Divisional Court for its opinion was whether their finding on this point was correct in point of law. This was the question of law, and the only H question of law, which the Divisional Court had to determine.

After certain proceedings, immaterial for the purposes of this appeal, had been taken, that court ultimately answered the question put to them in the affirmative. The Court of Appeal by the order now appealed from, reversed this decision on the ground, as stated by VAUGHAN WILLIAMS, L.J., that there was nothing in the findings of fact appearing in the Special Case justifying the conclusion of the justices I that it was not the intention of Jacob, Earl of Radnor, in 1827 or later, to make and dedicate the road in question as a public highway, or that there was, in fact, no dedication of such road as a highway prior to March, 1836, and he, therefore, answered the question put by the justices in the negative. He further stated that, in his opinion,

> "there was sufficient evidence that this road was so used as a highway or footway prior to 1836 to justify the conclusion that there was a dedication by Lord Radnor, who acquiesced in such user."

The grounds of his decision were stated by BUCKLEY, L.J., thus: A

"I cannot find that in finding these facts the justices have found any relevant facts to negative the dedication, which in my judgment is evidenced by the facts to which I have first referred."

That appears to be the user. FLETCHER MOULTON, L.J., dissented. It would appear, I think, from the double negative form in which the alleged error of the B justices is thus stated, that the line of reasoning adopted by counsel for the respondents in the argument before your Lordships was in the Court of Appeal only too successful. It was, as I understood it, to this effect: "Proof of open, uninterrupted, and continuous user raises a presumptio juris in favour of dedication. If evidence be not produced to rebut this presumption, it must prevail. C Tribunals which are exclusive judges of fact, whether juries or justices, are bound in law to act upon it, and their finding against it is an error in law. In the present case there was such evidence of user, no rebutting evidence was produced, the justices were, therefore, bound in law to find that this way was dedicated to the public, and their decision to the contrary was a decision made without any evidence to support it, and consequently invalid in point of law." What the justices have really and in fact done is not to find a negative without any evidence D to support it, but have refused, on the evidence laid before them, to find the affirmative proposition contended for by the respondents that the owner, the Earl of Radnor, had intended to dedicate, and had dedicated, this footway to the public. The existence of this intention, which is crucial in such matters, being an inference of fact, the justices were clearly within their right in so refusing, unless it be the law that in such cases where open, long continued and uninterrupted evidence of E user is clear, unrebutted and unexplained, the tribunal whose members are the exclusive judges of issues of fact are bound in law to draw this affirmative inference, and consequently that in every case where the question of the dedication to the public of a highway is tried before a judge and jury, and strong evidence is given of user by the public, while no evidence rebutting the so-called presumptio juris thereupon arising is produced, the litigant relying upon dedication must F necessarily be entitled to have a verdict directed for him. During the argument, in order to test the soundness of this line of reasoning, I asked to be referred to any case where in a trial before a judge and jury a verdict was directed under such circumstances. No such authority was produced. I believe it would have been produced had it existed. I think it does not exist. On the contrary, the invariable well-established practice, followed by many of the most able and distinguished G judges for many, many years, has, I think, been, no matter how strong the evidence of user, to leave all the evidence to the jury, ask them to consider it as a whole and determine whether the owner of the soil intended to dedicate to the public a highway over it. The justices in cases such as the present are, if anything, more absolute and exclusive judges of fact than is the jury in a trial before them. Their finding cannot, like the finding of a jury, be set aside as against H the weight of evidence. Order 40 and such like orders of the Supreme Court Rules do not apply to their findings as they do to the verdict of a jury. I am unable, therefore, to discover on what principle their decision can be set aside as contrary to law because they have refused to find in a way in which a jury in a similar case would not be directed to find or be bound to find.

I propose, therefore, to test the soundness of the reasoning upon which the I Court of Appeal have apparently acted by reference to the procedure followed on the trial of questions such as this before a judge and jury, and as the point is of general importance one may be excused for dealing at some length with a few of the best-known authorities. In *Poole* v. *Huskinson* (3), PARKE, B., thus states the principle of the law (11 M. & W. at p. 830):

"In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to

dedicate, there must be an animus dedicandi of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon a question of intention that many acts of enjoyment."

In *Mann* v. *Brodie* (2), LORD BLACKBURN, after quoting this passage, said (10 App. Cas. at p. 386):

> "But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no step to disabuse them of that belief, it is not conclusive evidence, but evidence upon which those who have to find the fact may find that there was a dedication by the owner whoever he was."

The remarks of LORD WATSON show that under Scottish law the inference which a jury may draw from evidence of user, is an inference not of law but of fact. In *Barraclough* v. *Johnson* (7) it was proved that in the year 1814 the representative of the owner of the soil of a laneway entered into an agreement with a certain company, together with a surveyor of highways acting on behalf of the inhabitants of a hamlet, that this laneway should be open to carriages, that the company should pay an acknowledgment of £5 per annum and supply cinders for the repair of the road, which the people of the hamlet should spread. Up to this time there had been a gate across the laneway which was kept locked and carriages stopped, but apparently passengers and horses were allowed to pass. In 1832 disputes arose between the parties when the passage of carriages was prevented by the proprietor, but from the date of the agreement up to this time the lane was open, and carriages, horses and pedestrians allowed to use it. An action was then brought; the judge, PATTESON, J., left all the evidence to the jury, and instructed them

> "that though user was evidence of a dedication to the public, yet the question always was what the landowner intended, and if it appeared that he had not intended absolutely to dedicate, the inference from user failed, and that in the present case, unless the jury thought that the proprietor in 1814 intended absolutely to dedicate the carriage road to the public, he might resume it if the bargain was broken by the other parties."

The jury found that there was no good dedication of the carriageway, but that there was a dedication of the way for foot passengers and horses. No direction was given to the jury that they were bound to find as to the footway where the user had been continuous, or any intimation given that there was a presumption in favour of dedication of either right of way, which, unless rebutted, should prevail. A court, consisting of LORD DENMAN, C.J., and LITTLEDALE, PATTESON and COLERIDGE, JJ., upheld the verdict, PATTESON, J., using these words (8 Ad. & El. at p. 105):

> "I think that the intention to dedicate or not must be left to the jury. The very term dedication shows that intent is material. There cannot be such a thing as turning land into a road without intention on the owner's part."

This case was cited with approval by LORD MACNAGHTEN in *Simpson* v. *A.-G.* (8). He said ([1904] A.C. at p. 493):

> "As regards the second, it is, I think, enough for me to say that it is clear law that a dedication must be made with an intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not itself amount to dedication: *Barraclough* v. *Johnson* (7)."

R. v. *Inhabitants of the Tithing of East Mark* (9) was the case of an indictment for non-repair of a road which had been formed over part of the waste land of a manor, and had been set out as a private road by an award, dated in January, 1797, of commissioners acting under a Private Enclosure Act. By this award a certain portion of this waste had, as directed by the Act, been allotted to the lord of the manor in respect of his interest in the soil. Evidence had been given, which was apparently not contradicted, that the road had been used by the public generally ever since it was set out up to the time of the trial in the year 1848, a period of over fifty years. It was contended for the defendants that there could be no dedication to the public of this right of way, as there was no one capable of dedicating it, inasmuch as the interest in the soil over which the road had been made had been taken out of the lord of the manor by the award. WILLIAMS, J., who presided at the trial, instructed the jury in the language of PARKE, B., in *Poole* v. *Huskinson* (3) already quoted, and proceeded to add that there could not be land without an owner, that the ownership of it must be in somebody, and that it was for the jury to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public. This instruction was held to be right by a court composed of LORD DENMAN, C.J., and PATTESON, WIGHTMAN and ERLE, JJ. The last-named learned judge expressed himself more strongly as to the effect which the jury should give to the evidence of user than I have been able to find was done by any other learned judge in any of the older authorities. He said (11 Q.B. at p. 884):

> "In this case there was uninterrupted user of the road by the public for about fifty years. I think the learned judge would have been quite justified in telling the jury, that although there must be an intention on the part of the owner to dedicate, such use was so strong an evidence of his intention that the jury ought to find in favour of the dedication unless there was some evidence that he did not consent. The direction was much more favourable to the defendant than that would have been."

It will be observed that the words are "ought to find," not "must find."

R. v. *Petrie* (10) was similar to the last case in this, that there was clear and strong evidence of a continuous and open user by the public of the street called Rope Street, the street in question in the case, from the year 1827, when it was laid out, until the year 1836, when the defendants obstructed it. It was objected, however, that the estate upon which the street was situate was in strict settlement, that the tenant for life was in possession till 1829, when the estate was under a power contained in the settlement sold by his trustees. The first tenant in tail was still a minor. CROWDER, J., the presiding judge at the trial, told the jury that there was evidence that the east end of Rope Street had been for several years actually used by the public, from which a dedication might be inferred. "And he asked the jury whether they inferred that there was a dedication, and at what time and by whom." The jury answered that there was a dedication in 1829 by whosoever was then owner in fee. On that finding a verdict was entered for the Crown. On a motion for a new trial it was held by COLERIDGE, WIGHTMAN, ERLE and COMPTON, JJ., that the question put to the jury was the proper question. And this same learned judge, ERLE, J., expressed himself thus (4 E. & B. at p. 748):

> "I think the judge was bound to put the question he did. The counsel for the prosecution claimed to rest their case on a certain inference from the facts; if there was good evidence from which the inference might be drawn the judge was bound to ask the jury whether they would draw it."

These last are precisely the two authorities relied on by SIR MONTAGUE SMITH in *Turner* v. *Walsh* (1). But the judgment of that very learned judge in that case is no authority whatever for the proposition that if the user by the public be proved

A to be ever so open, lengthy and continuous, and the presumption of dedication arising therefrom be not rebutted, the jury is at law bound to infer a dedication, or that the judge presiding at the trial is entitled to direct them so to do. In that case strong and clear evidence of user was given. It was not rebutted. The presiding judge ruled that user in the colony (New South Wales) might be relied upon in like manner as it might be in England for the purpose of establishing B dedication of a road over Crown lands, as against the Crown, and that the user proved was sufficient to entitle the jury to presume dedication by the Crown of the road in question. This was the instruction to the jury of which SIR MONTAGUE SMITH expressly approved. He says (6 App. Cas. at p. 641):

> "Their Lordships have no difficulty in saying that the judge was right in C directing the jury that from the user of twenty-one years before the statute, continued since 1861 down to the time of action without any interruption or interference on the part of the Crown, they might presume a dedication prior to the statute, and at a time when the Crown had power to dedicate."

Again the words are "might presume," not "must presume." The portion of his judgment in which it is contended he laid down that the presumption of dedication D from continuous user was a præsumptio juris, which if not rebutted juries were bound at law to act upon, had reference to a passage in the judgment of MANNING, J., in which that learned judge apparently suggested that the user previous to the Crown Lands Act, 1861, was only inchoate and that its effect was defeated by that statute. The case is, in my view, no authority whatever for the proposition in support of which it was cited.

E In *Winterbottom* v. *Lord Derby* (11), user of the way in dispute by the public for a period of seventy years before action was proved. The defence was that during the entire of that period the land the way crossed was under lease, and that the defendant as reversioner was not bound by the action of the lessee. The presiding judge told the jury that from long user, going back indeed as far as living memory could go, they were at liberty, if they pleased, to infer a dedication.

F Cases of this kind might be multiplied. Your Lordships have not been referred to any case, and I, though I have searched somewhat diligently, have not been able to find any case in which there was even a suggestion that when the evidence of user is of the strongest kind and is unrebutted, the judge is entitled to direct the jury to find a verdict in favour of dedication. The crucial matter being the existence in the mind of the owner of an intention to dedicate, the inference of G that fact, if drawn at all, must be drawn by the judges of fact. The respective functions of the judge and jury in such cases are, in my view, this. It is for the judge in each case to determine, as a matter of law, whether there is any evidence from which the inference of an intention to dedicate can reasonably be drawn; it is for the jury to determine whether it shall be drawn. And if, by adopting such a rule or formula as that contended for, a judge takes upon himself H to decide upon the question whether the alleged presumption is rebutted or no, and forces this conclusion of his own upon the tribunal which is to determine issues of fact, either by directing them to find in a certain way, or by setting aside their decision if they find in the contrary way, he usurps an authority which in no way belongs to him. The rule of law as to the action of justices in such cases as this is, I think, that, if it does not appear on the face of their proceedings that I they have, as it is said, misdirected themselves, or there was evidence before them upon which reasonable men might act to sustain their findings of fact, their decisions cannot be disturbed. An order made without any evidence to support it is in truth, in my view, an order made without jurisdiction, and is, therefore, invalid at law, but a refusal to find an affirmative in favour of the person on whom the burden of proof lies cannot be so treated. It does not come within either the letter or spirit of the above-mentioned rule. If in the present case the justices were not satisfied that the earl intended to dedicate, they were bound to find against dedication. No middle course was open to them.

Counsel for the respondents referred to para. 131 of TAYLOR ON EVIDENCE (9th Edn.). The statement of the law contained in that paragraph is perfectly accurate, and is supported by the six authorities mentioned in the notes. It is to this effect, that the uninterrupted user of a road justifies a presumption in favour of the original animus dedicandi, even against the Crown. That is a wholly different thing from saying that this presumption is a præsumptio juris, which, if unrebutted, must be acted upon by exclusive judges of fact. This rule, relied upon by the respondents as to the unrebutted presumption of dedication, is a good working rule for all judges of fact to act upon. It is a rule which juries should be instructed to act upon, and which they ought to act upon, but it is, in my opinion, nothing more than that. An order made by such judges, in effect refusing to act upon it in favour of the person on whom the burden of proving dedication lies, cannot therefore, I think, be treated as a nullity, void at law, and made without jurisdiction. The practice of over a century in trials of such questions before juries establishes this. I am far from saying that if the present case had been tried before a jury they would not have been justified in finding in favour of dedication on the evidence on which the findings of the justices are presumably based. I think they would have been fully justified in so doing, but I am quite unable to come to the conclusion that a finding against the dedication is a conclusion at which no reasonable men could arrive. I go further. I do not think a finding to this latter effect could properly be set aside on the ground that it was against the weight of evidence.

The intention with which Jacob, Earl of Radnor, and his successors permitted the user relied upon being the crucial matter, it is essential to consider the time at which and the circumstances under which the user commenced and subsequently continued. If an owner of enclosed land permits the public for years to traverse on foot a well-marked footway across it, leading from one public thoroughfare to another, without making any effort to prevent them, or indicating in any way that he objects to the practice, the user would be very strong evidence indeed of his intention to confer on the public the right to use that footway; but if the owner of a moor or of some waste land over which the public were in the habit of wandering in all directions, were to make an unfenced road across it with similar termini, and by erecting gates or barriers upon the road prevent the passage of horses or carriages over it, but took no measures to prevent the public from wandering over it, or walking along it as they had theretofore done over the land upon which it has been made, it would appear to me to be pushing a principle to extremes to hold that this omission was not perfectly consistent with the absence of any intention on the owner's part to do anything more than allow the old practice to continue, so far as the changed nature of the surface would permit, without conferring upon the public any new right whatever. HEATH, J., said in *Steele* v. *Houghton* (12) in reference to a claim by the poor of the right to glean in cornfields (1 Hy. Bl. at p. 60):

> "It is the wise policy of the law not to construe acts of charity though continued and repeated for never so many years in such manner as to make them the foundation of legal obligation."

The same thought, substituting the word "kindliness" or "good nature" for the word "charity," is expressed by BOWEN, L.J., in *Blount* v. *Layard* (13) (a case about fishery) in the well-known passage of his judgment quoted with approval by LORD MACNAGHTEN in *Simpson* v. *A.-G.* (8). It ran thus ([1891] 2 Ch. at p. 690):

> "If the case is re-tried, the jury ought to be most carefully warned (as they were) not to do injustice under the idea that they are vindicating a public right. I think they ought to be solemnly told (as they no doubt will be) that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, though they are matters of

A private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

This passage applies forcibly, I think, to the present case. One has only to look at the map after reading the findings in para. 5 of the Special Case to realise how great the inconvenience, if not annoyance, would have been, caused by the fencing B of this road in such a way as to prevent anyone rambling on the waste land beside it or from crossing over it to the beach, or gaining access to it, and how difficult, if not impossible, it would have been, while the road remained unfenced, to have prevented those wanderers from walking along it from end to end. Much reliance was placed upon the fact that while a toll-gate and barriers were erected upon this road to prevent the passages of wheeled traffic along it, no barriers were C erected to prevent the passage along it of passengers on foot; that, on the contrary, room was left at each side of these obstructions for foot passengers to pass. But no barrier—while the public were permitted to wander over the waste land and the road remained unfenced—could have been effective for that purpose; because anyone could by deviating on to the waste land at either side of the road have outflanked the barrier. Exclusion from the waste land would possibly have been D an effective protection to the owner's rights, but it would have been a churlish and unkindly act, hurtful, probably moreover, to the development of Folkestone as a seaside resort.

It has been found that there was no evidence of any road or defined footway having been made upon this land before the year 1836, and there is no finding that such a footway existed over it leading from one public thoroughfare to another E before that date, or that any precaution was taken to prevent people from wandering where they would over the surface of the waste land. It was, however, found that since 1836 foot passengers used the whole width of the road as a passage, and had traversed the banks at its sides where practicable; that the road was not absolutely necessary for the accommodation of any persons other than those who occupied the houses since erected abutting upon it, their servants, tradespeople, F and visitors; that such repairs as were effected upon it down to 1851 were executed at the expense of Lord Radnor and his successors, but that it was never properly repaired till the year 1836; and never formally dedicated as a public highway according to the provisions of the Highways Act, 1835, s. 23. The correctness of this last finding is admitted.

It was not disputed in argument that for all purposes other than that of the G passage of persons on foot this road was a private road; nor was it disputed that Jacob, Earl of Radnor, was in the year 1827 only tenant for life of his estate, and as such could not at common law have dedicated to the public any right of way over it. Neither was it disputed that for many years from and after that date, 1827, the estate was settled in strict settlement, but the appellants put in evidence before the justices a private Act of Parliament of June, 1825, passed to enable H building leases to be granted of part of the settled estates of the earl. The first section empowers him to grant building leases with power to the lessees to appropriate any portion of the demised premises as and for streets, passages, or ways for the more convenient enjoyment of such houses as might be built, and the fifth section, which is the important section, empowers the earl to "allot and set out" a component part of the pieces or plots of ground described in the schedule annexed I to the Act for "public squares, roads, streets, ways, avenues, or otherwise for the use and convenience of the houses and other public buildings to be erected upon the said pieces or plots of ground or any part or parcel thereof as aforesaid." The waste land below the cliff was included in this schedule. If the earl dedicated this road as a footway to the public he could only do so under the provisions of this section. A lengthened argument was addressed to your Lordships' House on the construction of the section. It is obvious that its framers considered that a street, road, or way, though public, might yet be for the convenience of the occupiers of the houses to be built, but it was contended that this particular Sandgate road

was "not allotted or set out" for the purpose of a public footpath, but merely as and for a private roadway for horses and carriages to traverse. I think it would, on the authorities I have cited, have been competent for the earl to have "allotted and set out," under the provisions of this section, a road to serve the double purpose of a public footpath and a private road for the passage of horses and carriages, and that it would have been competent for any jury who might have tried the case, and for the justices who actually tried it, to have presumed from long continued user that he intended to do this, but I think it would have been equally competent for such a jury, and was competent for the justices, having regard to all the facts, notwithstanding the evidence of user, to have found that the earl never intended to do anything so improbable. One could, I think, understand his making, for the development of his estates, a road public for all purposes leading from one public thoroughfare to another, or making a private road (for which he did not require statutory powers), leaving the public to wander over it as they had formerly wandered on the ground it covered, and not churlishly depriving them of that enjoyment, without intending to confer any new public right. Both of these courses would have been reasonable enough. I fail to see on what ground it could be held that no reasonable men could find he adopted the latter. Counsel for the appellants urged that if either the then earl of the corporation believed that any public footway then existed over this road, it would necessarily have been mentioned in this negotiation. No allusion appears to have been made to its existence. I concur with him in thinking that the conduct of the parties in this respect is very significant. On the whole, I am of opinion that the appeal should be allowed and the judgment of the King's Bench Division restored, on the ground, in addition to that already mentioned, that it would have been competent for a jury, had the case been tried by a jury, to have, on proof of the facts found, returned a verdict either in favour of dedication or against it, and that neither verdict could have been disturbed. I further think that if the findings in the Case Stated were treated as a special verdict found by a jury, the respondents would not have been entitled to have a judgment entered for them, and I am, therefore, unable to discover any ground on which the conclusion of this bench of justices should be disturbed where a jury's determination would not have been disturbed. It is hardly necessary to point out that in *Greenwich Board of Works* v. *Maudsley* (14) the court had power to draw inferences of fact.

Solicitors: *Holt, Beever & Crowdy*, for *A. F. Kidson*, Town Clerk, Folkestone; *White, Borrett & Black*, for *A. D. & L. J. D. Brockman*, Folkestone.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

DUNLOP PNEUMATIC TYRE CO., LTD. *v.* NEW GARAGE AND MOTOR CO., LTD.

[House of Lords (Lord Dunedin, Lord Atkinson, Lord Parker and Lord Parmoor), May 18, 19, July 1, 1914]

[Reported [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 30 T.L.R. 625]

Contract—Damages—Liquidated damages or penalty—Question for court—Characteristics of liquidated damages and penalty—Presumption of penalty where sum payable on occurrence of events of varying importance—Rebuttal where pre-estimate of damage impossible.

Where the parties to a contract agree that on breach of the contract one party will pay to the other a specified sum "by way of damages and not as a penalty" they may prima facie be supposed to have meant what they say, but the expression is not conclusive, and the court must determine whether the payment stipulated is in truth a penalty or liquidated damages. The essence of a penalty is a payment of money stipulated in terrorem of the offending party: the essence of liquidated damages is a genuine pre-estimate of damage. The question whether a sum stipulated is a penalty or liquidated damages is one of construction to be decided on the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach. A sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from a breach of the contract or if the breach consists only in not paying a sum of money and the sum stipulated is greater than the sum which ought to have been paid, and there is a presumption (but no more) that there is a penalty when a single sum is made payable on the occurrence of one or more of all of several events, some of which may occasion serious and others trifling damage. But that presumption may be rebutted if the damage caused by each and every one of those events, however varying in importance, may be of such an uncertain nature that it cannot previously be accurately ascertained.

Retail dealers agreed to sell the goods of a wholesale manufacturer only on conditions which were designed to insure maintenance of the prices fixed by the manufacturer and to pay £5 for every article sold in breach of the agreement "as and by way of liquidated damages, and not as a penalty":

Held: although the sale of an article of one type in breach of the contract must result in more damage to the manufacturer than the sale of another, the provision in the contract must be taken to refer to a single obligation to maintain prices generally and not to the payment of a sum on the non-performance of any one of many obligations differing in importance; in the circumstances of the case and on construction of the contract the provision relating to damages contained nothing unreasonable, unconscionable, or extravagant; and, therefore, the stipulation was to be taken as one for liquidated damages and the retailers were liable to pay the sum specified in respect of each breach of the contract of which they had been guilty.

Notes. Applied: *Ford Motor Co. (England)* v. *Armstrong* (1915), 31 T.L.R. 267; *English Hop Growers* v. *Dering*, [1928] All E.R.Rep. 396; *Widnes Foundry (1925), Ltd.* v. *Cellulose Acetate Silk Co.* (1931), 47 T.L.R. 481. Considered: *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.* v. *Parslay*, [1936] 2 All E.R. 515; *British Motor Trade Association* v. *Salvadori*, [1949] 1 All E.R. 208; *Cooden Engineering Co.* v. *Stanford*, [1952] 2 All E.R. 915; *Stockloser* v. *Johnson*, [1954] 1 All E.R. 630. Referred to: *Watts, Watts & Co.* v. *Mitsui & Co.*,

[1916–17] All E.R.Rep. 501; *Tool Metal Manufacturing Co.* v. *Tungsten Electric Co.* (1953), 71 R.P.C. 1.

As to liquidated damages or penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298–302; and for cases see 17 DIGEST (Repl.) 148 et seq.

Cases referred to:

(1) *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (*Don Jose Ramos*), [1905] A.C. 6; 74 L.J.P.C. 1; 91 L.T. 666; 21 T.L.R. 58, H.L.; 17 Digest (Repl.) 149, *489*.

(2) *Public Works Comr.* v. *Hills*, [1906] A.C. 368; 75 L.J.P.C. 69; 94 L.T. 833, P.C.; 17 Digest (Repl.) 149, *490*.

(3) *Webster* v. *Bosanquet*, [1912] A.C. 394; 81 L.J.P.C. 205; 106 L.T. 357; 28 T.L.R. 271, P.C.; 17 Digest (Repl.) 156, *532*.

(4) *Kemble* v. *Farren* (1829), 6 Bing. 141; 3 Moo. & P. 425; 7 L.J.O.S.C.P. 258; 130 E.R. 1234; 17 Digest (Repl.) 157, *546*.

(5) *Wallis* v. *Smith* (1882), 21 Ch.D. 243; 52 L.J.Ch. 145; 47 L.T. 389; 31 W.R. 214, C.A.; 17 Digest (Repl.) 77, *14*.

(6) *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; 35 W.R. 17, H.L.; 17 Digest (Repl.) 158, *555*.

(7) *Willson* v. *Love*, [1896] 1 Q.B. 626; 65 L.J.Q.B. 474; 74 L.T. 580; 44 W.R. 450, C.A.; 17 Digest (Repl.) 148, *488*.

Also referred to in argument:

Atkyns v. *Kinnier* (1850), 4 Exch. 776; 19 L.J.Ex. 132; 154 E.R. 1429; sub nom. *Atkins* v. *Kinnear*, 14 L.T.O.S. 353; 17 Digest (Repl.) 157, *548*.

Reynolds v. *Bridge* (1856), 6 E. & B. 528; 26 L.J.Q.B. 12; 27 L.T.O.S. 169; 2 Jur.N.S. 1164; 4 W.R. 640; 119 E.R. 961; 17 Digest (Repl.) 158, *549*.

Diestal v. *Stevenson*, [1906] 2 K.B. 345; 75 L.J.K.B. 797; 96 L.T. 10; 22 T.L.R. 673; 12 Com. Cas. 1; 17 Digest (Repl.) 152, *509*.

Pye v. *British Automobile Commercial Syndicate, Ltd.*, [1906] 1 K.B. 425; 75 L.J.K.B. 270; 22 T.L.R. 287; 17 Digest (Repl.) 151, *497*.

Appeal by the plaintiffs in the action from an order of the Court of Appeal (VAUGHAN WILLIAMS and SWINFEN EADY, L.JJ., KENNEDY, L.J., dissenting).

The appellants were wholesale manufacturers of motor tyres, covers, and tubes, and in April, 1911, they entered into an agreement with the respondents, who sold similar goods by retail, which provided that the respondents would not sell or offer any Dunlop motor tyres, covers, or tubes to any private customers or to any co-operative society at prices below those mentioned in the appellants' price list current at the time of sale, nor give to any such customer or society any cash or other discounts or advantages reducing the said prices, and, further, that the respondents would not sell or offer any Dunlop motor tyres, covers, or tubes to any other person, firm, or company at prices less than those mentioned in the price list aforesaid. It was further provided that the respondents would pay to the appellants the sum of £5 for each and every tyre, cover, or tube sold or offered in breach of the agreement as and by way of liquidated damages and not as a penalty, but without prejudice to any other rights or remedies which the appellants might have under such agreement. They also agreed not to sell to "persons whose supplies" the appellants "may decide to suspend." The appellants brought this action against the respondents for an injunction and damages for alleged breaches of the agreement. The action was tried before PHILLIMORE, J., without a jury. He ordered judgment to be entered for the plaintiffs for an injunction, and directed an inquiry to be held before a master as to the damages sustained by them and for an account of the goods sold by the defendants since the date of the agreement, and of the prices at which they were sold. The master held that the sum mentioned in the agreement was liquidated damages, and not a penalty, and assessed the damages at £250. The defendants appealed to the Court of Appeal, who held that the sum of £5 mentioned in the agreement was a penalty, and, as

A there was no other evidence of damage, the plaintiffs were entitled to nominal damages only. The plaintiffs appealed.

Younger, K.C., *Disturnal*, K.C., and *Kingsbury* for the appellants.
McCall, K.C., and *Morton Smith* for the respondents.

Their Lordships took time for consideration.

B July 1, 1914.—The following opinions were read.

LORD DUNEDIN.—The appellants, through an agent, entered into a contract with the respondents under which they supplied them with their goods, which consisted mainly of motor tyres, covers, and tubes. By this contract, in respect of certain concessions as to discounts, the respondents bound themselves not to do C several things, which may be shortly set forth as follows: Not to tamper with the manufacturers' marks; not to sell to any private customer or co-operative society at prices less than the current price list issued by the Dunlop company; not to supply to persons whose supplies the Dunlop company had decided to suspend; not to exhibit or to export without the Dunlop company's assent. Finally, the agreement concluded (cl. 5):

D

> "We agree to pay to the Dunlop company the sum of £5 for each and every tyre, cover, or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty."

The appellants, having discovered that the respondents had sold covers and tubes at prices under the current list price, raised action and demanded damages. The E case was tried and the breach in fact held proved. An inquiry was directed before the master as to damages. The master inquired, and assessed the damages at £250, adding this explanation:

> "I find that it was left open to me to decide whether the £5 fixed in the agreement was penalty or liquidated damages. I find that it was liquidated damages."

F

The respondents appealed to the Court of Appeal, when the majority of that Court, VAUGHAN WILLIAMS and SWINFEN EADY, L.JJ., held (KENNEDY, L.J., dissenting) that the said sum of £5 was a penalty, and entered judgment for the plaintiffs for the sum of £2 as nominal damages. Appeal from that decision is now before your Lordships' House.

G We had the benefit of a full and satisfactory argument, and a citation of the very numerous cases which have been decided on this branch of the law. The matter has been handled, and at a recent date, in the courts of highest resort. I particularly refer to *Clydebank Engineering Co.* v. *Yzquierdo y Castaneda* (1), in your Lordships' House, and *Public Works Comr.* v. *Hills* (2) and *Webster* v. *Bosanquet* (3), in the Privy Council. In all these cases many of the previous H authorities were considered. In view of that fact, and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:

(i) Though the parties to a contract who use the words penalty or liquidated I damages may primâ facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case. (ii) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage: *Clydebank Engineering Company* v. *Yzquierdo y Castaneda* (1). (iii) The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of

as at the time of the making of the contract, not as at the time of the breach: *Public Works Comr.* v. *Hills* (2) and *Webster* v. *Bosanquet* (3). (iv) To assist this task of construction various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are: (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach—illustration given by LORD HALSBURY, L.C., in the *Clydebank Case* (1). (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid: *Kemble* v. *Farren* (4). This, though one of the most ancient instances, is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that, when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable—a subject which much exercised JESSEL, M.R., in *Wallis* v. *Smith* (5)—is probably more interesting than material. (c) There is a presumption (but no more) that it is a penalty when

> "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages":

per LORD WATSON in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (6) (11 App. Cas. at p. 342). On the other hand: (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties: *Clydebank Case* (1) per LORD HALSBURY; *Webster* v. *Bosanquet* (3) per LORD MERSEY.

Turning now to the facts of the case, it is evident that the damage apprehended by the appellants owing to the breaking of the agreement was an indirect and not a direct damage. So long as they got their price from the respondents for each article sold, it could not matter to them directly what the respondents did with it. Indirectly it did. Accordingly, the agreement is headed "Price Maintenance Agreement," and the way in which the appellants would be damaged if prices were cut was clearly explained in evidence, and no successful attempt was made to controvert that evidence. But though damages as a whole from such a practice would be certain, yet damages from any one sale would be impossible to forecast. It is just, therefore, one of those cases where it seems quite reasonable for parties to contract that they should estimate the damage at a certain figure, and provided that the figure is not extravagant there would seem no reason to suspect that it is not truly a bargain to assess damages, but rather a penalty to be held in terrorem.

The argument of the respondents was really based on two heads. They overpressed, in my judgment, the dictum of LORD WATSON in *Lord Elphinstone's Case* (6), reading it as if he said that the matter was conclusive, instead of saying, as he did, that it raised a presumption, and they relied strongly on *Willson* v. *Love* (7). Now, in the first place, I have considerable doubt whether the stipulated payment here can fairly be said to deal with the breaches, "some of which"—I am quoting LORD WATSON's words—"may occasion serious and others but trifling damage." As a mere matter of construction, I doubt whether cl. 5 applies to anything but sales below price. But I will assume that it does. None the less the mischief, as I have already pointed out, is an indirect mischief, and I see no data on which, as a matter of construction, I could settle in my own mind that the indirect damage from selling a cover would differ in magnitude from the indirect damage from selling a tube, or that the indirect damage from a cutting price sale would differ from the indirect damage from supply at full price to a hostile

A because prohibited, agent. You cannot weigh such things in a chemical balance. The character of the agricultural land which was ruined by slag heaps in *Elphinstone's Case* (6) was not all the same, but no objection was raised by LORD WATSON to applying an overhead rate per acre, the sum not being in itself unconscionable. I think that *Elphinstone's Case* (6), or rather the dicta in it, do go this length—that if there are various breaches to which one indiscriminate sum to be paid in B breach is applied, then the strength of the claim must be taken at its weakest link. If you can see clearly that the loss on one particular breach could never amount to the stipulated sum, then you may come to the conclusion that the sum is a penalty, but further than this it does not go. So, for the reasons already stated, I do not think that the present case forms an instance of what I have just expressed.

C As regards *Willson's Case* (7), I do not think it material to consider whether it was well decided on the facts, for it was decided on the view of the facts that the manurial value of straw and of hay were known ascertainable quantities as at the time of the bargain, and radically different, so that the damage resulting from the want of one could never be the same as the damage resulting from the want of the other. Added to that, the parties there had said penalty, and the effort D was to make out that they really meant liquidated damages; and lastly, if my view of the facts in the present case is correct, then RIGBY, L.J., would have agreed with me, for the last words of his judgment are as follows ([1896] 1 Q.B. at pp. 633, 634):

> "On the other hand, it is stated that, when the damages caused by a breach of E contract are incapable of being ascertained, the sum made by the contract payable on such a breach is to be regarded as liquidated damages. The question arises, what is meant in this statement by the expression 'incapable of being ascertained'? In their proper sense the words appear to refer to a case where no rule or measure of damages is available for the guidance of a jury as to the amount of the damages, and a judge would have to tell them they must fix F the amount as best they can."

To arrive at the indirect damage in this case, supposing no sum had been stipulated, that is just what a judge would, in my opinion, have had to do. On the whole matter, therefore, I go with the opinion of KENNEDY, L.J., and I move your Lordships that the appeal be allowed, and judgment given for the sum as brought out by the master, the appellants to have their costs in this House and in the G courts below.

LORD ATKINSON.—The action out of which this appeal arises was brought upon a contract entered into between the appellants, through the agency of Messrs. Pellant, Ltd., and the respondents, claiming, among other things, to recover a sum of £5 in respect of each of the breaches of this contract complained of. The H sole question for decision on this appeal is whether the sum of £5 is a penalty or liquidated damages.

The appellants are extensive and well-known manufacturers of motor tyres, covers, and tubes—a trade in which there is keen competition. They have no patents protecting their manufacture. Success over their competitors depends on the reputation acquired for their products, and largely upon the efficiency of the I organisation of their business. Ninety-nine per cent. of their output in this class of goods is sold through what one of their managers, who was examined as a witness, described as their distributing organisation. It consists in this, that they sell to motor-car manufacturers, persons called factors who resell to retail agents, and retail agents themselves, and that all these latter sell to the public, the users of the goods. The appellants produce price lists of these goods of theirs varying from time to time. They invariably sell at these prices to the members of their distributing organisation under agreements similar to that sued upon, giving, however, discount and rebates at varying rates. These agreements are styled price-

maintenance agreements, and their main purpose, obviously, is to prevent the sale to the public, the users, either directly or indirectly, of the goods which the appellants manufacture at prices less than those named in their price lists. The result of this is that, competition having reduced these prices to the lowest remunerative scale, the agent secures his remuneration by selling at the prices at which he buys. If he sells at lower prices than these the loss comes out of his discount and rebates, his own profits. The manager in his evidence explains elaborately the dislocation of the distributing organisation of the appellants and the injury to their trade which would ensue from the sale by one or more of their agents or factors of their goods at prices less than those named in these lists. He pointed out that if the business of one of their agents in any particular place was undercut by such sales, the agent would, owing to the diminution of his remuneration, most probably throw up his agency and become the agent of a competitor, thus leaving the field open to the rivals of the appellants; that it was essential for their trade that their wares should be obtainable all over the country at as many places as possible; that though the consequential injury to their trade by this undercutting would, or might, be very serious, it would be very difficult to prove in evidence the precise amount of their loss in money; that considering all these things, the appellant company fixed £5, the sum mentioned in the agreement, as a fair and reasonable sum for liquidated damage in respect of the breaches specified. This evidence was uncontradicted.

In a good deal of the argument which has been addressed to your Lordships on behalf of the respondents, the true object of this price-maintenance agreement and the nature of the consequential injury to the plaintiffs' trade flowing from the breaches of it have been somewhat lost sight of. It has been urged that as the sum of £5 becomes payable on the sale of even one tube at a shilling less than the listed price, and as it was impossible that the appellant company should lose that sum on such a transaction, the sum fixed must be a penalty. In the sense of direct and immediate loss the appellants lose nothing by such a sale. It is the agent or dealer who loses by selling at a price less than that at which he buys, but the appellants have to look at their trade in globo, and to prevent the setting up, in reference to all their goods anywhere and everywhere, a system of injurious undercutting. The object of the appellants in making this agreement, if the substance and reality of the thing and the real nature of the transaction be looked at, would appear to be a single one—namely, to prevent the disorganisation of their trading system and the consequent injury to their trade in many directions. The means of effecting this is by keeping up their price to the public to the level of their price list, this last being secured by contracting that a sum of £5 shall be paid for every one of the three classes of articles named sold or offered for sale at prices below those named on the list. The very fact that this sum is to be paid if a tyre cover or tube be merely offered for sale, though not sold, shows that it was the consequential injury to their trade due to undercutting which they had in view. They had an obvious interest in preventing this undercutting, and on the evidence it would appear to me impossible to say that their interest was incommensurate with the sum which it was agreed to pay.

Their object is akin in some respects to that which a trader has in binding a former employee not to set up, or carry on, a rival business within a certain area. The trader's object is to prevent competition, and especially to prevent his old customers whom the employee knows from being enticed away from him. If one takes, for example, the case of a plumber; the carrying on of the trade of a plumber may mean anything from mending gas-pipes for a few pence apiece up to doing all the plumbing work of a big hotel. If the employee should mend a hundred of such pipes for twenty old customers at 6d. apiece, for which the employer would charge 1s. apiece, could it possibly be contended that the trader's loss was only a hundred sixpences at £2 10s.? It is, I think, quite misleading to concentrate one's attention upon the particular act or acts by which, in such cases as this, the rivalry in trade is set up, and the repute acquired by the former

employee that he works cheaper and charges less than his old master, and to lose sight of the risk to the latter that old customers, once tempted to leave him, may never return to deal with him, or that business which might otherwise have come to him may be captured by his rival. The consequential injuries to the trader's business arising from each breach by the employee of his covenant cannot be measured by the direct loss in a monetary point of view on the particular transaction involved in the breach. An old customer may be as effectively enticed away from him through the medium of a 10s. job done at a cheap rate as by a £50 job done at a cheap rate, or a reputation for cheap workmanship may be acquired as effectively in one case as in the other. In many cases a person may contract to do or abstain from doing an act which is a composite act, the product or result of almost numberless other acts. For instance, if one should contract with a builder to build a house of the best materials and with the most skilled workmanship, and to hand over possession of the same completed on a certain day for £1,000, £500 to be paid if the agreement was not performed, every fire grate set which on completion would be found to be of bad material, every door which would be then found to have been defectively hung, every cubic foot of masonry which would be found to have been badly and improperly built, would involve a breach of the agreement, but it would be quite illegitimate thus to disintegrate the obligation to do what the parties regarded as a single whole, into a number of obligations to do a number of things of varying importance, and treat the £500 as primâ facie a penalty, because these individual breaches of the agreement did not cause, in many instances, any injury commensurate with that sum. This is the very ground, or one of the grounds, upon which LORD HERSCHELL rests his judgment in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (6). He said (11 App. Cas. at p. 345):

> "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled."

In the present case the agreement of the parties, in effect, though possibly not in form, did little, if anything, more than impose a single obligation—namely, to sell or endeavour to sell the goods of the appellants at the prices named in their lists, though, of course, as they sold different kinds of goods, this single obligation might be violated in many ways. Much reliance was placed by the respondents on the well-known passage in the judgment of LORD WATSON in the last-mentioned case (11 App. Cas. at p. 342), to the effect that

> "when a single lump sum is made payable by way of compensation, on the occurrence of one or more of several events, some of which may occasion serious, and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification."

It is quite true that, as mentioned by SWINFEN EADY, L.J., LORD ESHER, in *Willson* v. *Love* (7), said ([1896] 1 Q.B. at p. 630) that he thought that this passage meant the same thing as if it ran "some of which occasion serious and other less serious damage." With all respect, this alteration would mean that the damage resulting from each event should be uniform in amount, a construction which would mean that the stipulated compensation must presumably be a penalty in almost every conceivable case. Moreover, LORD WATSON's statement of the law as it stands was approved by LORD DAVEY in *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (1) and in *Webster* v. *Bosanquet* (3) without any qualification of that kind. In this last-mentioned case, as in the present, the contract provided that the amount specified should be paid as "liquidated damages, and not as a penalty." The covenant upon which the matter in controversy turned was contained in a deed made on the dissolution of a partnership between two partners, the plaintiff and defendant, and it provided that the defendant should not, during a certain

period, be at liberty to sell the whole or part of the tea crops of two estates named to any person other than the plaintiff without first offering to him the option of buying the same, and further provided that on breach of this covenant by the defendant he should pay to the petitioner the sum of £500 as "liquidated damages and not as a penalty." Now, it will be observed that this covenant would be violated by the sale of any appreciable part, in a business point of view, of the crops of either of these estates, no matter how relatively small that part might be compared with the entire crop of either. It is also clear that the object of the parties when they executed the deed was to secure to the plaintiff the option of buying the entire crops of both estates, and that when they fixed this sum of £500 they were thinking of the loss which the plaintiff might sustain by the loss of that option. The amount of tea sold by the defendant in breach of the covenant was considerable—nearly 54,000 lb. It was laid down that in determining whether a sum contracted to be paid is liquidated damages or a penalty, one is to consider whether the contract, whatever its language, would, at the time it was entered into, have been unconscionable and extravagant, and one which no court ought to allow to be enforced if this sum were to be treated as liquidated damages, having regard to any possible amount of damages conceived to have been in the contemplation of the parties when they made the contract. LORD MERSEY, in delivering the judgment of the Board, said ([1912] A.C. at p. 398):

> "When making the contract it was impossible to foresee the extent of the injury which might be sustained by the plaintiff if sales of tea were made to third parties without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss to arise made it most reasonable for the parties to agree beforehand as to what the damages should be. And, furthermore, it is well known that damages of this kind, though very real, may be difficult of proof, and that the proof may entail considerable expense."

Those remarks are, having regard to the evidence in the present case, particularly applicable to it.

In *Kemble* v. *Farren* (4), TINDAL, C.J., said (6 Bing. at p. 148):

> "We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point."

Therefore, although it may be true, as laid down by LORD WATSON, that a presumption is raised in favour of a penalty where a single lump sum is to be paid by way of compensation in respect of many different events some occasioning serious and some trifling damage, it seems to me that this presumption is rebutted by the very fact that the damage caused by each and every one of those events, however varying in importance, may be of such an uncertain nature that it cannot be accurately ascertained. The damages have been proved to be of that nature in the present case, and the very fact that they are so renders it all the more probable that the sum of £5 was not stipulated for merely in terrorem, but was really and genuinely "a pre-estimate of the appellants' probable or possible interest in the due performance of this contract."

SWINFEN EADY, L.J., holds that cl. 5 of the agreement in the present case applies to the first part of cl. 3, the supplying of these goods to persons on the appellants' black list, as it was styled. I confess that this seems to me a very, very doubtful construction. What is prohibited by the second clause is "the sale or offering for sale of motor tyres, cases, or tubes at prices less than those in the price list." What is dealt with in cl. 5 is a sale or offering for sale of these particular kinds of goods in breach of the agreement. What is dealt with in the first part of cl. 3 is the supplying without consent of any such goods to these black-listed agents at any

price whatever. But even if SWINFEN EADY, L.J., should be right in this it would not lead me to a conclusion different from that to which I have come. The appellants, like the respondents, are most probably good business men. Neither of them contemplated, presumably, the black-listing of these agents without adequate trade reasons. Nothing was more natural than that the appellants should seek to prevent the supply of their goods indirectly to persons to whom they would not supply them directly. Considerable injury to the appellants' trade interests might obviously be done by putting such persons in a position to undercut their prices, and derange their supply organisation, and nothing conceivable could be more difficult than to prove by evidence, or to estimate precisely in money the exact amount of damages which might be caused by such an injury. The passage in the judgment of TINDAL, C.J., above quoted applies directly to such state of things. I entirely concur with KENNEDY, L.J., in his criticism of the agreement. I agree with him that on the face of it, on this point of liquidated damages, it contains nothing unreasonable, unconscionable, or extravagant; and I further think that the same may be said of the real transaction between the parties if its substance be regarded reasonably. For these reasons I think that the judgment of KENNEDY, L.J., was right, that the judgment appealed from was wrong and should be reversed, and the judgment of PHILLIMORE, J., be restored, and the appeal allowed with costs.

LORD PARKER.—Where the damage which may arise out of a breach of contract is in its nature uncertain, the law permits the parties to agree beforehand the amount to be paid on such breach. Whether the parties have so agreed or whether the sum agreed to be paid on the breach is really a penalty must depend on the circumstances of each particular case. There are, however, certain general considerations which have to be borne in mind in determining the question. If, for example, the sum agreed to be paid is in excess of any actual damage which can possibly, or even probably, arise from the breach, the possibility of the parties having made a bona fide pre-estimate of damage has always been held to be excluded, and it is the same if they have stipulated for the payment of a larger sum in the event of breach of an agreement for the payment of a smaller sum.

The really difficult cases are those in which the court has to consider what presumptions or inferences arise from the number or nature of the stipulations on breach of which it is agreed that the sum in question should be paid. In the case of a single stipulation, which, if broken at all, can be broken once only, and in one way only, such as a covenant not to reveal a trade secret to a rival trader, there can be no inference or presumption that the sum payable on breach is not in the nature of agreed damages, and if the parties have referred to it as agreed or liquidated damages, no reason why the court should not treat it as such. The question is more complicated when the stipulation, though still a single stipulation, is capable of being broken more than once, and more ways than one, such as a stipulation not to solicit the customers of a firm. A solicitation which is unsuccessful can give rise to only nominal damages, and even if it be successful, the actual damage may vary greatly according to the value of the custom which is thereby directly or indirectly lost to the firm. Still, whatever damage there is must be the same in kind for every possible breach, and the fact that it may vary in amount for each particular breach has never been held to raise any presumption or inference that the sum agreed to be paid is a penalty, at any rate in cases where the parties have referred to it as agreed or liquidated damages. The question becomes still more complicated where it is agreed to pay a single sum on the breach of a number of stipulations of varying importance. It is said that in such a case an inference or presumption is raised against the sum in question being in the nature of agreed damages, even though the parties have referred to it as such. In this respect I think that a distinction should be drawn between cases in which the damage likely to accrue from each stipulation is the same in kind, and cases in which the damage likely to accrue varies in kind with each stipulation. Cases of the former class

seem to me to be completely analogous to those of a single stipulation, which can be broken in various ways and with varying damages; but probably it would be difficult for the court to hold that the parties had pre-estimated the damage if they have referred to the sum payable as a penalty. A

In cases, however, of the latter class, I am inclined to think that the primâ facie presumption on inference is against the parties having pre-estimated the damage, even though the sum payable is referred to as agreed or liquidated damages. The damage likely to accrue from breaches of the various stipulations being in kind different, a separate pre-estimate in the case of each stipulation would be necessary, and it would not be very likely that the same result would be arrived at in respect of each kind of damage. In my opinion, however, any such presumption or inference would be primâ facie only and capable of being displaced by other considerations. Supposing it were recited in the agreement that the parties had estimated the probable damage from a breach of one stipulation at from £5 to £15, and the probable damage from a breach of another stipulation at from £2 to £12, and had agreed on a sum of £8 as a reasonable sum to be paid on the breach of either stipulation, I cannot think that the court would refuse to give effect to the bargain between the parties. In the present case, even accepting the construction of the contract which makes cl. 5 apply not only to a sale or offer contrary to the provisions of cl. 2, but also to one contrary to the provisions of cl. 3, I think it reasonably clear that the damage likely to accrue from the breach of every stipulation to which cl. 5 applies is the same in kind. Such damage will in every case consist in the disturbance or derangement of the system of distribution by means of which the appellants' goods reach the ultimate consumer. The parties by their contract agree that the sum payable on breach of any such stipulation is to be paid by way of damages and not by way of penalty, and I can see nothing to justify the court in refusing to give effect to this bargain. B C D E

LORD PARMOOR.—On April 7, 1911, Messrs. A. Pellant, Ltd. (acting as agents for the appellants), entered into a price-maintenance agreement with the respondents. The question to be determined is the construction of this agreement. In cl. 5 the respondents agreed to pay to the appellants F

> "the sum of £5 for each and every tyre, cover, or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty."

There has been difference of opinion whether the sum of £5 is inapplicable only to a breach of the conditions contained in cl. 2 of the agreement or extends to a breach of the conditions contained in this paragraph. Clause 2 contains an undertaking by the respondents that they G

> "will not sell or offer any Dunlop motor tyres, covers, or tubes to any private customers or to any co-operative society at prices below those mentioned in the price list current at the time of sale, nor give to any such customer or society any cash or other discounts or advantages reducing the same, and will not sell or offer any Dunlop motor tyres, covers, or tubes to any other person, firm, or company at prices less than those mentioned in the said price list." H

I agree with the opinion of KENNEDY, L.J., that under the terms of the contract the sum of £5 is only payable in respect of a breach of the undertaking in cl. 2 of the contract and does not extend to other breaches. I further agree with the opinion expressed by the lord justice that, within this limitation, cl. 5 of the contract does not apply to more than one contingency and that the case must be considered on this basis. It was held by the Court of Appeal that although the sum of £5 was agreed between the parties to be by way of liquidated damages and not as a penalty, yet it must be regarded as a penalty; that the appellants could not recover any greater damages for breach of the agreement in the sale or offering of any tyre, cover, or tube than such damage as they could prove that they had sustained; since they could not prove that they had sustained actual damage. I

A they were not entitled to more than nominal damages. It is against this decision that the appeal is brought to your Lordships' House.

There is no question as to the competency of parties to agree beforehand the amount of damages, uncertain in their nature, payable on the breach of a contract. There are cases, however, in which the courts have interfered with the free right of contract, although the parties have specified the definite sum agreed on by B them to be in the nature of liquidated damages, and not of a penalty. If the court, after looking at the language of the contract, the character of the transaction, and the circumstances under which it was entered into, comes to the conclusion that the parties have made a mistake in calling the agreed sum liquidated damages, and that such sum is not really a pactional pre-estimate of loss within the contemplation of the parties at the time when the arrangement was made, but a penal sum C inserted as a punishment on the defaulter irrespective of the amount of any loss which could at the time have been in contemplation of the parties, then such sum is a penalty, and the defaulter is only liable in respect of damages which can be proved against him. It is too late to say whether such interference with the language of a contract can be justified on any rational principle.

There are two instances in which the court has interfered when the agreed sum D is referable to the breach of a single stipulation. It is important that the principle of interference should not be extended. The agreed sum, though described in the contract as liquidated damages, is held to be a penalty if it is extravagant or unconscionable in relation to any possible amount of damage which could have been within the contemplation of the parties at the time when the contract was made. No abstract rule can be laid down without reference to the special facts of the E particular case, but when competent parties by free contract are purporting to agree a sum as liquidated damages there is no reason for refusing a wide limit of discretion. To justify interference there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate. In *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (1), LORD HALSBURY, L.C., gives an apt illustration of what would probably render a F sum agreed by the parties unconscionable, and, therefore, a penalty ([1905] A.C. at p. 10):

> "For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for £50 you were to pay a million of money as a penalty, the extravagance of that would be at once apparent."

G In the present case the definite sum agreed by the parties is £5, and this cannot be said to be extravagant or extortionate, having regard to the nature of the contract. The second instance in which the courts have sanctioned interference is in the case of a covenant for a fixed sum, or for a sum definitely ascertainable, and a larger sum is inserted by arrangement between the parties, payable as liquidated damages in default of payment. Since the damage for the breach of covenant is H in such cases by English law capable of exact definition, the substitution of a larger sum as liquidated damages is regarded, not as a pre-estimate of damage, but as a penalty in the nature of a penal sum. In the present case this limitation has no application. It cannot be said that the sum of £5 is being substituted for the payment of a smaller fixed or ascertainable sum, since from the nature of this contract any accurate pre-estimate of damage would be practically impossible. The words of TINDAL, C.J., in *Kemble* v. *Farren* (4) are directly applicable (6 Bing. I at p. 148):

> "We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases, it saves the expense and difficulty of bringing witnesses to that point."

The point on which the majority of the Court of Appeal decided this case against the appellants is that, where a contract contains varying stipulations, and the

evidence shows that these stipulations are of varying degrees of importance, the court exercises a wider power of interference, and a single sum made payable by the occurrence of the breach of one or more, or all of such stipulations, is primâ facie a penalty and not liquidated damages. If this statement of the law is accurate without limitation, the agreed sum of £5 in the present case would be primâ facie in the nature of a penalty, since that sum is fixed irrespective of the varying degrees of importance of the stipulations. I agree with KENNEDY, L.J., that, though the fact that the agreed sum covers more than one event is an element in the case, or may constitute a presumption that it is a penalty, it is in no sense conclusive against such sum being treated as liquidated damages. There may be a greater risk of infringing the principle against extortion, or against the substitution of a larger for a smaller payment, in applying the same figure to a number of different breaches of varying importance, more especially if some occasion serious and others but trifling damage, than when it is applied to one breach; but if these tests are complied with the parties may reasonably be allowed to make their own agreement. No doubt, if the agreed sum is not applied distributively, but equally to stipulations of varying importance, and in reference to any of the stipulations it is a penalty, it is a penalty for the purpose of the whole contract, since it could not in the same contract be construed both as a penalty and as liquidated damages. If the same agreed sum, separately allocated in different agreements to breaches of varying importance, could be properly construed as a pre-estimate of damage, it seems illogical to regard such sum as a penal payment because for convenience or economy the whole transaction is included in one agreement. The present case is an illustration in point. Having regard to the character of the contract, it would have been possible to have a series of contracts applicable to the various stipulations, and to have inserted in each of them a sum of £5 as liquidated damages to compensate a loss difficult, if not incapable of ascertainment, at the time when the contract was made. I can see no reason why the parties should not be allowed to contract in one document instead of several, or that in such a case the law should interfere with freedom of contract.

SWINFEN EADY, L.J., in the Court of Appeal, largely bases his judgment on *Willson* v. *Love* (7). In that case there was a covenant by the lessees of a farm not to sell hay or straw off the premises during the last twelve months of a term, and provision that an additional rent of £3 per ton should be payable by way of penalty for every ton of hay or straw so sold. There was a substantial difference between the manurial value of hay and that of straw, and it was held that the sum so made payable was a penalty and not liquidated damages. It is noticeable in that case that the parties expressed the sum to be a penalty, and not liquidated damages, but in giving judgment A. L. SMITH, L.J., says ([1896] 1 Q.B. at p. 631):

> "Where a sum is made payable by a contract to secure performance of several stipulations, the damages for the breach of which respectively must be substantially different, or, in other words, the performance of stipulations of varying degrees of importance, that sum is primâ facie to be regarded as a penalty and not as liquidated damages."

If the words primâ facie only apply to a presumption which can be displaced, then I agree with KENNEDY, L.J., that the presumption is displaced in the present case, which belongs to a class in which it is practically impossible to make an accurate assessment of damage, and there is no question of extortion or of substituting a larger for a smaller sum. If the words primâ facie imply that the sum will be regarded as a penalty unless there are some special circumstances which could justify an opposite conclusion, the statement appears to be expressed in too general terms. In *Wallis* v. *Smith* (5), tried before FRY, J., and taken to the Court of Appeal, it was necessary to decide whether when a contract contained a condition for payment of a sum of money or liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of

money, the sum named should be treated as liquidated damages or as a penalty. All the previous cases were examined in the Court of Appeal, and the court unanimously affirmed the judgment of FRY, J., that the agreed sum was not a penalty but liquidated damages. LINDLEY, L.J., says (21 Ch.D. at p. 275):

> "When I come to look at the cases I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages."

COTTON, L.J., says (21 Ch.D. at p. 268):

> "There are a number of covenants to which cl. 25 applies, and in respect of the breach of which it is said that £5,000 shall be liquidated damages. Now, in what cases have the courts said that in those circumstances you shall construe the words 'liquidated damages,' not what they mean—as a sum assessed between the parties—but only as a penal sum, leaving the real damages to be ascertained. Undoubtedly the authorities do say this, that when a stipulation applies to a breach of a number of covenants, and one of those is a covenant for payment of a sum of money, where the damage for the breach of it is, according to English law, capable of being actually defined, then where a sum is said to be liquidated damages the stipulation applies not distributively to the different covenants but equally to all, and you must hold that the sum cannot be damages assessed by parties as in the case of a particular covenant with respect to which the damages are incapable of being ascertained and are by law fixed in a different way; but you must look upon it as a mere penalty, and ascertain when the breach occurs what is the damage sustained in respect of the particular breach."

In the present case there is no question of giving a larger sum as liquidated damages for a fixed or ascertainable sum, in reference to any of the stipulations to which the agreed figure is applicable, and no adequate reason for altering the terms of the contract as arranged by the parties. The parties adopted a wise and prudent course, having regard to the nature of the contract and the practical impossibility of an accurate ascertainment of damages. In my opinion, this appeal should be allowed with costs.

Appeal allowed.

Solicitors: *John B. & F. Purchase*; *John Hands.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

NORTH-WESTERN SALT CO., LTD. *v.* ELECTROLYTIC ALKALI CO., LTD.

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Moulton, Lord Parker of Waddington and Lord Sumner), December 16, 17, 18, 1913, February 12, 1914]

[Reported [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313; 58 Sol. Jo. 338]

Contract—Illegality—Public policy—Restraint of trade—Dismissal of action on contract—Illegality not raised in defence—Contract ex facie illegal—Contract illegal when read in connection with surrounding circumstances—All circumstances not before court.

Where an action rests on a contract which on the face of it, or when read in connection with all the surrounding circumstances, is shown to be so unreasonable as between the parties or so detrimental to the public as to be illegal as being in restraint of trade the court should dismiss the claim although the defendant has not raised the question of illegality on his pleadings. The matter is one of law for the judge. But if the contract is not ex facie illegal and there is not sufficient evidence to enable the court to review the case in its entirety the court is not entitled to consider the question and decide against the plaintiff.

Contract—Illegality—Public policy—Restraint of trade—Agreement between business concerns regulating trade relations—Consideration of interests of public—Parties best judges of reasonableness between themselves.

Per VISCOUNT HALDANE, L.C.: When the question is one of the validity of a commercial agreement for regulating their trade relations entered into between two firms or companies, the law adopts a different attitude from that which it takes in the case of, e.g., an agreement for service by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, when the law looks jealously at the bargain. In the former case the law still looks carefully to the interests of the public, but it regards the parties as the best judges of what is reasonable as between themselves.

Notes. Applied: *Lipton* v. *Powell*, [1921] 2 K.B. 51; *Rawlings* v. *General Trading Co.*, [1921] 1 K.B. 635. Considered: *Edler* v. *Auerbach*, [1949] 2 All E.R. 692. Referred to: *Joseph Evans & Co., Ltd.* v. *Heathcote*, [1918–19] All E.R.Rep. 279; *Montefiore* v. *Menday Motor Components Co.*, [1918–19] All E.R.Rep. 1188; *Naylor Benzon & Co.* v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Crown Milling Co.* v. *R.*, [1927] A.C. 394; *English Hop Growers* v. *Dering*, [1928] All E.R.Rep. 396; *Palmolive Co. (of England)* v. *Freedman*, [1928] Ch. 264; *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.* v. *Parslay*, [1936] 2 All E.R. 515; *Kores Manufacturing Co., Ltd.* v. *Kolok Manufacturing Co., Ltd.*, [1958] 2 All E.R. 65.

As to agreements contrary to public policy, see 8 HALSBURY'S LAWS (3rd Edn.) 130–136; and for cases see 12 Digest (Repl.) 269 et seq.

Cases referred to:

(1) *A.-G. of Commonwealth of Australia* v. *Adelaide Steamship Co., Ltd.*, [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp.M.L.C. 361; sub nom. *R. and A.-G. of Commonwealth of Australia* v. *Adelaide Steamship Co.*, 29 T.L.R. 743, P.C.; 43 Digest 12, *68*.

(2) *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630; 62 L.J.Ch. 273; 68 L.T. 833; 9 T.L.R. 150, C.A.; affirmed sub nom.

Nordenfelt v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 12 Digest (Repl.) 270, *2074*.

Also referred to in argument:

Mason v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143*.

Jones v. *North* (1875), L.R. 19 Eq. 426; 44 L.J.Ch. 388; 32 L.T. 149; 39 J.P. 392; 23 W.R. 468; 43 Digest 14, *75*.

Elliman, Sons & Co. v. *Carrington & Son, Ltd.*, [1901] 2 Ch. 275; 70 L.J.Ch. 577, 84 L.T. 858; 49 W.R. 532; 45 Sol. Jo. 536; 39 Digest 526, *1403*.

Printing and Numerical Registering Co. v. *Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 12 Digest (Repl.) 272, *2093*.

F. Cade & Sons v. *John Daly & Co.*, [1910] 1 I.R. 306.

Horner v. *Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, *181*.

Collins v. *Locke* (1879), 4 App. Cas. 674; 48 L.J.P.C. 68; 41 L.T. 292; 28 W.R. 189, P.C.; 43 Digest 21, *137*.

Mallan v. *May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, *258*.

Hare v. *London and North Western Rail. Co.* (1861), 2 John. & H. 80; 30 L.J.Ch. 817; 26 J.P. 70; 7 Jur.N.S. 1145; 70 E.R. 978; 38 Digest (Repl.) 376, *471*.

R. v. *Waddington* (1800), 1 East, 143; 102 E.R. 56; 14 Digest (Repl.) 371, *3607*.

Mogul Steamship Co. v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 5 T.L.R. 658; 6 Asp.M.L.C. 455; 37 W.R. 756, C.A.; affirmed [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 12 Digest (Repl.) 263, *2039*.

Standard Oil Co. v. *United States* (1911), 221 U.S. 1.

United States v. *American Tobacco Co.* (1911), 221 U.S. 106.

Hilton v. *Eckersley* (1855), 6 E. & B. 47; 24 L.J.Q.B. 353; 25 L.T.O.S. 214; 20 J.P. 4; 1 Jur.N.S. 874; 3 C.L.R. 1415; 119 E.R. 781; affirmed (1856), 6 E. & B. 66, Ex. Ch.; 12 Digest (Repl.) 271, *2079*.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal reversing a decision of SCRUTTON, J.

The following statement of the facts is taken from the judgment of the LORD CHANCELLOR: The appellant company are a combination of salt manufacturers, and they are alleged to include substantially the whole of the salt manufacturers in the north-west of England, and to have obtained the practical control of the inland market in England for the sale of vacuum salt, stoved and unstoved. Stoved salt is salt which is used for household purposes and has been subjected to special drying processes to fit it for such purposes. Vacuum salt is salt, whether afterwards stoved or not, which has been prepared by a process in which the waste steam from the works is carried under the salt pans, instead of fires being put under these salt pans. The contract between the appellants and the respondents, who were salt manufacturers, was made on Nov. 9, 1907. By its terms the respondents agreed to sell to the appellants 72,000 tons of vacuum salt, of which 12,000 were to be stoved salt. Delivery was to be spread over the four years between Jan. 1, 1908, and Dec. 31, 1911, in about equal monthly quantities. These quantities represented 18,000 tons a year, of which 3,000 were to be of stoved salt, unless the respondents in November in any year exercised an option to deliver unstoved salt only in the following year. The price was to be 8s. a ton for both kinds of salt, delivered into trucks at the sellers' works or into craft at their canal wharf. Stoved salt was to be loaded in bags, to be provided by the buyers, but to be filled and stitched at the expense of the sellers. The sellers were to be free to manufacture other salt for their own use, but not for sale, excepting so much as

was required to satisfy a certain current contract. The sellers were to have the option of re-purchasing from the buyers the stoved vacuum salt manufactured by themselves to the extent of 3,000 tons annually at the buyers' current prices. If the sellers made stoved vacuum salt they were to be elected distributors in respect of 3,000 tons annually, on the same terms and conditions as the buyers' other distributors. The sellers agreed not to lease or sell any of their land during the contract for salt making or boring for brine for salt making, but they might sell brine for other purposes than salt making. They were to be free to reduce or cease their making of salt. The agreement was to be taken as in settlement of all questions arising out of a previous agreement of Aug. 25, 1906. There were, of course, other salt manufacturers, and these were also under contract to sell salt to the appellants, and they acted as distributors of salt for the appellants under an agreement for distribution, the terms of which did not substantially vary during the period covered by the contract sued on. The effect of these terms was that if the salt manufacturers exercised their option to re-purchase the stoved salt, and then re-sold it, they would have to pay out of the price they received not only the current selling prices, but certain amounts which they might receive for putting the salt into bags and stitching them, and the amount of these charges could be claimed by the appellants as additions to their current selling price. There were also loading and other charges, the amounts of which might be similarly claimed. The appellants' current price for table salt, apart from all additions—the naked price, as it was called—was fixed on Mar. 30, 1908, at 18s., and the respondents intimated their exercise of the option to re-purchase. Controversy arose as to the terms and effect of the option when exercised, and as to whether the respondents were bound to sign a distributor's agreement, and in what terms. Meantime the respondents began, in breach of their contract, to sell stoved salt to customers. They appear to have concealed these sales from the appellants. The latter, however, discovered what had been done, and claimed damages.

In the event the present action was brought. In their points of claim the appellants simply stated the contract of Nov. 9, 1907, alleged breaches, and claimed damages. They set out particulars of the sales alleged to have been made in breach by the respondents, and stated the character of the dispute which had arisen as to the measure of damages. The respondents' points of defence were confined to a denial of the alleged breaches as regards the bulk of the stoved salt in question. The case made was that they had in substance re-purchased and properly sold the stoved salt in question, and that they had duly paid or brought into court all the money the appellants were entitled to. As to another and smaller quantity of the salt in controversy, they admitted sales in breach of contract, but disputed the measure and amount of the damages claimed, and they brought into court sums which they alleged were sufficient to satisfy all proper claims. In their reply the appellants joined issue generally, and alleged that the respondents were only entitled to sell salt re-purchased on the terms contained in the distributor's agreement, under which they ought, as a preliminary to such re-sale, to have lodged with the appellants the contracts for sale. This it was alleged that the respondents had not done, and the appellants further relied on certain inland conditions which were issued in accordance with the distributor's agreement, and with which it was said that the respondents had not complied. The respondents did not in their points of defence set up the invalidity or non-enforceability of the contract of Nov. 9, 1907, and it was admitted at the Bar that it was through no slip, but after consideration, that this was not done. The only questions raised by the pleadings were, first, whether the respondents had not in substance re-purchased under the option in the contract and then properly re-sold; and, secondly, as to the measure of damages. The action was tried in the Commercial Court, before SCRUTTON, J. The learned counsel for the respondents, in the course of cross-examining one of the appellants' witnesses, raised the point as to the legality of the agreement. Counsel for the appellants objected that no such point

had been pleaded. SCRUTTON, J., sustained the objection. He held that unless illegality appeared on the face of the plaintiffs' case the point could not be put in cross-examination, having regard to the fact that no such point was raised by the pleadings, pursuant to what was required by the Rules of the Supreme Court. He refused leave to amend, but he said that if, after hearing the plaintiffs' case, he was satisfied that the claim was as matter of law illegal or unenforceable, he would be bound to take judicial notice of this and to disallow the claim. He finally gave a judgment for the plaintiffs on the question of validity, and for the rest, confined it to the other questions which I have indicated. It dealt mainly with the measure of damages. The case went to the Court of Appeal, where a majority of the court, consisting of VAUGHAN WILLIAMS and FARWELL, L.JJ., held that the contract was in restraint of trade and bad, and that the action should be dismissed with costs. KENNEDY, L.J., dissented. The court was willing to grant a new trial, if both parties desired it, in which further evidence as to the circumstances could be brought forward, but the defendants elected to take a final judgment. The majority of the learned judges in the Court of Appeal held that the contract sued on must be read in connection with the distributor's agreement, and that this agreement must be read as connected with another agreement dated Sept. 11, 1906, between the plaintiffs and certain other salt manufacturers in the north-west of England. They considered that when these agreements were construed together the contract of 1907 must be held illegal as being in restraint of trade, and as forming part of a scheme for securing a monopoly by restricting output and raising prices. FARWELL, L.J., said:

> "In the present case no circumstances, in my opinion, could justify such a contract made for the mere purpose of raising prices, with the inseparable incident of depriving the members of the public of the choice of manufacturers, while hoodwinking them into the belief that such choice is open to them; in any case, the special circumstances would have to be pleaded and proved by the plaintiffs."

In his dissenting judgment, KENNEDY, L.J., held that there was no evidence on which, so far as the interests of the community were concerned, it could be held to be proved that the contract was contrary to public policy. It was, in his opinion, principally and essentially a contract for sale which was made between manufacturers and sellers of salt dealing with each other on equal terms, and regulating by partial and temporary restrictions, and for good consideration, the manufacture and sale of salt by one of them beyond a specified quantity, but only as part of a scheme for mutual profit. He found no sufficient evidence that the provisions of the contract of 1907 sued on were so injurious that it ought to be held invalid as offending against public policy. The plaintiffs appealed to the House.

Sankey, K.C., and *J. D. Crawford* for the appellants.
Maurice Hill, K.C., and *McCardie* for the respondents.

Their Lordships took time for consideration.

Feb. 12, 1914. The following opinions were read.

VISCOUNT HALDANE, L.C.—This is an appeal by the plaintiff in an action brought to recover damages for breach of a contract relating to the sale of salt. The question to be determined is whether the contract was enforceable. [HIS LORDSHIP stated the facts set out above and continued:] Some doubt has been raised whether the general agreement with the other salt manufacturers of Sept. 11, 1906, was put in evidence. But I assume, for the present, that it was in evidence, and I turn to it. It is contended that it must be looked at because of the provision in the contract sued on, which says (cl. 7) that the respondents, if they make any stoved vacuum salt, are to be elected distributors on the same terms and conditions as the appellants' present distributors. These terms and conditions are

contained in a document dated Aug. 7, 1908, which was submitted to the respondents as already stated, and which they refused to sign. It is headed: "Distributors Appointment," and it purports to define the terms on which a person appointed to be one of the appellants' salt distributors may purchase salt from the appellants and sell it. It defines the quantity that may be so purchased at prices to be fixed by the appellants, and the conditions on which it may be re-sold at prices to be similarly fixed, and it contains provisions regulating the amount to be sold, the discounts, the use of craft and rolling stock, the freight and other charges, and the customers to whom sales may be made. It provides that the appellants are not to be bound to deliver salt except at the works where it is produced, and that they may, on receiving any order, decide at which of the works of any of their members it is to be delivered. The document contains a statement that similar appointments had been given to other distributors, who were named, and in some cases it was stated that the appointment contained a clause providing that it should not prejudice rights under an agreement of Sept. 11, 1906, being the general agreement already referred to between the appellants and the other salt manufacturers. This last-mentioned agreement, which purports to be made with fourteen salt manufacturers of Cheshire, Lancashire, Worcester, and Stafford, comprising both companies and firms, contains provisions largely resembling those in the contract sued on. The purpose of both contracts was to enable the appellant company to control the sales and prices of salt within its sphere of influence, and as the members of the appellant company were the salt manufacturers themselves, this was not impracticable.

It is no doubt true that where on the plaintiff's case it appears to the court that the claim is illegal, and that it would be contrary to public policy to entertain it, the court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality. In the case before us it is to me obvious that the Court of Appeal could not be sure that it had got before it the whole of the materials which were necessary if it was to be justified in deciding on the legality of what it took to be a scheme for securing a monopoly by restricting output and raising prices, and for depriving the public of the choice of manufacturers, while hoodwinking them into the belief that such choice was open to them.

Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and remunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement. On material questions of fact such as these the Court of Appeal had not the proper evidence before it, and the pleadings of the respondents had thrown on the appellants no duty to bring forward such evidence. The general agreement of 1906, which was referred to in the document relating to the appointment of distributors, was not an agreement sued on. It constituted only a surrounding circumstance

in the case, and it is impossible to predict how that case might have appeared had the appellants presented full evidence of all the circumstances. The Court of Appeal ought, in my opinion, in the absence of amended pleadings and full evidence, to have refused to enter into what was a mere speculation on an intricate and wide question of fact.

If this be so, then the only question which can legitimately be considered is whether the contract sued upon is one which on the face of it ought not to be enforced. As I read the judgments of the majority of the lords justices, they seemed to have thought that the contract, although possibly valid if taken by itself, was not so in view of inferences of fact to be drawn from the character of the outside agreements to which referred. But if there is not sufficient evidence to enable a court to review the situation in its entirety, then the court is confined to what appears on the face of the contract sued upon, including any documents incorporated with it. As the outside agreements and documents to which I have referred were not so incorporated, I think that they could not be looked at in an action with the restricted issues which the pleadings before us raise.

I come back, therefore, to the contract on which the action is based. The law as to contracts in restraint of trade is not doubtful. In order to be valid, a clause imposing restraint must be reasonable, and he who says that the restraint is so must make it out. But he will discharge this burden if he can point to other parts of the contract which show the reasonableness of the restraining clause. If the contract read as a whole appears on the face of it not to be unreasonable in the interest, either of the parties or of the public, that is enough, and the question is not one of evidence. Evidence may, indeed, be given as to the character of the business and the circumstances. But it cannot be given on the question of the reasonableness of what appears on the face of the document when construed in the light of the circumstances as to which evidence is admissible. The question is one of law for the court, and is not an issue of fact. When the controversy is as to the validity of an agreement, say, for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude; it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded, I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality. Nor do I find that the public interest was necessarily or even probably injured.

I have already adverted to the fact that competition from abroad and from other parts of the United Kingdom was not affected. It may be, for all that appears, that agreements of this kind were the only effective method of preventing domestic competition from being carried to a length which would ultimately prove not merely ruinous to the parties themselves, but injurious to the public, even outside that portion of it which was dependent on the prosperity of the salt manufacturing industry. No doubt if there were a monopoly attempted to be set up which was calculated to enhance prices to an unreasonable extent, that would, if it so appeared on the face of the contract, be ground for refusing to enforce it. But an effective attempt to set up such a monopoly or so to enhance prices can but rarely appear on the face of an agreement between two traders. Whether such an attempt is really being made is almost always a question of fact. It certainly does not appear as being made on the face of the agreement in question. It may well be that

prices such as 18s. or 23s., which were to be charged for the appellants' salt, were fair prices. The fact that the manufacturer is only to receive 8s. cannot, standing by itself, be treated as sufficient evidence to the contrary. For it may be well worth while for a firm like the respondents, which obviously had to face much competition, to take a low price in order to secure a steady market, and the appellants' prices may have been no higher than a manufacturer might under ordinary circumstances have expected to get. Nor am I impressed by the view of FARWELL, L.J., that the arrangements stipulated for by the appellants for directing the supply of orders to be made from the factories which they thought most convenient in particular cases was detrimental to the public, who might be hoodwinked thereby. Such distribution arrangements are common in business. One of their obvious purposes is to save cost of carriage, and there is no reason to suppose that the business world is either ignorant that they may exist, and so is likely to be deceived, or is incapable of taking care of itself.

In an appeal which recently came before the Judicial Committee of the Privy Council (*A.-G. of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1)), my noble and learned friend, LORD PARKER, delivered on behalf of the committee a judgment in which the law on these subjects was fully reviewed. Among other statements in that judgment there is one which bears closely on the question before us. After explaining the difference between a monopoly in the strict sense of a restrictive right granted by the Crown, and a monopoly in the popular sense in which what is meant is that a particular business has been placed under the control of some individual or group, he says ([1913] A.C. at p. 796) that it is

> "clear that the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties, this onus will be no light one."

I desire to adopt this proposition as applicable to the question before us. For the reasons I have given, I do not think that, consistently with the principle so expressed, a court of justice is at liberty to infer from the terms of the contract in controversy that it is directed to establishing either a pernicious monopoly or a state of things injurious to the public. And I agree with what was said by LINDLEY, L.J., one of the most cautious and accurate judges of our time, in *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (2) ([1893] 1 Ch. at p. 646):

> "The interest of the public is no doubt adverse to monopolies and to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they themselves prefer, and to abandon and sell to the best advantage those businesses which for any reason they do not wish to continue."

The result of the consideration I have given to this appeal is that I think that this House should declare that the contract in question has not been shown to be in unreasonable restraint of trade, and that it was, therefore, enforceable by the appellants. As the Court of Appeal did not proceed to dispose of the points raised by the respondents as to the measure of damages, the case must be remitted to it for that purpose, with the declaration I have suggested. The appellants are entitled to their costs of the appeal to this house, and also to their costs of the last hearing in the Court of Appeal.

LORD MOULTON.—I agree, and, in my opinion, the sole question which your Lordships are called upon to decide is one of no difficulty if the history of this case be borne in mind. [HIS LORDSHIP stated the facts.] The discussion before this House has related solely to the question whether the court was justified in dismissing the action on the ground that the contract was illegal or unenforceable. The argument on behalf of the respondents is a very specious one. It is conceded that if a written contract is ex facie in restraint of trade so as to be against public policy, the judge is entitled, and, indeed, bound, to take the point, and the decision

is for him and not for the jury. The same must be true when the question is whether a contract when taken in connection with the surrounding circumstances, is in like manner against public policy. This must be so because the question is one of law, and, therefore, is for the court and not for the jury; although it is needless to say that, if there be a dispute as to the facts, that dispute has to be settled by the tribunal which has the duty of deciding as to fact before the judge can exercise his function. If, therefore, say the respondents, the court, taking the contract in connection with the facts appearing in a plaintiff's case or otherwise legitimately brought before the court at the trial, comes to the conclusion that it is against public policy, it is entitled and bound to dismiss the action. This reasoning would be sound in the case of a properly constituted action, where the defence of illegality is duly raised on the pleadings. The court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. If any be missing it is the plaintiff's own fault, and he must take the consequences. In such a case the legal motto, de non apparentibus et de non existentibus eadem est ratio, is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence. Even if they are in a position to call the evidence they are not at liberty so to do, because they are only entitled to call evidence on the issues raised by the pleadings. The facts before the court at the end of the case are, therefore, only a casual selection from the surrounding circumstances, and the court has no longer the right to treat them as properly and fully representing those surrounding circumstances so as to justify its pronouncing on their true effect upon the contract. It may be shortly put as follows. If the contract and its setting be fully before the court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiff, as fairly representing the whole setting.

Lurking beneath the argument for the respondents was the idea that the public good is a matter of such supreme importance that courts should not require proof in due form and in accordance with the recognised requirements of our legal procedure of any charge of illegality or offence against the rules of public policy. But our judicial procedure is based on the principal that in fairness a litigant should have due notice of the issues that are to be raised in order that he may prepare himself with the evidence necessary to present his case fittingly to the court, and it would indeed be strange to hold that this wholesome rule should be relaxed when he is charged with something so grave as acting against the common weal. Such a proposition partakes of the absurdity of the rule in criminal proceedings that prevailed in England centuries ago—viz., that, because felony was so very wicked, persons accused of it should not be allowed the assistance of counsel. Happily we have shaken ourselves free from all such notions, and the principle that in all cases fair notice should be given to the plaintiff of all the defences that are to be raised is now so fully recognised in our procedure that it is formulated in the rule above quoted, in language which permits no misunderstanding as to the general rule, and which, in particular, specifically includes such a case as the present.

One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement illegal on grounds which nothing could cure. In such a case the court would act upon it. But this is no exception to the general rule. Amendments of the pleadings and permission to the plaintiff to call evidence would ex hypothesi be useless in such case, because the fact is conclusive of the illegality. But no such case is before us here. It is evident that had the issue been raised on the pleadings, it would have entitled the plaintiffs to call further evidence of various kinds, and such evidence might have negatived any inference

that the parties were concerned in creating or supporting a hurtful combination in restraint of trade.

It remains to apply these principles to the present case. The contract sued upon is not ex facie illegal. So far as is material to this question, it may be described as a contract whereby the respondents have the option to buy up to a certain amount of stoved salt at a certain price, but there is a condition attached to this option that if they exercise it they shall not re-sell the goods except at certain prices and in a certain way. It was a hopeless task to argue that such a contract is ex facie against public policy, and accordingly the argument in the Court of Appeal and in this House turned mainly on the nature and status of a separate and independent contract made by the appellants with other persons which was not incorporated in, and did not form part of, their contract with the respondents. It was contended that this latter contract was in restraint of trade and hurtful to the public, and that the contract with the respondents was in aid of this contract, and that, therefore, it was also invalid. There can be no doubt that if this issue had been raised on the pleadings the appellants might have called relevant evidence as to the circumstances under which these contracts were made and as to their object and effect. This they had no opportunity of doing by reason of the respondents' electing not to raise the issue by their pleadings, and we cannot pronounce on the question whether the surrounding circumstances were such as to render the contract with the respondents illegal because we have not the requisite material before us. The consequence is that this appeal should be allowed with costs. The case must be remitted to the Court of Appeal on the question of damages.

LORD PARKER OF WADDINGTON.—I agree. A contract in restraint of trade may on the face of it be so unreasonable as between the parties, or so detrimental to the public, that the court will on its own initiative refuse to enforce it. There may, however, be contracts in restraint of trade the validity or invalidity of which cannot be gauged by the terms of the documents themselves without reference to the circumstances under which they were executed. In such cases it is more difficult for the court to act on its own initiative. Indeed, it ought not so to act unless it be quite certain that all the relevant facts are in evidence. The present action was for damages for breaches of a contract in restraint of trade. As I read the pleadings, both the breaches and liability for the breaches are admitted, the substantial matter in dispute being as to the measure of the damages. No question was raised as to the validity of the contract itself, nor can it be contended that the contract is on the face of it either unreasonable as between the parties or detrimental to the public. At the trial the defendants' counsel proposed to cross-examine one of the plaintiff's witnesses as to the circumstances under which the contract was executed, in order to show that, having regard to those circumstances, the contract was invalid. The judge refused to allow this to be done, as no question of invalidity was raised by the pleadings. He also refused to allow the pleadings to be amended so as to raise the question of invalidity. Under those circumstances neither party had any opportunity of tendering the evidence which would have been relevant on this question if raised by the pleadings. It so happened, however, that certain facts and documents which would have been relevant on this question if raised, were also relevant, and were admitted in evidence, on other issues in the action. On the strength of those facts and documents the majority of the Court of Appeal (KENNEDY, L.J., dissenting), have held the contract sued on to be invalid as part of a scheme for securing a monopoly by restricting output and by raising prices. The question your Lordships have to determine is whether this decision can stand. For my part, I entirely agree with the dissenting judgment of KENNEDY, L.J. Even assuming that the facts and documents in question, if unexplained, would establish the existence of an

attempt on the part of the plaintiffs to establish such a monopoly, your Lordships cannot disregard the fact that the plaintiffs have had no opportunity of explaining them. The full facts, if known, might profoundly modify any inferences your Lordships might be induced to draw from the imperfect information now before the House. For example, the circumstances under which the plaintiffs entered into the agreement of Sept. 11, 1906, with the salt manufacturers of Cheshire, Lancashire, Worcester, and Stafford may have been analogous to those which the Privy Council recently considered in *A.-G. of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1), in order to determine whether the trade restrictions contained in the "Vend" agreement therein referred to were necessarily detrimental to public interest. The competition between salt producers within the area covered by the agreement of Sept. 11, 1906, either inter se or with salt producers outside this area may have been so drastic that some combination limiting output and regulating competition within the area so as to secure reasonable prices may have been necessary, not only in the interests of the salt producers themselves, but in the interest of the public generally, for it cannot be to the public advantage that the trade of a large area should be ruined by a cut-throat competition. Under these circumstances, though it was no doubt open to the Court of Appeal, taking the view they did of the evidence, to direct a new trial, it was not, in my opinion, open to them to hold the contract invalid on the imperfect information before them. It appears that the defendants refused to concur in asking the Court of Appeal for a new trial, nor have they asked for this on the present appeal. Under these circumstances, I think the only course is to allow the appeal, and remit the case to the Court of Appeal to be dealt with on the footing that the contract was valid.

LORD SUMNER. I agree that it is unnecessary to decide any question about the form of the pleadings, the propriety of refusing to allow the respondents to amend, or the admissibility of any part of the evidence. In a case such as this the burden is on the respondents of proving the illegality on which they rely. Since the decision of *A.-G. of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1) this must be taken as established. The whole question is whether or not, in the condition in which the materials reach your Lordships, illegality has been proved. As it appears to me, the agreement of 1906 and the evidence elicited in the cross-examination of Mr. Clarke are not materials sufficient to enable a court to act in this matter. The respondents were not parties to that agreement, and the contract between them and the appellants did not become less legal because the appellants on their side had entered into particular engagements with strangers. It is not their motive, but the contract sued on that is in question. Much of the oral evidence was strictly immaterial since, though obtained in cross-examination, it went to no issue. It may, therefore, be disregarded. Nor does the residue suffice, for this simple reason. Whatever else can be made of it, if anything, it is certain that we do not know half the facts material to the case. For myself I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of salt. In such a matter partial information is as bad as none. By this contract A. buys all B.'s product for a given and not protracted period, and buys it to sell again. B. has the right to buy back, or virtually to keep out, a certain quantity, if he desires to make a dealer's as well as a manufacturers' profit. To prevent B. from underselling A. he is put under terms as to his sales over. In law B. is probably a buyer from A. and a seller to third parties; practically his position hardly differs from that of A.'s del credere agent. To restrict an agent's authority can hardly be illegality in the principal, and there is little more here. Further, B. is restrained from opening up any more salt-bearing ground, directly or indirectly. In the case of a mineral which is not inexhaustible and cannot be renewed, that may as well make for the public

good as not. No doubt the difference between the selling price fixed for the producers, the respondents, and the buying price open to the public is extreme, but we do not know enough of the conditions of competition or of the other elements in the ultimate selling price beyond bare costs of production to act upon it. Doubtless the parties entered into the contract in order to make money out of it, probably by keeping up prices, but that is not conclusive. I dare say the appellants were not any more anxious to go into all the facts than the respondents were to plead illegality in black and white, but your Lordships have to decide this appeal as things stand here. I am, therefore, of opinion that this appeal should be allowed with costs, and that the judgment of the Court of Appeal should be set aside and the case be remitted to them to hear and determine the other questions arising on the defendant's notice of appeal.

Solicitors: *Crump, Sprott & Co.*, for *Archer, Parkin & Archer*, Stockton-on-Tees: *Field, Roscoe & Co.*, for *Alsop, Stevens, Crooks & Co.*, Liverpool.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

MELLOR AND OTHERS *v.* LYDIATE

[King's Bench Division (Lord Reading, C.J., Darling, Bankes, Avory, and Lush, JJ.), July 16, 17, 31, 1914]

[Reported [1914] 3 K.B. 1141; 84 L.J.K.B. 8; 111 L.T. 988; 79 J.P. 68; 30 T.L.R. 704; 24 Cox, C.C. 443]

Licensing—Offence—Sale of liquor without justices' licence—Liquor owned by brewers—Licence held by manager—Sale to customer by manager—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 65.

By s. 65 (1) of the Licensing (Consolidation) Act, 1910 [see now s. 120 of the Licensing Act, 1953: 33 Halsbury's Statutes (2nd Edn.) 142]: "A person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor." Penalties are specified in s. 65 (2) of the Act.

The appellants, brewers and wholesale wine and spirit merchants, were the owners of a public house the justices' licence in respect of which was held by S., who was the manager for the appellants under an agreement by which he undertook to manage the premises, inter alia, under such rules and in such manner as the appellants required. The liquor on the premises was the property of the appellants, who were rated as occupiers, their name appearing on various signs and signboards exhibited outside the premises. When granting the licence to S, the justices were made fully aware of the terms of the agreement under which he went into the house and they also knew the capacity in which he acted. On Feb. 14, 1914, the respondent went to the licensed premises and was served with intoxicating liquor, namely beer, by S.

Held: the sale contemplated by s. 65 was a sale by the person who actually sold the liquor; S. was the person who actually made the sale; and, therefore, the appellants were not guilty of an offence under the section.

Per DARLING, J., and AVORY, J.: Even if the sale was by the appellants, they were not liable, for it would be a sale by persons holding a licence in the name of their agent or servant with the knowledge and sanction of the justices.

Notes. Distinguished: *Holt Brewery Co.* v. *Thompson* (1920) 123 L.T. 56. Referred to: *Nash* v. *Stevenson Transport, Ltd.*, [1935] 2 K.B. 341; *Hotel Regina (Torquay), Ltd.* v. *Moon*, [1940] 2 All E.R. 495.

As to illegal sales of liquor, see 22 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; and for cases see 30 DIGEST (Repl.) 84 et seq.

Cases referred to:

(1) *Dunning* v. *Owen*, [1907] 2 K.B. 237; 76 L.J.K.B. 796; 97 L.T. 241; 71 J.P. 383; 23 T.L.R. 494; 21 Cox, C.C. 485, D.C.; 30 Digest (Repl.) 86, *661.*

(2) *Peckover* v. *Defries* (1906), 95 L.T. 883; 71 J.P. 38; 23 T.L.R. 20; 21 Cox, C.C. 323, D.C.; 30 Digest (Repl.) 84, *649.*

(3) *Williamson* v. *Norris*, [1899] 1 Q.B. 7; 68 L.J.Q.B. 31; 79 L.T. 415; 62 J.P. 790; 47 W.R. 94; 15 T.L.R. 18; 43 Sol. Jo. 29; 19 Cox, C.C. 203, D.C.; 30 Digest (Repl.) 89, *672.*

(4) *Brooker* v. *Wood* (1834), 5 B. & Ad. 1052; 3 Nev. & M.K.B. 96; 3 L.J.K.B. 96; 110 E.R. 1081; 30 Digest (Repl.) 137, *895.*

(5) *Ritchie* v. *Smith* (1848), 6 C.B. 462; 3 New Mag. Cas. 56; 18 L.J.C.P. 9; 12 L.T.O.S. 148; 12 J.P. 822; 13 Jur. 63; 136 E.R. 1329; 12 Digest (Repl.) 309, *2382.*

(6) *R.* v. *Jones, Ex parte Davies* (1895), 59 J.P. 87.

(7) *R.* v. *Lyon, Ex parte Skinner* (1898), 62 J.P. 357; 14 T.L.R. 357, C.A.; 30 Digest (Repl.) 14, *64.*

(8) *Saunders* v. *Thorney* (1898), 78 L.T. 627; 62 J.P. 404; 14 T.L.R. 346; 42 Sol. Jo. 451, D.C.; 30 Digest (Repl.) 107, *785.*

(9) *Nix* v. *Nottingham Justices*, [1899] 2 Q.B. 294; 68 L.J.Q.B. 854; 81 L.T. 41; 63 J.P. 628, 676; 47 W.R. 628; 15 T.L.R. 413, 463; 43 Sol. Jo. 641, C.A.; 30 Digest (Repl.) 68, *506.*

(10) *Caldwell* v. *Bethell*, [1913] 1 K.B. 119; 82 L.J.K.B. 101; 107 L.T. 685; 77 J.P. 118; 29 T.L.R. 94; 23 Cox, C.C. 225, D.C.; 30 Digest (Repl.) 101, *754.*

Also referred to in argument:

Mayhew v. *Suttle* (1854), 4 E. & B. 347; 3 C.L.R. 59; 24 L.J.Q.B. 54; 24 L.T.O.S. 159; 19 J.P. 38; 1 Jur.N.S. 303; 3 W.R. 108; 119 E.R. 137, Ex. Ch.; 30 Digest (Repl.) 548, *1819.*

Diron v. *Birch* (1873), L.R. 8 Exch. 135; 42 L.J.Ex. 135; 42 L.J.Ex. 135; 28 L.T. 360; 21 W.R. 443; 1 Digest (Repl.) 785, *3140.*

Graff v. *Evans* (1882), 8 Q.B.D. 373; 51 L.J.M.C. 25; 46 L.T. 347; 46 J.P. 262; 30 W.R. 380, D.C.; 8 Digest (Repl.) 671, *133.*

Watteau v. *Fenwick*, [1893] 1 Q.B. 346; 67 L.T. 831; 56 J.P. 839; 41 W.R. 222; 9 T.L.R. 133; 37 Sol. Jo. 117; 5 R. 143; 1 Digest (Repl.) 358, *324.*

Lynam v. *O'Reilly*, [1898] 2 I.R. 48; 8 Digest (Repl.) 674, **83.*

National Sporting Club v. *Cope* (1900), 82 L.T. 352; 64 J.P. 310; 48 W.R. 446; 16 T.L.R. 158; 19 Cox, C.C. 485, D.C.; 8 Digest (Repl.) 672, *145.*

Stansfield & Co., Ltd. v. *Andrews* (1909), 100 L.T. 529; 73 J.P. 167; 25 T.L.R. 259; 22 Cox, C.C. 84, D.C.; 30 Digest (Repl.) 89, *671.*

Kinahan & Co. v. *Parry*, [1910] 2 K.B. 389; 79 L.J.K.B. 1083; 102 L.T. 826; reversed, [1911] 1 K.B. 459; 80 L.J.K.B. 276; 103 L.T. 867, C.A.; 1 Digest (Repl.) 405, *642.*

Case Stated by the stipendiary magistrate for the city of Liverpool.

An information, dated Feb. 18, 1914, was preferred by Robert Lydiate (hereinafter called "the respondent") against James Mellor and others, trading as

James Mellor & Sons (hereinafter called "the appellants"), for that they in the city of Liverpool on Feb. 14, 1914, did unlawfully sell by retail certain intoxicating liquor, to wit, beer, without holding a justices' licence authorising them to hold an excise licence for the sale of such liquor, contrary to the provisions of s. 65 (1) of the Licensing (Consolidation) Act, 1910 [see now s. 120 (1) of the Licensing Act, 1953]. On the hearing of the information the following facts were proved or admitted. (i) The appellants were a partnership firm carrying on the business of brewers and wholesale wine and spirit merchants in the city of Liverpool, for which purposes they held the necessary wholesale licences. (ii) The appellants were the owners of several fully licensed public-houses in Liverpool, including one known as the Central Vaults, at No. 30, Tithebarn Street (hereinafter referred to as "the licensed premises"). (iii) The appellants held no justices' licence in respect of the licensed premises. (iv) The justices' licence in respect of the licensed premises was on Feb. 14, 1914, and had for some years past, been held by Henry Smith. (v) Henry Smith was the manager of the licensed premises for the appellants under an agreement dated Mar. 18, 1907. (vi) The licensing justices when granting the licence to Henry Smith were satisfied that he was a fit and proper person to hold a licence. (vii) Henry Smith was resident on the licensed premises, which was in accordance with the agreement and with the conditions made by the justices in granting the licence to him. He personally conducted the sale of the intoxicating liquor on the licensed premises and was responsible for the management of the licensed premises. The whole of the intoxicating liquor stocked in and sold at the licensed premises was the property of the appellants, and the appellants received the whole of the moneys arising from the sale thereof less only the deductions therefrom permitted by the agreement to be made by Henry Smith. The licensed premises were rated in the rate book under the name of James Mellor & Co., and there appeared outside the licensed premises such signs as "Mellors' Old Derby Ale Stores," "Mellors' Wine and Spirit Stores," "Mellors' Luncheon Bar," etc. (viii) The appellants had been the owners of the licensed premises for many years, and before Henry Smith first obtained the licence in 1907 the agreement was produced to the licensing justices, who had full knowledge of its terms and of the capacity in which Henry Smith was to become the licensee. (ix) The respondent purchased intoxicating liquor at the licensed premises on Feb. 14, 1914, and the actual conduct of the sale was by Henry Smith. (x) The appellants always exercised a strict supervision over Henry Smith, who accounted weekly to the appellants for the takings on the licensed premises in accordance with the terms of the agreement. (xi) The business and assets (including the licensed premises) of the appellants had since Feb. 14, 1914, been transferred to a company limited by shares. (xii) There were some 1,500 persons in the said city holding justices "on" licences, and of this number there were about 1,050 who held such licences with the full knowledge and approval of the licensing justices as managers for brewing firms under agreements similar to that of Henry Smith in this case, and the system of licensing managers for brewing owners of public-houses has been in force in Liverpool for over thirty years past.

On behalf of the respondent it was contended that the sale on Feb. 14, 1914, was in law and in fact a sale by the appellants at the licensed premises, and that, as the appellants did not hold a justices' licence enabling them so to sell, they ought to be convicted of an offence under s. 65 of the Licensing (Consolidation) Act, 1910. In support of this contention *Dunning* v. *Owen* (1), *Peckover* v. *Defries* (2), and *Williamson* v. *Norris* (3) were cited. On behalf of the appellants it was contended that the fact that all the circumstances in connection with the licensing of the premises were known to the licensing justices at the time when they granted the licence to Henry Smith was a sufficient protection to the appellants against any liability under s. 65, and, further, that, although it was a fact that the licence in existence for the licensed premises was in the name of Henry Smith, yet he was, and was well known to be, only acting for

and on behalf of the appellants, whose business was being carried on and whose intoxicating liquor was being sold by his hands, and that, therefore, no offence as charged had been committed by the appellants. In support of these contentions the following cases were referred to: *Brooker* v. *Wood* (4); *Ritchie* v. *Smith* (5); *R.* v. *Jones, Ex parte Davies* (6); *R.* v. *Lyon, Ex parte Skinner* (7); *Saunders* v. *Thorney* (8); *Nix* v. *Nottingham Justices* (9); *Caldwell* v. *Bethell* (10). Reference was also made to s. 20 (2) of the Licensing (Consolidation) Act, 1910, and the two first-mentioned cases relied upon by the respondent were sought to be distinguished on the ground that fraud was a constituent part of the facts therein.

The learned stipendiary magistrate was of opinion that on the authority of *Dunning* v. *Owen* (1) there had been a sale in law by the appellants on the licensed premises, and that, as they did not hold a justices' licence for that purpose, they ought to be convicted.

Under the agreement between the appellants and Henry Smith (which was annexed to and formed part of the Case Stated) Smith agreed that he would act as manager for the appellants of the Central Vaults; that he and the persons assisting him in the management of the business for the time being carried on in the said public-house would conduct himself and themselves in a proper and orderly and sober manner; that he and they would conduct and manage the public-house and the business carried on therein under such rules and in such manner as the appellants should require and in a quiet and orderly manner and use his best endeavours to preserve and maintain the custom and business thereto; that neither he nor his wife nor servant nor any agent assisting him in the conduct of the business should do or suffer any act or thing which might afford or be likely to afford any reasonable pretext for the refusal or suspension of the licences attached to the premises or for any information or complaint to be laid or made against him or the premises; that he would annually at the proper time so long as he should remain in the premises apply for and obtain the renewal of the licences; that he would personally attend to the business and devote his whole time and attention thereto, that he would keep proper books of account (which would be provided by and be the property of the appellants) and enter therein daily in the mode prescribed by the appellants an account of all moneys received by him on that day and of all moneys paid by him that day for sundries which he might be authorised by the appellants to provide; that he should every Monday by 10 a.m. make out an account of the previous week's takings according to the mode prescribed by the appellants, with an account of the moneys paid for sundries during such week, and should hand over the takings (less such payments for sundries) to the appellants or any person whom they might appoint to receive the same; that he would not sleep away from the premises without the assent of the appellants; that whenever he should be required by the appellants so to do he would give up vacant possession of the premises and sign the necessary notices for the transfer of the licences both by temporary authority, by indorsement at petty sessions, and by complete transfer at special sessions into the name of any person whom the appellants might appoint; and that, if he or his wife, agent, or any of his servants should act in any way or do any act in contravention of the rules for the time being or any of them for the conduct of the public-house and premises prescribed by the appellants, the agreement should (at the appellants' option) be at an end, and he might be thereupon dismissed from the premises.

Sir Robert Finlay, K.C., Rigby Swift, K.C., Bodkin, and *Colin Smith* for the appellants.

Leslie Scott, K.C., and *Howard Jones* for the respondent.

Cur. adv. vult.

July 31, 1914. The following judgments were read.

LORD READING, C.J.—The appellants were a partnership firm of brewers who were also the owners of various fully-licensed public-houses in Liverpool, including the Central Vaults. One Henry Smith had acted for them since March, 1907, as the manager of the business there conducted, and had ever since that date, and in particular on Feb. 14, 1914, held a justices' licence authorising him to sell intoxicating liquor by retail on the said premises. On this date Henry Smith sold a pint of beer to the respondent at the public-house—that is, he actually conducted the sale and received the money therefor from the respondent. The liquor stocked at the public-house and that sold to the respondent was the property of the appellants. Under the agreement in writing of March 18, 1907, between the appellants and Henry Smith, Smith undertook to manage the public-house in a proper, quiet, and orderly manner, and under such rules and in such manner as the owners should require. He further agreed not to do anything which might afford a reasonable pretext for the refusal or suspension of the licences attached to the premises, and undertook annually to apply for and to obtain the renewal of these licences. Upon these facts the respondent instituted proceedings against the appellants for having contravened the provisions of s. 65 (1) of the Licensing (Consolidation) Act, 1910, which, so far as material, is in the following words:

> "Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor. . . ."

The learned magistrate convicted the appellants and inflicted a nominal fine. In giving his decision he said that, had the matter been res integra, he would have held that no offence had been committed, but that he felt bound, by reason of the judgment in *Dunning* v. *Owen* (1) to decide against the appellants. This court has now to determine whether the appellants have committed any offence under s. 65 of the statute in question.

On behalf of the respondent it is contended that as the appellants were the owners of the public-house and of the intoxicating liquor there sold, and as the business on the premises was conducted by Henry Smith their servant, who was under their control and supervision, and was acting on their behalf and for their benefit, the sale to the respondent was a sale by the appellants, and as they were not the holders of a justices' licence they had committed an offence under the section of the statute. On behalf of the appellants it was contended that there had been no sale by them within the meaning of the words in s. 65, and that, in any event, their servant, for whose act it was sought to make them responsible under the statute, was the holder of a justices' licence, and, therefore, that the requirements of the statute had been met. The matter in dispute is of considerable public importance, particularly in Liverpool, as in that city alone the licensing justices have adopted and followed for over thirty years the policy of granting justices' licences to brewers' managers under agreements similar to that forming part of this case. Of 1,500 persons holding justices' on-licences in that city, there are about 1,050 who hold such licences to the knowledge of the licensing justices and with their approval in the same way as Henry Smith, and under agreements similar to that between him and the appellants.

The question to be decided depends upon the construction of the words in the section, and particularly upon the meaning to be attributed to the words "shall not sell or expose for sale." If it were right to construe this section as if we were determining the rights and obligations of the parties to a contract of sale, it could not be doubted, as a general principle of law, that a sale by

a servant authorised in that behalf is a sale by the principal, at least to the extent of imposing upon the latter the burdens and the advantages of the contract. But I cannot think that when the legislature enacted that a justices' licence should be required as a condition precedent to the right of selling intoxicating liquor by retail on the licensed premises, it intended that every person who might be made liable as a contracting party to a contract of sale must hold a justices' licence for such sale notwithstanding that he took no part in the actual conduct of the sale on the premises. The justices' licence is not required for revenue purposes. It is required for the protection and preservation of public morals, and for the prevention of offences which are subversive of good order and the public safety: *Ritchie* v. *Smith* (5). The object of the statutory requirement is to make the person who conducts and manages the business there transacted responsible to the licensing justices for its proper and orderly conduct and management in accordance with the requirements of the statute and of the licensing justices acting in pursuance thereof. It is clear that the word "sell" has different meanings in different sections of this statute. For example, it cannot be doubted that the barman or other assistant under the control or direction of the holder of the licence does not commit an offence under s. 65 when he sells a pint of beer across the counter to a customer: per LORD RUSSELL OF KILLOWEN, C.J., in *Williamson* v. *Norris* (3), [1899] 1 Q.B. at p. 13. The Lord Chief Justice in that case said that the true meaning of the section is that the sale which is prohibited must be a sale by the person who ought to be licensed. If a person is placed on the premises for the purpose of taking charge and control of the premises and the business there conducted, he is a person who, in my opinion, requires the protection of a justices' licence, and that notwithstanding that he is responsible to principals for the good conduct and management of the premises and business, and is acting for their benefit and as their servant. He remains responsible to the justices; he is a person deemed by them, in the exercise of their discretion, a fit and proper person to whom a licence should be granted under s. 9 of the Licensing (Consolidation) Act, 1910. On the other hand, under s. 69 of the statute, every person who sells is held to include every person who does the physical act of transferring the liquor to the purchaser, and includes the barman or other person as well as the licence-holder.

In the present case the question is whether the appellants can be said to have sold the liquor under s. 65. There has been only one sale, and that was the sale actually conducted by Henry Smith, who is the licence-holder. In my judgment, there cannot be, under this section, one sale physically made by him for which a licence is required and another arising out of his acts by the appellants as a firm and by each of the members of the firm. If the sale was not by him, but by the appellants, it would mean that the person placed by the appellants on the premises to manage and conduct the business there did not require to hold a licence. For the reasons I have already given, I think that he is the person aimed at by Parliament in this section who requires the protection of a justices' licence. As he held a licence, the appellants have not aided or abetted him in committing an offence under this section. I am, therefore, of opinion that the appellants did not sell the liquor to the respondent within the meaning of the section, and have, therefore, not committed the offence of which they have been convicted. An examination of *Dunning* v. *Owen* (1) makes it plain that nothing that I have said in this judgment is in conflict with that decision. That case applied the principle of law laid down in *Peckover* v. *Defries* (2) to the facts of the case then before the court. It did not lay down any new principle of law. I do not intend in my judgment to detract in the slightest degree from or otherwise to weaken the full effect of the judgments in *Dunning* v. *Owen* (1) and *Peckover* v. *Defries* (2) which, in my opinion, are right and salutary decisions. I am of opinion, for the reasons given, that this appeal should be allowed, and the conviction quashed.

DARLING, J.—This case raises a question under s. 65 of the Licensing (Consolidation) Act, 1910, which enacts that:

"Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence . . ."

It seems to me that the prohibition contained in the words quoted is not absolute, and that a person not holding a justices' licence may lawfully sell by retail intoxicating liquor, provided he does so "subject to the provisions of this Act," and such, I think, was the sale by the appellants. They were the owners of the licensed house, and the liquor was there sold and dispensed by Henry Smith—he was resident on the licensed premises, and was there acting entirely as manager of the business carried on—by virtue of the agreement set out in the Special Case. The court need not be embarrassed by the judgments in *Dunning* v. *Owen* (1) and still less by *Peckover* v. *Defries* (2) for in the latter case the point here to be decided did not arise, and in the former it was expressly reserved. Smith, being the manager for the appellants of the whole business conducted on their premises, did undoubtedly sell liquor there within the meaning of the Act, and, therefore, he needed the protection of a justices' licence. Of course there was a sale by, or at least on behalf of, the appellants of whatever liquor of theirs was sold by their managing agent; but such a sale by them is not necessarily a selling of the kind for which they require a licence. The whole transaction may be regarded thus: The appellants did sell their goods on the licensed premises, but merely through and by means of Smith, their fully authorised agent or manager, knowingly licensed to act in this manner on his principal's behalf. This selling was by a licensed person of goods to which the licence properly applied, and was entirely within the contemplation of the justices who granted it. But there was no complete and perfect sale without the concurrence of the principals and agent alike, and so the person conducting the sale was the alter ego of the appellants. Perhaps it would be a refinement of language to say that, having regard to the agreement between them, the principals and agent are rightly to be considered as a dual or complex personality—one holding a licence for the benefit of both—just as joint tenants of a copyhold estate are equally possessed of the entire holding, although one of them is admitted tenant on the roll of the manor. In my opinion, the appellants did not sell liquor contrary to the provisions of the Act, and so the conviction should not stand.

BANKES, J.—This is a Special Case stated by the stipendiary magistrate of Liverpool in order to raise the question whether the appellants were rightly convicted by him of selling intoxicating liquor without being duly licensed. The material facts are that the appellants are brewers at Liverpool and the owners of licensed premises known as the Central Vaults in Tithebarn Street. The appellants appointed one Smith as their manager to conduct their business upon the said premises upon the terms that he was to have the entire management and be paid a weekly salary, accounting weekly to the appellants for all moneys received. The appellants themselves supplied the intoxicating liquors. The terms of the engagement are contained in a written agreement which forms part of the Special Case. Smith applied to the licensing justices for a licence authorising him to sell intoxicating liquor at the said premises. The agreement was produced to the justices, who, with full knowledge of all the circumstances, granted him the licence. The effect of the granting of the licence was that the premises became licensed premises within the meaning of the Licensing (Consolidation) Act, 1910, and Smith became the holder of the licence and, as such, the person who, under the group of sections headed "General Regulations as to the Sale of Liquor and Conduct of Licensed Premises," is responsible for the proper conduct of the licensed premises. The premises are treated in the Act

as Smith's premises. For instance, s. 75 (1) [s. 136 (1) of Licensing Act, 1953] provides that:

> "The holder of a justices' licence shall not permit drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sell any intoxicating liquor to a drunken person."

In my opinion, the holder of a licence who serves a customer, or who authorises him to be served with intoxicating liquor on the licensed premises, sells the liquor to the customer within the meaning of the Licensing (Consolidation) Act, 1910. To contend that he does not do so because the liquor is not his property, but belongs to someone else, would be, in my opinion, a hopeless contention.

In the present case the respondent applied to be served upon the licensed premises, and was served with intoxicating liquor by Smith, the holder of the licence. This was, in my opinion, a sale by Smith, which his licence authorised him to make, and, consequently, it was a transaction authorised by the Licensing (Consolidation) Act, 1910. Section 65 of the Act provides that:

> "Subject to the provisions of this Act, a person shall not sell by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor."

The appellants themselves held no such licence as is indicated in the section. The magistrate held that he was bound by the authority of *Dunning* v. *Owen* (1) to convict the appellants, and he did so, at the same time expressing his opinion that, but for that decision, he should have held that no offence had been committed. The question for our decision is whether the conviction was right. In my opinion, it was not. It is, no doubt, true, as contended by counsel for the respondents, that Smith's act was, in the ordinary commercial sense, a sale by the appellants because it was a sale by their authorised agent of liquor which was their property. This, however, does not decide the question. I agree also with counsel's contention that we ought, in construing s. 65, not to exclude the ordinary meaning of the word "sell," unless there is something in the statute which renders it necessary to do so, or that to include the ordinary meaning would result in an absurdity. The section is governed by the opening words, "Subject to the provisions of the Act." What are the material provisions of the Act in relation to the sale by Smith which constitutes the alleged offence? They are that the act of Smith was an authorised act, a lawful sale by the holder of the licence upon the licensed premises. It is the act of Smith which is said to render the appellants liable to conviction, because the sale by Smith was a sale by their agent, and, therefore, a sale by them. In my opinion, any construction of s. 65 which results in the act of Smith in serving the respondent with intoxicating liquor being treated as between the respondent and Smith as an authorised and lawful act, and the same act as between the respondent and Smith's principals, for whom he, Smith, was acting in serving the respondent, being treated as an unauthorised and illegal act, is absurd and must be rejected. This, however, is the construction which the respondent is seeking to put upon the section.

I do not propose to attempt to put a construction upon the section which shall be applicable to every case which may arise. It is sufficient to say that, in my opinion, the opening words of s. 65 limit the operation of the section to cases other than the present case, and that no person can be convicted of selling intoxicating liquor without a licence under this section, where the act complained of is an act done by the person who is a duly appointed manager, who holds a licence authorising him to do the act.

AVORY, J.—In my opinion, the question to be decided in this case is whether intoxicating liquor has been sold without the authority of a justices' licence. The words in the Licensing Act, 1872, "without being licensed to sell the same," have, I think, been altered in the Act of 1910 in order to remove doubt whether

the word "licensed" referred to the excise licence or to the justices' licence. On the facts found in this Special Case it is clear that the justices authorised and intended to authorise Smith as the agent or servant of the appellants to sell intoxicating liquor which at the time of sale was the property of Messrs. Mellor. The sale in question in the present case was, therefore, authorised by the licence, and whether the sale was by Messrs. Mellor, as I think it was within the meaning of s. 65 of the Licensing (Consolidation) Act, 1910, or by Smith, their agent or servant, as I also think it was, the sale was not unlawful, but was a sale by a person holding a licence in the name of his agent or servant in the one case, and by the actual holder of the licence in the other case. I think that the learned stipendiary magistrate was right in the view which he was desirous of adopting—namely, that the requirements of the law are satisfied if the owners of the intoxicating liquor hold a licence by or through their representative with the knowledge and sanction of the licensing justices—and that *Dunning* v. *Owen* (1), by which he was misled, is not, in my opinion, in conflict with this decision. That case was really decided on the same ground as *Peckover* v. *Defries* (2)—namely, that the sale was by a person who was neither the authorised agent of a licensed person, nor authorised to sell through a licensed agent. I agree that the appeal should be allowed.

LUSH, J.—We have in this case to put a construction on s. 65 of the Licensing (Consolidation) Act, 1910. The question is whether Mr. Smith, the appellants' manager, who held a justices' licence, sold the beer on the licensed premises, or whether the appellants who supplied the beer and took the profits, and whose agent Mr. Smith was, sold it within the meaning of the section. If the former was the case, no offence was committed; if the latter, an offence was committed, as the appellants held no licence. It seems clear to me that there was only one sale. It was either a sale by Mr. Smith or a sale by the appellants. The argument for the respondent was that it was a sale by the appellants, because the appellants were the principals on the contracts made by Mr. Smith. The section, which is one of a group of sections dealing with the conduct of licensed premises, has nothing to do with defining contractual rights or contractual obligations. It was for the purpose of securing the proper management of the business of selling intoxicating liquor on licensed premises that the enactment was passed. Bearing this in mind, and construing the section in view of what its obvious purpose is, we must, in my opinion, hold that the "seller" contemplated by the section is the person who actually sells; the person who is in charge and who makes the contracts and generally conducts the business of selling. The person who does that is Mr. Smith, not the appellants, and although he sells for the appellants' benefit, it is he who sells and not the appellants themselves. The appellants, therefore, have not committed any offence, and, inasmuch as their manager was duly licensed, they have not participated in the commission of any offence by him. I think that the appeal ought to be allowed and the conviction quashed.

Appeal allowed.

Solicitors, *John Hands*, for *Edwin Berry & Co.*, Liverpool; *E. W. & Bruce Beal*, for *Edward H. Cooke*, Liverpool.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

A

MITCHELL AND ANOTHER *v.* CROYDON JUSTICES

[King's Bench Division (Avory, Rowlatt and Shearman, JJ.), May 4, 5, 1914]
[Reported 111 L.T. 632; 78 J.P. 385; 30 T.L.R. 526]

B *Licensing—Compensation authority—Reference by licensing justices of application for renewal of licence—Member of authority one of referring justices—Competence to sit as member of authority and also give evidence—Evidence to be given in public—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *and* 1, *Geo.* 5, *c.* 24), *s.* 19 (2).

Where an application for the renewal of an on-licence is referred by licensing justices to the compensation authority one of the licensing justices who referred C the case and is also a member of the compensation authority is entitled under s. 19 (2) of the Licensing (Consolidation) Act, 1910 [now s. 15 (2) of the Licensing Act, 1953] to give evidence regarding the reasons of the licensing justices in referring the case. But if he wishes to give evidence he should not sit on the Bench as a member of the compensation authority and leave the Bench to go into the witness-box. He should elect whether to be a witness D and give evidence or to sit as a member of the authority and adjudicate on the matter. His acting in both capacities in the same case is highly undesirable as likely to result in a lack of confidence in the administration of justice.

Where licensing justices are heard under s. 19 (2) of the Act [s. 15 (2) of the Act of 1953] they should be heard in the presence of the persons whose E interests are affected, **semble**, in open court.

Licensing—Compensation authority—Reference by licensing justices of application for renewal of licence—Decision to be arrived at judicially—Matters to be considered.

On a reference by licensing justices to the compensation authority of an application for the renewal of an on-licence the compensation authority are F not entitled merely to look at a map showing the various licensed houses in a district and say from such inspection that certain houses shall be closed. To act in that manner would not be to exercise a judicial function. Evidence must be forthcoming on which the authority can come to a proper decision, and in arriving at their decision they must consider the conflicting claims put forward by the various individuals interested in the matter and also the interests G and convenience of the public.

High Court—Appeal from quarter sessions—Power to draw inferences of fact—Power to reverse findings of fact by quarter sessions—Supreme Court of Judicature Act, 1894 (57 *&* 58 *Vict.*, *c.* 16), *s.* 2 (2).

By s. 2 (2), of the Supreme Court of Judicature Act, 1894 [now Supreme H Court of Judicature (Consolidation) Act, 1925, s. 25], on the hearing of an appeal from quarter sessions the appellate court "may draw any inference of fact which might have been drawn in the court of quarter sessions, and may give any judgment or make any order which ought to have been given or made by that court. . . .

This subsection means that upon the facts proved or admitted before quarter I sessions the appellate court may draw any inference necessary to enable it to determine the question of law which arises on them, but it does not entitle the appellate court to reverse the findings of quarter sessions on questions of fact.

Notes. Referred to: *R.* v. *Bath Compensation Authority*, [1925] 1 K.B. 685; *Chivers & Sons, Ltd.* v. *Cambridge County Council, Trustees of the National Institute of Agricultural Botany Registered* v. *Cambridge County Council*, [1957] 1 All E.R. 882.

As to the compensation authority, see 22 Halsbury's Laws (3rd Edn.) 577–580; and for cases see 30 Digest (Repl.) 54 et seq. For Licensing Act, 1953, see 33

HALSBURY'S STATUTES (2nd Edn.) 142. As to appeals by Case Stated from quarter sessions to High Court, see 25 HALSBURY'S LAWS (3rd Edn.) 312 et seq.; and for cases see 33 DIGEST 407 et seq. For Supreme Court of Judicature (Consolidation) Act, 1925, see 5 HALSBURY'S STATUTES (2nd Edn.) 337.

Cases referred to:

(1) *Raven* v. *Southampton Justices*, [1904] 1 K.B. 430; 73 L.J.K.B. 282; 90 L.T. 94; 68 J.P. 68; 52 W.R. 574; 20 T.L.R. 146; 48 Sol. Jo. 143, D.C.; 30 Digest (Repl.) 69, *517*.

(2) *Dartford Brewery Co.* v. *London County Quarter Sessions*, [1906] 1 K.B. 695; 75 L.J.K.B. 597; 94 L.T. 782; 70 J.P. 197; 22 T.L.R. 491; 50 Sol. Jo. 441, D.C.; 30 Digest (Repl.) 57, *428*.

(3) *Hickton* v. *Hodgson* (1913), 110 L.T. 380; 78 J.P. 93; 30 T.L.R. 221, D.C.; 30 Digest (Repl.) 33, *241*.

Also referred to in argument:

Dairy Supply Co. v. *Houghton* (1911), 106 L.T. 220; 76 J.P. 43; 28 T.L.R. 94; 10 L.G.R. 22 Cox, C.C. 704; 33 Digest 452, *1643*.

Case Stated by justices for the borough of Croydon, sitting as the compensation authority.

At a duly appointed principal meeting, held on July 1, 1913, at the Town Hall, Croydon, the question of the renewal of the publican's licence held by Julia Mitchell, one of the appellants, in respect of a public-house known as the Crown and Sceptre and situate in Union Road in the borough of Croydon, came up for consideration under s. 19 of the Licensing (Consolidation) Act, 1910 [Licensing Act, 1953, s. 15], before certain of the justices of the borough sitting as a compensation authority, in pursuance of the Licensing (Consolidation) Act, 1910, and the rules made thereunder. Eight justices sat as the compensation authority, and of these eight justices five were members of the borough licensing committee which had referred the question of the renewal of the licence of the public-houses to the compensation authority. The borough licensing committee (being the renewal authority for the borough of Croydon) referred the question of the renewal of the licence of the Crown and Sceptre public-house to the compensation authority, on the ground that they considered it redundant, and that the number of licensed houses in its immediate neighbourhood was ample for the accommodation of the neighbourhood in which it was situated. After hearing the evidence, as hereinafter set out, and after hearing counsel on behalf of the appellant Julia Mitchell, the tenant and the licensee of the public-house, and on behalf of the other appellants, Young and Co.'s Brewery, Ltd., the owners of the public-house, the justices by a majority refused the renewal of the licence of the public-house subject to the opinion of the King's Bench Division of the High Court of Justice on the present Case stated.

At the hearing before the justices a map of the locality was produced, on which the fully-licensed houses and the beerhouses within a quarter of a mile radius from the Crown and Sceptre public-houses were marked. The Crown and Sceptre public-house was a fully-licensed house occupying a corner position in Union Road just off the Whitehorse Road. The premises were assessed at £110 gross and £88 net rateable value, and were substantially built and had a commanding appearance, the whole front facing Windmill Road. The premises comprised good bedroom accommodation, three bars all with separate entrances from Union Road, namely, public and private bars and bottle and jug department, a billiard room with one full-sized table, a large saloon bar, a kitchen, a large beer cellar paved and drained, a wine-cellar, a scullery, an excellent public urinal, entered from Union Road, and there was a total frontage to Union Road of about 107 ft. 6 in. The premises were lighted with electric light throughout the ground floor and basement, and with gas on the upper floor. They were in a good state of repair generally, and were in good sanitary condition. On Feb. 20, 1912, plans were laid before the renewal

authority setting out proposed alterations to the premises by throwing into the existing premises an adjoining shop. The plans were approved by the renewal authority, and the alterations were carried out in June 1912, at a cost of over £200, a further sum of £79 being spent on other structural repairs. The result of these alterations has been to provide a large and spacious saloon bar capable of seating sixty people at small tables and there is a total seating accommodation on the ground floor for eighty-eight people. The nearest licensed houses to the Crown and Sceptre public-house within walking distances there, and the assessments thereof, are as follows:

	Distant	Assessment Gross	Assessment Net Rateable
The Mail Coach ...	140 yds.	100	80
Fisherman's Arms ...	200 yds.	67	54
Gloucester Tavern ...	230 yds.	247	198
Queen's Arms	250 yds.	62	50
Golden Lion		24	19

In addition to the above there was a fully-licensed house, the Princess Arms, and two beerhouses, the Four-in-Hand and the Queen's Head, all within the quarter-mile radius. It was proved by the inspector of police of the division that it was easy to keep observation upon the Crown and Sceptre public-house, that the police periodically visited the house and found it well conducted, and that the house was used by respectable people of the working class. The appellant, Julia Mitchell, had been in occupation of the premises for over two years under a lease with fifteen years unexpired and pays an annual rent of £100. There had been fifteen transfers in twenty-seven years, and in the years 1908 and 1909 there were convictions against a former tenant for permitting the premises to be used for the purpose of betting. A large and increasing trade both in beer and spirits was done in the public-house, and the appellant, Julia Mitchell, made an excellent living in the house. No evidence was given relating to any of the other licensed houses in the district except as to their positions, their distances from the Crown and Sceptre public-house, and their assessments.

It was contended on behalf of the appellants that, as all the evidence which had been given was favourable to the Crown and Sceptre public-house, and as no evidence of differentiation from the nearest licensed houses in the district had been given, the appellants were entitled to the renewal of the licence. Cases were referred to in support of this contention, two of which were *Raven* v. *Southampton Justices* (1) and *Dartford Brewery Co.* v. *London County Quarter Sessions* (2). The justices by a majority decided that there was evidence of differentiation and refused the licence, but consented to state a Case for the opinion of the High Court of Justice.

After three other cases had been heard by the justices, the clerk to the compensation authority stated in open court to counsel appearing on behalf of the appellants that one of the justices sitting on the bench, Mr. Frank Denning, who had visited the licensed houses in the district and was a member of the borough licensing committee which had referred the question of the renewal of the licence to the compensation authority, was willing and anxious to give evidence as to his reasons for so referring the licence. Counsel for the appellants replied that, if the Bench desired to re-open the Case and hear further evidence, it was not in his power to prevent it, but in any event he would still ask the justices to state a Case for the opinion of the High Court, and also submitted that if Mr. Denning, who had previously adjudicated on the matter, was called as a witness, he ought not afterwards to adjudicate on it. The justices agreed to state a Case for the opinion of the High Court in any event, and, after some discussion, ruled that Mr. Denning could not adjudicate after he had given evidence. Mr. Denning then came off the bench and gave evidence upon oath. Apart from evidence which applied equally to all the licensed public-houses in the immediate neighbourhood, he stated that

the main reason which influenced him in referring the Crown and Sceptre public-house was the position which it occupied in the Union Road. He also stated that the Fisherman's Arms was in a better position for police observation, that there was more traffic passing that house, that two or three clubs used that house, that it had a bowling green, and that the Gloucester Arms was in the main road and was a larger house than the Crown and Sceptre. He further stated that the Crown and Sceptre was in the poorest part of the neighbourhood, and that an undesirable class of persons both used the house and congregated outside. In cross-examination he admitted that there was very little difference in the width of the Union Road opposite the Crown and Sceptre and the widths of Whitehorse Road and Windmill Road, that the Fisherman's Arms was a smaller and much older house than the Crown and Sceptre, that the accommodation for the public in the Crown and Sceptre was larger than that at the Fisherman's Arms or the Gloucester Arms, and that the Fisherman's Arms was doing a decreasing trade and a smaller trade than the Crown and Sceptre. Counsel for the appellants again submitted that there was no evidence of differentiation on which the justices could refuse the old licence, but the justices by a majority again refused the licence subject to the Case stated.

By s. 2 of the Supreme Court of Judicature Act, 1894 [Supreme Court of Judicature (Consolidation) Act, 1925, s. 25] :

> "(1) Every Case stated by a court of quarter sessions otherwise than under the Acts eleven and twelve Victoria, chapter seventy-eight, and twelve and thirteen Victoria, chapter forty-five, for the consideration of the High Court shall be deemed to be an appeal, and shall be heard and determined accordingly. (2) On the hearing of any appeal from a court of quarter sessions the appellate court may draw any inference of fact which might have been drawn in the court of quarter sessions, and may give any judgment or make any order which ought to have been given or made by that court, or may remit the order, and in criminal matters the conviction with the order, and the Case stated on it, with the opinion or direction of the appellate court, for re-hearing and determination by the court of quarter sessions, or may remit the Case for re-statement."

Sir Frederic Low, *K.C.*, and *Whiteley* for the appellants.
Colam, *K.C.*, and *Curtis Bennett* for the justices.

AVORY, J.—It cannot be doubted that in the present case there are circumstances which may very easily have created the impression upon the mind of the applicant for the licence of this particular public-house when he went away from the tribunal that justice had not been done. But I am afraid that there are many cases which come before licensing justices and licensing authorities where a licence-holder who has been doing a considerable trade in the public-house goes away under the same impression when the licence which he has been holding is not renewed. In this court the duty is imposed upon us of applying the law according to the statute and in accordance with the previous decisions of the court, and, in my opinion, there is one simple question for our decision in the present case—namely, whether the compensation authority had before them legal evidence upon which they could properly arrive at a conclusion which would justify them in refusing the renewal of this licence.

In order to determine that question it is necessary for us to look at the findings of fact as contained in this Special Case. There can be no doubt that we ought to examine the findings of fact with the utmost care upon the present occasion since we have been asked in effect by counsel for the appellants to overrule the decision of the justices upon a question of fact. We have been asked to do this under the provisions of s. 2 of the Judicature Act, 1894, which gives this court power, upon the argument of a Case which comes from quarter sessions, to draw any necessary inference of fact. Now the inference which the licensing justices

drew from the facts as laid before them was that the licence in the present case ought not to be renewed. The chief part of the argument which has been addressed to us on behalf of the appellants is that this court, acting in accordance with the powers given under s. 2 of the Judicature Act, 1894, ought to arrive at the conclusion that the licence ought to have been renewed. In my opinion, there is no such extensive power granted to this court under the Act of 1894. I expressed my views upon the effect of this statute in *Hickton* v. *Hodyson* (3), and I am still of the same mind—namely, that s. 2 of the Act only means that upon the facts which are either proved or admitted the court may draw any inference necessary to enable it to determine the question of law which arises upon them, but that it does not entitle this court to reverse the finding of the court of quarter sessions upon questions of fact.

That being so, the question before us resolves itself into one of extreme simplicity, and we have only to determine whether upon this Special Case there are facts which, in our view, afford legal evidence upon which the justices were entitled to refuse the renewal of this licence. It is quite true that there were many facts proved or admitted before the justices which went to show that this public-house was one which, in the ordinary course of things, should certainly have had its licence renewed. Among those facts there was one of a striking character, and one which does undoubtedly create a peculiar hardship as far as the appellants are concerned, for in 1912 the licensing justices for the borough had actually approved certain alterations, which were afterwards carried out at considerable expense, as far as this public-house was concerned—alterations which did very considerably increase the accommodation provided for the general public. I do not, of course, say that they were the same individual justices who sat in 1913 as those who had sat in 1912, and then imposed this hardship in 1913 after allowing the expenditure in 1912, but the fact remains that the same licensing authority, after acting in such a manner in one year as to allow a tenant to spend money upon improvements, actually refuses in the following year to grant a renewal of the licence, but refers it to the compensation authority for compensation instead of renewal.

When the case was before the compensation authority there were other facts of importance which were proved—namely, that the house was one which was convenient for police observation, that it was used by a respectable class of working men, that it was doing an increasing trade, and that there was ample accommodation for the public. Up to this point, therefore, as I have pointed out, the whole of the evidence was one way, and went to show good grounds for the renewal of the licence, even though there was opposition to it. The argument put forward, based upon these grounds, is that there was no justification for the licensing justices to refuse the renewal of the licence because there was no evidence of what has been called differentiation—that is to say, no evidence which serves to distinguish this house from the other licensed houses in the neighbourhood. A map has been produced which shows the distribution of public-houses in the locality in which the Crown and Sceptre is situated. The mere production of such a map, however, is not evidence upon which this court can act when there has been other evidence adduced before the justices.

As to this other evidence it is necessary to consider the case from two points of view. The first point is this: Was there any evidence at all of differentiation before one of the licensing justices, Mr. Denning, left the bench and went into the witness-box? And then the second point is, if there was no such evidence before he went into the witness-box, was there any such evidence after he had been called and examined? I have arrived at the conclusion, acting upon the principle which I have already mentioned—namely, that it is not the function of this court to express a different view of the facts from that which the justices have taken on a question which is peculiarly within their discretion—that even though I might personally have thought, that the evidence given was of such a nature as to have afforded good grounds for renewing this licence, there was, even before Mr. Denning went into the witness-box, evidence which would legally justify the

licensing justices in arriving at the conclusion that the renewal of the licence should be refused. I need not go into details as to the kind of evidence which was given, as the facts are sufficiently referred to in the Case, but when one considers simply the number of transfers that had taken place and the number of convictions recorded against the public-house at different times, no matter how much we may differ from the decision of the justices, they were fully entitled to form their own judgment and to act upon it. There was, indeed, evidence upon which they could lawfully come to the conclusion that the licence ought not to be renewed even before they had heard Mr. Denning, and therefore the decision of the justices ought not to be interfered with by us.

If the view that I have expressed is the correct one, there is no need to go into the question of evidence being given by gentlemen in the position occupied by Mr. Denning. I am sorry that we are not compelled to consider the effect of evidence given in the manner and under the circumstances it was given, because I have not the slightest hesitation in saying that the course adopted by him is one which ought on no account to be accepted as a precedent for future action. No man ought to allow his judicial character to conflict with his character as a witness; and if a member of an administrative body which has to exercise judicial functions wishes to give evidence in a case, he ought to decide upon the position which he intends to occupy before the proceedings commence. In this case Mr. Denning sat as a member of the licensing committee of the borough; he was one of those who referred the public-house for compensation; he sat and adjudicated when the compensation authority inquired into the matter; and I think I am right in assuming that he was one of the majority when the renewal of the licence was refused. After having acted in the manner which I have described, the point was taken that there was no evidence of differentiation, and after some time had elapsed, three other cases having been heard in the meantime, it was stated that one of the justices, who was sitting on the Bench and who had adjudicated on the case, wished to state the reasons why he had himself come to the conclusion that the question of the licence should be referred to the compensation authority. This justice was Mr. Denning. He left the Bench, went into the witness-box, gave evidence, the case was further heard, and, although the justices decided that Mr. Denning could not now adjudicate upon the matter, the majority of those who were sitting on the Bench again refused the renewal of the licence. I regret to say that I do not know of any authority which would justify the court in saying that the evidence given in this manner was not admissible in law. As his testimony was admissible, reluctantly as it is that I have come to this conclusion, and as he did give evidence satisfying the rule as to differentiation between the public-house in question and others in the neighbourhood, even if I am wrong in holding that the justices were justified in their finding on the evidence before them prior to the time when Mr. Denning went into the witness-box, the facts he deposed to were such that we are not entitled in any way to say that the justices were wrong in their application of the law. Consequently, as I am of opinion that the justices had evidence before them upon which they could legally act, there is no ground upon which we can interfere with their decision, and the present appeal must be dismissed.

ROWLATT, J.—I agree. There can be no doubt whatever that there are matters connected with these proceedings which are exceedingly regrettable. I think that the course pursued by Mr. Denning and acquiesced in, apparently, by his colleagues is one that can only be described, using the mildest terms, as most unfortunate. There was no difficulty in the way of Mr. Denning appearing in court either as a justice or as a witness. He was entitled to adopt either position, but he ought to have made up his mind beforehand as to which of the two positions he would accept. It is, to my mind, unthinkable that a man can combine the function of sitting in a judicial capacity, when impartiality is demanded, with the function of a party or witness, which involves looking at the matter in question from one

side only. That is the reason why it is so essential that a decision should be arrived at before the proceedings commence. If it was possible for a person to occupy the two positions when the same question was in dispute, I cannot see how any confidence could ever be felt in the administration of justice. What can a litigant think if, when he appears before a judicial tribunal of any kind, the person who is sitting in judgment can at any moment descend from the Bench and give evidence against him? It is essential that the litigant shall know that those who are sitting in judgment upon him are sitting judicially, and the thought ought never to cross his mind that he can attribute to any of his judges the possibility of a change in his functions. That is why I say that the particular proceedings in this case are of a most unfortunate character.

Still, I think that it cannot be asserted that the evidence was legally inadmissible, regrettable as were the circumstances under which it was given, although at the same time I am most anxious to say, and this is due to the justices, that everything that was done was done in the frankest manner, and that there was no concealment of any kind on their part. The only question that remains, therefore, is whether there was any evidence upon which the decision of the justices to refuse the renewal of the licence can be supported. I will look at it as though the evidence of Mr. Denning was not there at all, because from the narrowest point of view I do not think that the decision of the justices can be disturbed. It has been urged before us that there is no evidence of differentiation. I cannot help thinking that it is somewhat unfortunate that as soon as a new Act of Parliament is passed which introduces what may be termed a new branch of jurisprudence, some word or phrase is immediately coined which sets up a new system of confusion and misunderstandings, and the law gets enthralled by what is after all something not much better than a piece of slang. This is pretty much what has happened in the case of this word "differentiation," and here we have it put before us that there is no evidence of differentiation against the public-house, just as we might have it put before us in another kind of case that there was no evidence of negligence. I do not think that that is the case. The Licensing (Consolidation) Act, 1910, was passed for the purpose of enabling steps to be taken, whenever there were too many public-houses in a district, to reduce the number of the same, and very naturally the question which immediately arises is this: On what materials are the authorities to act in coming to a decision as to which houses are to go and which are to remain? I think that the decisions which have been given upon this point do not proceed further than this, that the justices are not entitled merely to look at a map, from which alone no facts can be elicited on either side, and merely say that certain houses shall be suppressed from such inspection. To act in this manner would not be to exercise a judicial function at all. Evidence must be forthcoming upon which the authority can come to a proper decision, and in arriving at their decision they must consider the conflicting claims that are put forward by the various individuals interested in the matter, and they must also consider the interests and the convenience of the public. It is not a question of finding something prejudicial to the public-house necessarily, although there is no doubt that this is the form which an objection generally takes. But in this case the justices had not simply the map of the district before them; they had the map and they had evidence upon which any question as to locality could be elucidated by the surveyor and the police. There was evidence that the house was one of excellent character. It is quite true that they had also the fact before them that the public-house had changed its tenants with considerable frequency, and they had, moreover, the whole evidence as to the locality. With all these facts before them, no matter what conclusion any other body of persons might have arrived at, I think that the justices were quite entitled to say that this particular public-house must be closed, that the licence would not be renewed, and that it must be referred to the compensation authority.

As to the other point, the one which was put before us first of all, apparently to prepare our minds for what was really, if I may so call it, the pinch of the case,

it has been suggested that we are entitled, under s. 2 of the Judicature Act, 1894, to draw an inference from the facts of the case contrary to that which was drawn by the justices. In my opinion, the section does not apply to this kind of case at all. It only means that where certain facts are found, the effect of those facts, which, perhaps, cannot exactly be said to be a question of law, can be dealt with by this court. I do not know whether this is too narrow a rule to be laid down, but at any rate I am perfectly convinced that the effect of the section under consideration leaves this case well outside it, because here it is not really an inference of fact, the justices have come to a conclusion really of opinion, their opinion and their view as to which of the houses must go is, after all, to be considered, it must be arrived at fairly upon evidence and judicially, but, after all, somebody has to decide it. It is they who have to decide it; we have not to decide it, and I do not think that the section come anywhere near enabling us to decide it. For these reasons I agree that this appeal ought to be dismissed.

SHEARMAN, J.—I am of the same opinion, though I must confess that I have had great difficulty in arriving at my decision. The first of my difficulties has been the form in which the Case has been stated. I have always understood that a Case of this kind should be so stated as to give the greatest possible assistance to the court which has to decide the question; and that the question which is submitted to the court for decision should be stated in the clearest possible language. I think it ought to be understood that in cases of this description the court should not merely have all the evidence given, but should have the conclusions of fact at which the justices have arrived, and, when it is the decision of a majority of the justices, I think that the court should be supplied with a statement as to the conclusions at which the majority have arrived. When I turn to this Case, I think it creates a difficulty from the outset. It is well-settled law that the magistrates cannot decide a case of this kind on the map alone. But when I look at the Case I see, "The following facts were proved or admitted"; and immediately afterwards comes the statement, "A map of the locality was produced." The map is annexed to and forms a part of the Case. Is the meaning of this first paragraph relating to facts proved or admitted that the map was admitted as a part of the evidence? On the whole, I come to the conclusion that it was not, and that that statement was merely put in as showing that the magistrates had had a map; and, although the sentence before says this was one of the facts proved or admitted, I have come to the conclusion that that merely means that it was a document before the justices, though it is one which, on the decisions, the court cannot treat as evidence. Then, further, there is a statement of the matters which were proved by the inspector of police. I cannot help thinking that those who stated this Case did not mean that those matters were proved—that is to say, that they were conclusions arrived at by the court; but that by proof they meant that evidence was given which the magistrates were at liberty to accept or to reject. But when one comes to the end of the Case to seek what is the question submitted to us, I find that counsel for the appellants submitted that there was no evidence of differentiation. Then the Case goes on to say that the question for the opinion of the court is whether the justices were legally entitled, in the circumstances, to refuse the renewal of the licence. I read that as meaning that the appellants submitted that there was no evidence of differentiation, and really that is the question which is being submitted to us, and the expression "legally entitled," which is a wide and vague expression, does not mean to raise any question other than the question whether there was evidence before the justices of differentiation. That is to say: Was there evidence before the justices on which they could take away the licence of one house rather than the licence of another house because there were differences between the different houses which were under consideration? I have come to the conclusion that there was evidence before Mr. Denning went into the witness-box and gave evidence. There was, in my opinion, some evidence on which the majority of the justices could have acted. I have also come

A to the same conclusion as my brethren, that there was no legal obstacle to Mr. Denning's evidence being admissible as evidence, and that, therefore, a fortiori after he had given evidence there was evidence of differentiation. I may add that another difficulty of the Case was this. Mr. Denning was a party who was entitled to be heard, not to give evidence, but was entitled, under s. 19 (2) of the Licensing (Consolidation) Act, 1910 [Licensing Act, 1953, s. 15 (2)], to put forward his B views on behalf of the licensing justices, and I presume from his conduct that he was one of the majority of them. He was entitled to be heard, but I hope that that means "entitled to be heard in the presence of the persons whose interests are affected." I feel certain that it must mean that. I have felt in the course of the case great difficulty in arriving at a conclusion whether Mr. Denning merely expressed his views or reasons or gave evidence. Looking at the form in which the C Case is stated, I think that it must mean that he gave evidence. In my opinion, therefore, there was evidence upon which the justices could find as they did, and it follows that this court has no power to interfere with their findings of fact. For the reasons that I have stated I think that the decision of the justices must be supported and that this appeal must be dismissed.

Appeal dismissed.

D Solicitors: *Pyke, Parrott & Co.*; *Eldridge, Son & Martin.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

E

F

ARNOLD *v.* KING-EMPEROR

[PRIVY COUNCIL (Lord Shaw, Lord Sumner, Lord Parmoor, Sir John Edge and Mr. Ameer Ali), February 16, 18, 19, 25, 26, 27, April 7, 1914]

[Reported [1914] A.C. 644; L.R. 41 Ind. App. 149; 83 L.J.P.C. 299; 111 L.T. 324; 30 T.L.R. 462; G 24 Cox, C.C. 297]

Privy Council (Judicial Committee)—Practice—Appeal—Criminal appeal—Principles on which Judicial Committee will act.

The Judicial Committee on an appeal will not interfere with the course of criminal law unless there has been such an interference with the elementary H rights of an accused as has placed him outside the pale of regular law, or unless, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince the committee, first, that the result arrived at was opposite to the result which the committee would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or I misdirection had been avoided.

The practice laid down in *R.* v. *Joykissen Mookerjee* (1) (1862), 1 Moo. P.C.C.N.S. 272, and *Falkland Islands Co.* v. *R.* (2) (1863), 1 Moo.P.C.C.N.S. 299, has not been altered by *Re Dillet* (3) (1887), 12 App. Cas. 459, and later cases.

Notes. Referred to: *Nadan* v. *R.*, [1926] A.C. 482.

As to practice and procedure in appeals to the Judicial Committee, see 9 HALSBURY'S LAWS (3rd Edn.) 379 et seq.; and for cases see 8 DIGEST (Repl.) 821 et seq.

Cases referred to:

(1) *R.* v. *Joykissen Mookerjee* (1862), 1 Moo.P.C.C.N.S. 272; 9 Moo. Ind. App. 168; 15 E.R. 704; sub nom. *Joykissen Mookerjee* v. *R.*, 9 Jur.N.S. 4; 10 W.R. 832, P.C.; 8 Digest (Repl.) 822, *738*.

(2) *Falkland Islands Co.* v. *R.* (1863), 1 Moo.P.C.C.N.S. 299; 9 L.T. 103; 12 W.R. 220; 9 Cox, C.C. 351; 15 E.R. 713, P.C.; 8 Digest (Repl.) 807, *581*.

(3) *Re Dillet* (1887), 12 App. Cas. 459; 56 L.T. 615; 36 W.R. 81; 3 T.L.R. 492; 16 Cox, C.C. 241, P.C.; 8 Digest (Repl.) 822, *749*.

(4) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

(5) *Vaithinatha Pillai* v. *King-Emperor* (1913), L.R. 40 Ind. App. 193; 29 T.L.R. 709, P.C.; 11 Digest (Repl.) 605, *374*.

(6) *Lanier* v. *R.*, [1914] A.C. 221; 83 L.J.P.C. 116; 110 L.T. 326; 30 T.L.R. 53; 24 Cox, C.C. 53, P.C.; 8 Digest (Repl.) 825, *774*.

(7) *Clifford* v. *King-Emperor* (1913), L.R. 40 Ind. App. 241; 83 L.J.P.C. 152, P.C.; 8 Digest (Repl.) 821, *731*.

Appeal by special leave from a conviction and sentence by the Chief Court of Lower Burma (Sir Charles Fox, sitting with a jury).

The appellant, who was the editor and one of the proprietors of a newspaper called "The Burma Critic," published at Rangoon, was charged under s. 499 of the Indian Penal Code with having defamed Mr. G. P. Andrew, a deputy commissioner and district magistrate, by the publication of two articles entitled "A Mockery of British Justice." The jury found the appellant guilty, and he was sentenced to one year's simple imprisonment.

This report deals only with that part of the judgment of the Board dealing with the practice of the Board in criminal appeals.

Sir R. Finlay, K.C., *D. A. Wilson*, and *Arthur Pope* for the appellant.
Sir Erle Richards, K.C., and *A. M. Dunne* for the respondent.

April 7. **LORD SHAW OF DUNFERMLINE.**—From what has been said it will, their Lordships think, clearly appear that there was material before the jury on both sides of this case, and that the determination was on a subject peculiarly within the jury's province. In their Lordships' opinion, the case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. But even if it were conceded that, on a meticulous examination of the judge's charge or conduct of the case, certain flaws could be discovered, it is the duty of their Lordships to consider the special position and function of the Board in criminal cases as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the empire, as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case, incline their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by statute, is undoubted. On the other hand, there are reasons, both constitutional and administrative, which make it manifest that this power should be lightly exercised. The overruling consideration on the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the royal prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions. These views are not new. They were expressed more than fifty years ago by Dr. Lushington in his judgment in *R.* v. *Joykissen Mookerjee* (1), and

LORD KINGSDOWN, in *Falkland Islands Co.* v. *R.* (2), stated the matter compendiously in these words (1 Moo.P.C.C.N.S. at p. 312):

> "It may be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success."

Their Lordships desire to state that, in their opinion, the principle and practice thus laid down by LORD KINGSDOWN still remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is *Re Dillet* (3). It should be observed that, while that case was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a barrister and solicitor against a verdict convicting him of perjury, but there had been a consequential order of the court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential order. LORD BLACKBURN referred to LORD KINGSDOWN's judgment in *Falkland Islands Co.* v. *R.* (2) as authoritative and binding. After citing that learned judge, LORD BLACKBURN added (12 App. Cas. at p. 446):

> "In this statement of the general practice their Lordships agree. They are not prepared to advise Her Majesty to make this conviction for perjury an exception if it were not made the sole foundation for the subsequent order of Mar. 27, 1885,"

and liberty accordingly was granted (ibid.)

> "to appeal against the order of Mar. 27, 1885, striking him off the roll, and also to the extent above stated, and no further, against the conviction for perjury."

While, accordingly, the familiar sentences again about to be quoted from LORD WATSON are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just referred to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position which it occupied under the judgments of DR. LUSHINGTON and LORD KINGSDOWN pronounced about a quarter of a century before. LORD WATSON in *Re Dillet* (3) observed (12 App. Cas. at p. 467) that

> "the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that, wherever there has been a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect:

It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or unless, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in *Re Dillet* (3) has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it *Makin* v. *A.-G. for New South Wales* (4) was cited. That case in truth did not raise the question at issue in the present case. It depended on the construction of s. 423 of the Criminal Law Amendment Act, 1883 (a New South Wales statute). That section set up the judges of the Supreme Court as a tribunal to determine questions submitted to them in a Case Stated by the judge at the trial, and there was a proviso that there should be no quashing "unless for some substantial wrong or other miscarriage of justice." It was stated by this Board that, under that section, the judges have not been substituted for the jury. As they said ([1894] A.C. at p. 70),

> "In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence."

The second case founded on is that of *Vaithinatha Pillai* v. *King-Emperor* (5) in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board to demand imperatively that it should interpose, because the very foundations of justice seemed to have been attacked in the proceedings. A whole body of inadmissible evidence had been received in the case. The one witness who remained in the case whose evidence was relevant was supporting another witness who was a confessed perjurer. The remaining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the magistrate and certain officials. Lord Atkinson observed:

> "If true they show that these officials, or at least the sub-inspector, induced the witness to forswear himself, and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father; and if false they show that the witness was ready to commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements. There is no alternative."

The simple case accordingly confronting the Board was a case of a subject sentenced to death on no evidence at all. In these circumstances, although the principle of *Re Dillet* (3) was again re-affirmed, their Lordships did not see their way to refrain from interfering. The third case referred to is that of *Lanier* v. *R.* (6) and, fortunately, it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the judge himself. He, as narrated in the report, was a member of the family council which instigated the proceedings, and himself was a party to appointing two barristers to conduct the prosecution and arrange about their fee. The facts need not be referred to. The indictment was altered by drastic amendments; the trial was hurried on; but the narrative need go no further, for, as the report states ([1914] A.C. at p. 226),

> "In short, counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the appellant of crime."

The Board were of opinion that the sentence pronounced against the appellant (ibid. at p. 230)

> "formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere."

But the Board took care to repeat that it did not lightly interfere, and the language of LORD WATSON in *Dillet's Case* (3) was again cited. It was pointed out that the interference was not on any matter of form, but because of matters lying at the very foundation of justice (the judge had been a judge in his own cause); justice had "gravely and injuriously miscarried." That case stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the colonies or dependencies. That extreme case is this—that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is, therefore, a matter of general Imperial concern that, by way of an appeal to the King, it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal, and the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford* v. *King-Emperor* (7), on Nov. 17 last, and their Lordships refer to the judgment of the Lord Chancellor in this and the other refusals referred to.

The application to the present case is simple. Even had this committee been a Court of Criminal Appeal, it is hardly doubtful that the appeal would fail. A fortiori their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the appeal be dismissed. There will be no order as to costs.

Appeal dismissed.

Solicitors: *Bramall & White*; *Solicitor to India Office.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

Re WEBB. Ex Parte BOARD OF TRADE

[Court of Appeal (Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.JJ.). April 24, 1914]

[Reported [1914] 3 K.B. 387; 83 L.J.K.B. 1386; 111 L.T. 175; 58 Sol. Jo. 581; 21 Mans. 169]

B

Bankruptcy—Scheme of arrangement—Approval by court—"Reasonable security" for payment of statutory composition—Probability of recovery within reasonable time—Refusal to approve scheme even though sanctioned by creditors—Bankruptcy Act, 1890 (*53 & 54 Vict., c. 71*), *s. 3* (9).

C

By s. 3 (9) of the Bankruptcy Act, 1890 [see now s. 16 (10) of the Bankruptcy Act, 1914], where a scheme of arrangement with creditors proposed by a debtor is submitted for the approval of the court, the court shall, on proof of certain facts, refuse to approve the scheme unless it provides "reasonable security" for payment of not less than 7s. 6d. in the pound [5s. under Act of 1914] on all the unsecured debts provable against the debtor's estate.

D

The words "reasonable security" in this subsection are not used as meaning the security afforded by trustee investments or even the security required by a man who is very strict in his business affairs. The court must be satisfied that the security proposed is such that under it the statutory composition can probably be recovered within a reasonable time. Unless that condition precedent is complied with the court must refuse to sanction the scheme, even though the creditors have approved it.

E

Notes. As to compositions and schemes of arrangement, see 2 Halsbury's Laws (3rd Edn.) 341–348; and for cases see 5 Digest (Repl.) 1134 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

F

(1) *Re Paine, Ex parte Paine*, [1891] W.N. 208, C.A.; 5 Digest (Repl.) 1161, *9380*.

(2) *Re Burr, Ex parte Board of Trade*, [1892] 2 Q.B. 467; 61 L.J.Q.B. 591; 66 L.T. 553; 8 T.L.R. 515; 9 Morr. 133, C.A.; 5 Digest (Repl.) 1163, *9394*.

(3) *Re Bottomley, Ex parte Bottomley* (1893), 10 Morr. 262; 5 Digest (Repl.) 1161, *9381*.

G

Also referred to in argument:

Re E.A.B., [1902] 1 K.B. 457; 71 L.J.K.B. 356; 85 L.T. 773; 50 W.R. 229; 9 Mans. 105; sub nom. *Re Ashmead-Bartlett*, 18 T.L.R. 213; 46 Sol. Jo. 150, C.A.; 5 Digest (Repl.) 1161, *9383*.

Re Flew, Ex parte Flew, [1905] 1 K.B. 278; 74 L.J.K.B. 280; 92 L.T. 333; 53 W.R. 438; 21 T.L.R. 150; 12 Mans. 1, C.A.; 5 Digest (Repl.) 1160, *9379*.

H

Appeal from a decision of Mr. Registrar Hood.

A receiving order, dated May 8, 1913, was made against the debtor, Webb, who was a solicitor and registrar of the Whitechapel County Court. The debtor was sixty-four years of age, and in receipt of a salary and emoluments amounting to £1,100 per annum. His liabilities amounted to upwards of £28,000. A proposal for a composition was put forward in June, 1913, but, that falling through, a further proposal was put forward on Aug. 27, which was accepted and approved by a majority of three-fourths of the creditors in September. The scheme proposed was that the debtor should set aside £600 per annum out of his salary, of which there was to be no protection by life policies or otherwise, and that the debtor's brother, Charles W. Webb, should assign to trustees for the benefit of the creditors one-half of one-tenth share in the proceeds of sale arising from certain interests in oil properties in Wyoming, U.S.A. It having been found by the registrar that circumstances had occurred which would render it impossible for the debtor to

I

A obtain his discharge without suspension or conditions in the case of adjudication, the proposed scheme had to be approved by the registrar before it could be accepted. The registrar being of opinion that the proposed scheme provided reasonable security for the payment of 7s. 6d. in the pound on all unsecured debts provable against the debtor's estate, sanctioned the scheme and discharged the receiving order on Feb. 1, 1914. The interest, one-half of which was to be assigned B by the debtor's brother, was a tenth share in the net proceeds of sale of certain oil-bearing properties in Wyoming, which share had been assigned to the debtor by one Walter in 1907. In 1908 the debtor assigned his interest to his brother for £2,000. The evidence of the original assignment by Walter was contained in a letter dated June 9, 1913, signed by Walter. It was admitted that the interest so assigned did not amount to a charge on the properties in question, but was limited C to a personal claim against Walter. It was admitted that the properties had not so far produced anything. The Board of Trade and the official receiver appealed against the decision of the registrar sanctioning the scheme.

The Solicitor-General (*Sir Stanley Buckmaster, K.C.*) and *E. W. Hansell* for the appellants.

Hollis Walker, K.C., and *Woodgate* for the debtor.

D

COZENS-HARDY, M.R.—This is an appeal by the Board of Trade and the official receiver, raising what is undoubtedly a point of general interest and importance in the administration of the bankruptcy law. A receiving order was made against the debtor, Mr. Webb, who is a solicitor, in May, 1913. In June there E was a proposal for a scheme of composition. That scheme fell through because part of the security which was offered failed, and a second proposal was started in August, 1913. The creditors held a meeting, and in September by the requisite majority they approved it. It came before the registrar, who also approved of the scheme and discharged the receiving order.

The question turns upon s. 3 of the Bankruptcy Act, 1890 [see now Bankruptcy Act, 1914, s. 16], and in particular upon sub-s. 9 of that section. In certain F events, which I need not particularise, the court is bound, if the debtor is adjudicated a bankrupt, to refuse, suspend, or attach conditions to the debtor's discharge, and this, which is called the composition section, says:

> "If any facts are proved on proof of which the court would be required either to refuse, suspend, or attach conditions to the debtor's discharge, were he G adjudged bankrupt, the court 'shall refuse to approve the proposal unless it provides reasonable security for payment of not less than 7s. 6d. in the pound on all the unsecured debts provable against the debtor's estate'" [see now s. 16 (10) of Act of 1914 wherein the figure of 5s. is substituted for that of 7s. 6d].

Upon whom is the duty imposed of considering and deciding the question whether H the proposed scheme provides a reasonable security for the payment of 7s. 6d. in the pound? Quite clearly, upon the court; quite clearly the court cannot sanction the composition arrangement and annul the bankruptcy proceedings if it is satisfied that the scheme does not provide reasonable security, and it does not matter in the least, in those circumstances, what are the views of the creditors in the matter. It may be, and this is the other alternative—I dare say it is one which I may occur not infrequently—that the court may be satisfied that the scheme does provide reasonable security for payment of 7s. 6d. in the pound. I do not mean "reasonable security" in the sense in which it might be applied to trustee investments, or even those of a man who is very strict in his business arrangements, but if the court is satisfied that this proposal is security for 7s. 6d. in the pound it may then say "notwithstanding that, I am not bound to follow the wishes of the creditors or the majority of them, although I may be satisfied that the creditors have been actuated by other motives, or, it may be, satisfied that if the bankruptcy works out they will get more than 7s. 6d. in the pound." I do not doubt

if the condition about the scheme providing reasonable security for the payment of 7s. 6d. in the pound is satisfied that the court would in most cases listen favourably to the wishes of the creditors and in most cases would give effect to the resolution of the creditors in favour of accepting the composition.

What is the proposal here? The debts, so far as known, amount to a very considerable sum, and a composition of 7s. 6d. in the pound means in fact about £11,000, dealing only in very round figures. The proposal that is offered is, in the first place, a few hundreds a year from his salary as registrar of a county court. That, of course, is a matter which is quite inadequate to produce the £11,000. There is no covering of it by policies of assurance, and there is no other tangible security given by the debtor, but it is said that there are interests in oil properties in Wyoming, properties upon which large sums of money have been laid out, and which are of almost untold value. I think in some of the questions put to the experts it was stated that they were worth hundreds of thousands of pounds. But what is the title shown? It is said that there is a letter produced of June 9, 1913, signed by a Mr. Henry Walter, addressed, not to the bankrupt, but to his brother, Charles Webb, in these terms:

> "I hereby declare that it was agreed between Mr. H. R. Webb [i.e., the bankrupt] and myself in 1907 that in consideration of his services in recovering and protecting the properties as mentioned in para. 10 of the agreement of May 12, 1908, he was to have a clear 10 per cent. (10%) of the net proceeds of all dealings therewith accruing to Henry Walter or his assignee or nominee, such properties including the whole of the lands forming 'The Henderson Purchase'—viz.: (i) The 560 freehold acres at Lander; (ii) the 1,500 acres surrounding these freeholds; (iii) the freehold square mile at Conan Creek, being the lands referred to in schedules 1, 2, and 3 in Mr. H. R. Webb's proposed scheme of arrangement with his creditors."

That is the most extraordinary document I ever saw, if it is to be regarded as a root of title, to use for a moment a conveyancing term. It refers to a certain agreement of 1908, subsequent, be it observed, to the arrangement said to have been made with the bankrupt in 1907. I have read and carefully considered this agreement of May 12, 1908, and I say frankly without hesitation that I do not understand it. I doubt whether anybody does understand it. I doubt whether it is capable of being understood; certainly I am absolutely unable to say what is the effect of this agreement itself except this, that it does appear that the properties, or some of the properties in question, were subject to charges, the number of which I have not ventured to calculate, certainly some score or two of charges; and, further, it appears that as to the properties referred to in the schedules 1, 2, and 3 in the proposal, the position of things is this. As to the first schedule, which is said to be the most valuable one, foreclosure proceedings have been instituted in Wyoming, and a foreclosure decree has been made; but it is said, and I assume, of course, in favour of the debtor, that there have been proceedings that have resulted in the foreclosure proceedings being re-opened—re-opened, no doubt, upon terms—and it must, therefore, not be taken that all the mortgages are impeached or questioned; but as to some of them it has not been definitely established that they are charges on this property. The position remains, however, thus: Foreclosure proceedings as to the whole of the property in the first schedule, the existence of mortgages as to a large amount on that property not in dispute; a receiver appointed by the court in possession; and, so far as appears, not one penny has been received either by Mr. Walter or by anyone of the other parties to the transaction for many years. The next schedule is the property containing 1,500 acres, a little more or less. What is the position of that? That is not in Mr. Walter's possession; it is now in that of the Fremont Syndicate. What is the Fremont Syndicate? The Fremont Syndicate is a company which was in possession at the time, and I suppose is still in possession of these 1,500 acres, but it has made nothing out of them; the property has not been worked, nothing is being

derived from it, and all we know is that as late as last December there was an issue of debentures for the small amount of £1,800 at a discount of 30 per cent. The interest of Mr. Walter in the second schedule is not in the land itself but in certain shares or interests in this company, which is an English limited company. The property in the third schedule, again, is no longer in Mr. Walter's possession. That is now in the possession of the New Canadian Oil Co. As long ago as April 25, 1910, it was transferred to that, which is an American company, and there again not a penny has been produced in respect of this. Counsel for the debtor has argued the case very frankly. He admits that this letter, which is really the root of the title, does not create any charge upon this property at all, but merely gives personal rights against Mr. Walter. Is it possible for anybody to say that a security consisting of a personal right against Mr. Walter, who evidently has been a financial speculator to a large extent—and I am afraid not always to a very successful extent—that a personal security of this nature given by Mr. Walter, as to whose financial means and capacity no evidence is forthcoming, can be regarded, in the language of the section of the Act which I have read, as satisfying the court that this provides reasonable security for the payment of not less than 7s. 6d. in the pound? In my opinion, it is almost ludicrous to treat this matter seriously, or to say that this is in any way from any point of view a reasonable security for the payment of 7s. 6d. in the pound.

There are two authorities to which I think I ought to refer. LORD ESHER, M.R., in the first case which came after the Act of 1890, *Re Paine, Ex parte Paine* (1) says this ([1891] W.N. at p. 208):

> "The appellants were bound to show that the proposed scheme did provide 'reasonable security for the payment of not less than 7s. 6d. in the pound.' This did not mean payment at a distant time, such as a year hence. It meant reasonable security for the payment now or within a short time."

If that is the law, speaking for myself with great respect to the learned registrar, it is impossible to say that a security on an undivided interest in property like this, which has yielded nothing for years, and which exists in the State of Wyoming in America, can be a reasonable security within the meaning of the Act. I think that the subsequent case, and the next in point of time of *Re Burr, Ex parte Board of Trade* (2) is an extremely important case, because it seems to me to lay down the principles which ought to be followed. FRY, L.J., said ([1892] 2 Q.B. at pp. 476, 477):

> "There are two questions to be considered in the present case. First, is the court bound to refuse to approve the scheme? In my opinion, it is bound to refuse, because the condition which sub-s. 9 imposes has not been satisfied. It has not, in my opinion, been proved that this scheme provides reasonable security for the payment of 7s. 6d. in the pound. . . . I am of opinion that it is not proved that the scheme will provide reasonable security for the payment of 7s. 6d. in the pound, and that, consequently, it is being admitted that some of the facts exist which are mentioned in s. 8, and which would require the court, if the debtor were adjudged bankrupt, to refuse, suspend, or attach conditions to his discharge, the court is bound to refuse to approve the scheme."

In my opinion, upon that ground, not one depending upon time but upon the substance of the scheme, I think that this court is bound to refuse to sanction the scheme.

It is said that in *Re Bottomley, Ex parte Bottomley* (3), VAUGHAN WILLIAMS, J., made some observations, the tendency of which was to say that the question was very much one for the creditors to determine, that they understand the position better, and that the court ought to be slow to interfere with their view, and further with the latter part I entirely agree—it does not mean an absolutely good security, but it must be a reasonable security under which money could probably

be recovered. I am sure I am never likely, particularly in bankruptcy matters, to speak otherwise than with the greatest possible respect of VAUGHAN WILLIAMS, L.J., but I do not think that it is fair to take the language which he uses as in any way intending to depart from what FRY, L.J., said in the prior case, which was not cited to him in that case, or to treat that decision as in any way qualifying that which seems to me to be the necessary consequence of the language. For these reasons I think that the court is bound, notwithstanding that the creditors have approved, to refuse to sanction this scheme of composition, and that this appeal must be allowed.

SWINFEN EADY, L.J.—I am of the same opinion. It not being disputed that facts have been proved within the meaning of sub-s. 9 of s. 3 of the Act of 1890, that not being a matter in dispute, the subsection provides that the court shall refuse to approve the proposal—that is, a proposed scheme—unless it provides reasonable security for the payment of not less than 7s. 6d. in the pound on all the unsecured debts provable against the debtor's estate. Unless that condition precedent is complied with, the court is bound to refuse its approval of the proposal. It must be remembered that when a debtor intends to make a proposal, he arranges his scheme, a meeting of creditors is first held, and it is after the scheme has been before the creditors, and after the proposal has been accepted by the statutory majority of creditors, that is to say, a majority of three-fourths in number, and it is only after that step has been taken that the scheme comes before the court. Then, if the court is satisfied that the scheme does not provide reasonable security for the payment, it is bound to refuse its sanction. It seems to me that it cannot be contended that it is sufficient to say that the creditors have approved the scheme. That is so in every case where the scheme comes before the court. It is after the approval of the creditors that the court has to decide whether it will or will not approve the scheme.

In the present case is there reasonable security for the payment of 7s. 6d. in the pound? The debtor, we are told, is some sixty-four years of age, and holds an official position. The sum that is required to be provided for the composition is between £10,000 and £11,000. Of his own resources he is only able to offer to set aside £600 a year. That, of course, would go no way at all, having regard to his age and the time that would be required for the payment of the sum of about £10,500; that will go no way at all to provide this composition. Then all else that is offered is that his brother has received from the debtor for value, which it is said comes to about £2,000, an assignment of an interest which the debtor has. The debtor's interest is not the subject of any contract in writing, so far as appears before us, but it is manifested by a letter written by Henry Walter, the assignor, to the debtor's brother so recently as June 9, 1913. Until then it does not appear that there was any contract in writing, setting out what the interest was but under that letter dated June 9, 1913, Henry Walter, being interested in certain oil property, declares that so long ago as 1907 it was agreed that the debtor was to have a clear 10 per cent. of the net proceeds of all dealings with certain oil property, 10 per cent. of the net proceeds of all dealings therewith accruing to Henry Walter, his assignees or nominees, such properties including three specified properties, No. 1, No. 2, and No. 3. Although that letter is dated in 1913, the interest is stated to have been made over or promised—perhaps that is the more accurate word—to the debtor in 1907. On Jan. 6, 1908, the debtor agreed to assign, or did assign, whatever interest he had to his brother, and it does not appear that since Jan. 6, 1908, or at any time the brother or the debtor himself has ever received any cash whatever in respect of these interests, so that upwards of six years have gone by and no cash whatever has been received. So far as I gather, nothing whatever has been received by the brother except £1,500 debentures of a company called Fremont, Ltd. As I gather, the company was originally intended to acquire the properties mentioned, numbers 1 and 2, in the letter of June 9, 1913. Property No. 1 is freehold of 560 acres. I gather that property

No. 2 is leasehold. The interest of Walter in the property No. 1 has been the subject of extensive foreclosure proceedings, and apparently it now stands in this way, that there is a sum of £118,000 claimed to be due to mortgagees; there has been a foreclosure; the foreclosure has been re-opened; and now there are further proceedings pending in America with regard to that. I gather further that it was intended that this Fremont, Ltd., was to acquire the property, but under a note placed upon each of the three balance-sheets that appear on the file of the proceedings in that company, it is stated that the option over the freehold property has expired, and therefore it is only the leasehold interest that remains in Fremont, Ltd. With regard, therefore, to the property No. 1 in the schedule it would appear that it is an interest which is the subject of protracted litigation, which is heavily mortgaged, and in respect of which nothing has yet been received, and there is no definite evidence of anything being likely to be received either by the debtor's brother or anyone claiming through him.

With regard to the second property, the 1,500 acres surrounding the freeholds, that interest, whatever it is, appears to be vested in the company called Fremont, Ltd. That company's file has been produced. There are three balance-sheets, or rather there is upon the file a statement in the form of a balance-sheet as of June 30, 1911, filed with the summary of share capital made up to Nov. 13, 1911. When the next summary of share capital comes to be made up in 1912 there is no further summary in the form of a balance-sheet, but the form is filled up by the old summary being copied again, as if it was applicable at that date. When the next year comes to be dealt with there is a summary of the share capital and shares of Oct. 27, 1913, and there is exactly the same state of things. There is no statement, there is no balance-sheet of what the financial position of the company is, but only the old document made up to June 13, 1911, copied again. It does not appear that any interest has been paid on the debentures; we are left in the dark as to that, but we do know that there was a recent issue in December, 1913, of 1,800 debentures which could only be placed, or, in any case, were placed, at 20 per cent. discount. With regard to the third interest, the freehold square mile at Conan Creek, this property is made over to a company called the New Canadian Co., and we have no further details with regard to it, and nothing to show that a penny is ever likely to result from it.

I cannot, in the face of these facts, regard but as wild and extravagant the affidavit of Charles Walter which was relied upon in part by the debtor. Mr. Charles Walter says that he possesses large interests in the oil property and knows these properties. In para. 3 he says:

> "From my intimate knowledge of the oil properties referred to in the said scheme, and my expert knowledge extending over upwards of twelve years of oil lands in general in the State of Wyoming, U.S.A., I am satisfied that the value of the total interest of Charles W. Webb will exceed £100,000."

The interest of Charles W. Webb is this one-tenth, which will exceed £100,000. It will be observed he does not state what the interest is or give any particulars of it, and he does not state what are the charges upon the interest. Assuming it were worth £100,000, if it were mortgaged to the extent of £118,000, the equity of redemption would be worthless. Such an affidavit as that is of no value whatever in arriving at what the interest is. Having followed as well as one is able to follow this agreement which is most difficult to understand—perhaps as the Master of the Rolls has said, impossible to be understood—of May 12, 1908, and the other documents relating to the case, I am not satisfied that there is any reasonable prospect of anything coming from any of these oil-bearing properties within a reasonable time, whatever extended view may be taken of what is a reasonable time. Having regard to the fact that during the last six years no cash has been received from them, I am not satisfied that these properties or the interest of the debtor in them, or the interest which the debtor's brother is prepared to make over, afford any reasonable prospect whatever of anything coming, and I am quite

satisfied in the words of the statute that the interests do not provide any reasonable security for the payment of 7s. 6d. in the pound in the debts provable. In these circumstances, I am of opinion that the order sanctioning the scheme is erroneous and should be discharged.

PICKFORD, L.J.—I agree.

Appeal allowed.

Solicitors: *Solicitor of Board of Trade*; *W. J. A. Drake.*

[*Reported by* R. C. CARRINGTON, ESQ., *Barrister-at-Law.*]

CLEARY *v.* BRAZIL RAIL. CO.

[KING'S BENCH DIVISION (Rowlatt, J.), March 25, 30, 1915]

[Reported 85 L.J.K.B. 32; 113 L.T. 96]

Company—Debenture—Bearer debenture bonds—Claim by holder for unpaid interest—Failure to observe conditions precedent in trust deed—Previous action by debenture holder in Chancery Division—Right to recover payment.

The plaintiff was the holder of bearer debenture bonds issued by the defendant company in which it was provided that interest would be paid to the holder. The bonds were secured by and issued subject to the provisions contained in a trust deed. By cl. 28 of the trust deed the defendant company covenanted with the trustees to pay the interest, and cl. 36 provided that no holder of a bond could institute any suit or proceeding for the execution of the trusts without having first performed certain conditions. The plaintiff brought this action claiming payment of interest which had not been paid, but before he did so a debenture-holder's action had been successfully brought in the Chancery Division for the appointment of a receiver and consequential relief. The defendant company contended that the plaintiff's action should not succeed because he had not performed the conditions set out in cl. 36, and that the debenture-holder's action was a bar to these proceedings as the same relief which the plaintiff was claiming could have been given by the Chancery court.

Held: clause 36 did not apply as the plaintiff's action was not an action for the execution of the trust, but a claim for the payment of a debt; the debenture-holder's action was not a ground for staying the proceedings as that action had not been a claim for payments as in this case; and, therefore, the plaintiff was entitled to succeed.

Notes. As to the enforcement of remedies by debenture holders in general, see 6 HALSBURY'S LAWS (3rd Edn.) 500 et seq.: and for cases see 10 DIGEST (Repl.) 817.

Case referred to:

(1) *Hope* v. *Croydon and Norwood Tramways Co.* (1887), 34 Ch.D. 730; 56 L.J.Ch. 760; 56 L.T. 822; 35 W.R. 594; 10 Digest (Repl.) 841, *5543*.

Also referred to in argument:

Rogers & Co. v. *British and Colonial Colliery Supply Association* (1898), 68 L.J.Q.B. 14; 6 Mans. 305; sub nom. *Stewart, Rogers & Co.* v. *British and Colonial Colliery Supply Association*, 79 L.T. 494; 10 Digest (Repl.) 817, *5320*.

Lynde v. *Waithman*, [1895] 2 Q.B. 180; 64 L.J.Q.B. 762; 72 L.T. 857; 14 R. 489, C.A.; 35 Digest 539, *2684*.

Bowen v. *Brecon Rail Co., Ex parte Howell* (1867), L.R. 3 Eq. 541; 36 L.J.Ch. 344; 16 L.T. 6; 15 W.R. 482; 10 Digest (Repl.) 1282, *9061*.

Re Crigglestone Coal Co., Ltd., [1906] 2 Ch. 327; 75 L.J.Ch. 662; 95 L.T. 510; 22 T.L.R. 585, C.A.; 10 Digest (Repl.) 881, *5847*.

Earl Poulett v. *Viscount Hill*, [1893] 1 Ch. 277; 62 L.J.Ch. 466; 68 L.T. 476; 41 W.R. 503; 2 R. 288, C.A.; 35 Digest 538, *2675*.

Williams v. *Hunt*, [1905] 1 K.B. 512; 74 L.J.K.B. 364; 92 L.T. 192, C.A.; 35 Digest 538, *2675*.

Watson v. *Cave* (*No. 1*) (1881), 17 Ch.D. 19; 44 L.T. 40; 29 W.R. 433, C.A.; 9 Digest (Repl.) 724, *4803*.

Action brought by the plaintiff on a covenant contained in bearer debenture bonds and attached coupons issued by the defendant company, for half a year's interest due on Jan. 1, 1915, the coupons having been presented for payment and the defendant company having refused to pay.

The defendant company was incorporated under the laws of the State of Maine, in the United States of America, and in the year 1909 they created, in accordance with the laws in force in that State, a series of first mortgage sixty-year gold bonds for £100 each payable to bearer, and carrying interest at the rate of 4½ per cent. per annum. The bonds were secured by, and issued subject to the provisions contained in a trust deed, dated June 1, 1909, and made between the company of the first part, and the Empire Trust Co., a corporation duly incorporated under the laws of the State of New York, of the other part. The trust deed was duly executed in accordance with the laws in force in the State of Maine. By cl. 28 of the trust deed it was provided that:

> "The company will pay the principal moneys and interest secured by the bonds in accordance with the tenor thereof respectively, and shall observe and perform all the covenants and conditions contained therein or indorsed thereon respectively, which shall be binding upon the company and the holders of the bonds respectively, and by all persons claiming through or under them respectively."

By cl. 36 it was provided that:

> "The trustee shall not be bound to take any step to enforce the perfomance of any of the covenants on the part of the company in these presents contained . . . unless when required to do so in writing by the holder or holders of one-fifth part in value of the bonds for the time being outstanding or by an extraordinary resolution of the bondholders . . . and then only after it shall have been indemnified to its satisfaction against all actions, proceedings, claims, and demands, to which it may render itself liable, and all costs, charges, damages, and expenses, which it may incur by so doing, and it is hereby declared and agreed that no holder of bonds shall have the right to institute any suit or proceeding for foreclosure or sale under this mortgage, or for the execution of the trusts thereof, except upon and after the refusal or neglect of the trustees to proceed to act in the premises upon requisition and indemnification for the satisfaction of the trustees as aforesaid."

No requisition had been made to the trustee to proceed to act in accordance with the provisions of cl. 36. The defendant company was unable to pay its debts, and previously to the plaintiff bringing his action a debenture-holder's action was commenced in the Chancery Division of the High Court, of which the short title was *Re Brazil Rail. Co., Smith* v. *The Co.*, and by an order of the court dated Jan. 13, 1915, William Cameron Forbes, who had been appointed receiver by the United States District Court at Portland, Maine, on Oct. 13, 1914, was appointed receiver of all the assets in England comprised in the trust deed. This action in the Chancery Division was still proceeding for the

execution of the trusts of the trust deed, and for the enforcement of the mortgage thereby effected.

A. M. Latter for the plaintiff.
C. P. Blackwell for the defendants.

Cur. adv. vult.

Mar. 30, 1915. **ROWLATT, J.**, read the following judgment. This is an action brought upon a covenant contained in a debenture payable to bearer issued by the defendant company, which is incorporated in the State of Maine, and also upon a covenant contained in a coupon for interest attached to the debenture, the tenor of the covenant in each case being that the interest would be paid to the holder, and the statement of claim, therefore, claims the interest. What use the judgment will be to the plaintiff I do not know. All the assets, at any rate in this country and possibly everywhere, are included in the security of the debenture trust deed and are now under the protection of a receiver, who has been appointed in an action commenced by one of the debenture-holders. There is, however, some land somewhere expressed to be excepted from the security, and it is possible that a judgment may be of some use to the plaintiff in this country or in the country where the company is incorporated, or possibly in another country where it has property or where it desires to carry on business. But however that may be, it is not for me to consider whether the judgment will be of any use to the plaintiff. That is for him to consider.

A judgment upon a covenant which has been broken is not a discretionary remedy, it is a remedy to which the plaintiff is entitled if the covenant has been broken. Now, therefore, is there any legal or equitable defence to this action? In the first place, it is said that there is a defence owing to a provision of the trust deed, the terms and conditions of which were incorporated with the debenture. That provision, which is contained in cl. 36, is to the effect that no holder of a bond shall have the right to institute any suit or proceeding for the execution of the trusts of the trust deed without the performance of certain conditions precedent which in this case have not been performed. It was said that this action was a suit or proceeding for the execution of the trusts of the trust deed. All I can say to that is that it is not. An action against a covenantee for money which he covenants to pay is not an action for the execution of any trust at all. When the covenantee pays he is not performing a trust, he is simply paying a debt, and this action would have been just as competent if there never had been a trust deed, or if the trust deed had been released, which is legally, though not perhaps commercially, conceivable. But it is said with regard to this particular deed that an action of this kind is an action for the execution of the trusts within the meaning of the clause, where that phrase occurs, because by one of the clauses of the trust deed—namely, cl. 28—the company covenants with the trustees of the trust deed to pay this interest, and that therefore the bondholders are entitled under the trust deed to the benefit of an action of covenant. So they may be. They are entitled to the benefit of the covenant with the trustees, and that covenant might have been enforced in an action which might perhaps have been called an action for the execution of the trusts of the trust deed. It might have been possibly so called. But that would have been an action to which it would have been necessary for the trustees and for all the beneficiaries, actually or by representation, to be parties, and the demand in that action would have been that the trustees be compelled by the equitable powers of the court to put in suit their covenant against the company for the benefit of all their beneficiaries, and, of course, the covenant would have been enforced in that very action, but the plaintiffs would have been the trustees. That is a wholly different action from the present one. Besides the covenant with the trustees in the trust deed, there is the covenant, now sued on personally, with each holder of the debentures. This action is an

action entirely different from the action which I have mentioned, and I find no ground whatever for saying that this can be possibly regarded in any sense as an action for the execution of the trusts of the deed.

There was another objection made to this action which was that another debenture holder had commenced an action in the Chancery Division and had obtained an order for the appointment of a receiver. There is nothing in that analogous to the liquidation of the company. There is no question of winding-up, of course, but there is nothing in the procedure which I have mentioned analogous to an order for the administration of the assets of a debtor, such as the decree which is made in a creditor's action for the administration of the estate of a deceased person, whereby the court takes into its own possession and control all the assets of the debtor and necessarily restrains any individual action at common law. There is nothing of that kind in the debenture-holder's action, which is merely an action to have a receiver, and in which a receiver has been appointed. But it was further said that that action was an action including a claim for the same relief as is now claimed in this action; in other words, that it was an action leading to a personal judgment on behalf of the bond-holders against this company, and if that was so, though possibly it would not be a defence to the action—judgment not having been recovered—it would be a ground for staying it. It was also contended that a debenture-holder's action is just the same as a mortgagee's action for foreclosure, which includes, as has been well settled by several decisions which I need not refer to, a claim for a personal judgment for the interest right up to the date of the foreclosure, and that this action therefore includes such a claim. I have looked at the writ, which was put in, in the debenture-holder's action, and it is only a claim for the appointment of a receiver and consequential relief. It does not purport to be a claim for payment. But it was urged that I ought so to regard it and reference was made to *Hope* v. *Croydon and Norwood Tramways Co.* (1), where, in an action in which the plaintiff was a debenture-holder, NORTH, J., made a declaration that the debenture-holders, as a whole, were entitled to stand in the position of judgment creditors for the total amount of the debentures issued, and it is said that that showed that this debenture-holder's action was an action really including a claim for the same relief as is sought in this action. The reason why I did not give judgment when the case was heard was not because I had any doubt as to what my decision ought to be, but because I wanted just to look and see what that action before NORTH, J., really claimed, and I sent for the writ, and I found that it was not an action for a receiver. I do not know that a receiver was even claimed, but at any rate it was an action in which the first claim on the writ was for payment, and, therefore, an action on the covenant. The debenture-holder's action now pending in the Chancery Division is nothing of the kind; there is no claim for payment, and, therefore, that is a sufficient answer to the defendant's contention. There may be other answers, but I need not refer to them. It is sufficient to say that the pending debenture-holder's action is not an action which covers the same ground as, and therefore is no impediment whatever to the prosecution of, this action in which I now give judgment for the plaintiff for the amount claimed with costs.

Judgment for the plaintiff.

Solicitors: *Terrell & Varley*; *G. Tyser.*

[*Reported by* LIONEL H. BARNES, ESQ., *Barrister-at-Law.*]

Re MARIETTE. MARIETTE *v.* ALDENHAM SCHOOL GOVERNING BODY

[CHANCERY DIVISION (Eve, J.), July 2, 1915].

[Reported [1915] 2 Ch. 284; 84 L.J.Ch. 825; 113 L.T. 920; 31 T.L.R. 536; 59 Sol. Jo. 630]

Charity—Education—Games—Bequest to governors of school for building fives courts—Gift to headmaster to provide prizes in school athletics—Development of body by organised games part of education.

By his will a testator bequeathed £1,000 to the governing body of Aldenham School "for the purpose of building Eton fives courts or squash racket courts or for some similar purpose." The testator also bequeathed £100 to the headmaster for the time being of the school on trust to use the interest "to provide a prize for some event in the school athletic sports every year." Aldenham School was originally founded as a free grammar school. It was conceded that it was a charity within the statute of Elizabeth. There were 208 boys at the school all of whom except four were boarders. On an originating summons to determine if the gifts were valid charitable legacies,

Held: in considering whether or not a gift was charitable regard must be paid to the character and objects of the charity intended to benefit as well as to the character of the gift itself; in the present case the object of the charity was education in its widest sense which included development of the body, by organised games, as well as development of the mind: accordingly, both gifts were to a charity for purposes included in the objects of that charity, and were, therefore, valid charitable legacies.

Notes. Applied: *Re Gray, Todd* v. *Taylor*, [1925] All E.R.Rep. 250. Considered: *Scott* v. *Scott*, [1946] 2 All E.R. 576. Referred to: *I.R.Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525.

As to educational purposes which are charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 218 et seq.; for cases 8 DIGEST (Repl.) 326 et seq.

Cases referred to in argument:

A.-G. v. *Earl of Londsdale* (1827), 1 Sim. 105; 5 L.J.O.S.Ch. 99; 57 E.R. 518; 8 Digest (Repl.) 421, *1116*.

Re Good, Harington v. *Watts*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 55 W.R. 476; 21 T.L.R. 450; 49 Sol. Jo. 445; 8 Digest (Repl.) 347, *278*.

Re Donald, Moore v. *Somerset*, [1909] 2 Ch. 410; 78 L.J.Ch. 761; 101 L.T. 377; 53 Sol. Jo. 673; 8 Digest (Repl.) 418, *1100*.

Re Charlesworth, Robinson v. *Cleveland* (*Archdeacon*) (1910), 101 L.T. 908; 26 T.L.R. 214; 54 Sol. Jo. 196; 8 Digest (Repl.) 341, *230*.

Re Nottage, Jones v. *Palmer*, [1895] 2 Ch. 649, 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370*.

Incorporated Society v. *Richards* (1841), 4 Eq.R. 177; 1 Dr. & War. 258; 1 Con. & Law, 58; 8 Digest (Repl.) 380, **217*.

Re Clarke, Clarke v. *Clarke*, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811; 49 W.R. 628; 17 T.L.R. 479, 45 Sol. Jo. 484.

Re Drummond, Ashworth v. *Drummond*, ante p. 223; [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 30 T.L.R. 429; 58 Sol. Jo. 472; 8 Digest (Repl.) 359, *371*.

Adjourned Summons by executors to determine whether legacies were valid.

By his will, dated Dec. 2, 1908, Edgar Henry Mariette, of Aldenham School, Elstree, in the county of Hertford, after appointing his two brothers executors and trustees, bequeathed the several pecuniary and specific legacies set out in the

A schedule to the will and then devised and bequeathed all his real estate and the residue of his personal estate not otherwise disposed of to his trustees on the trusts declared in the will. By the schedule, which was duly signed and witnessed, the testator bequeathed the following three legacies:

"£1,000 to the governing body of Aldenham School for the purpose of building Eton fives courts or squash racket courts or for some similar purpose B that shall be decided upon by a majority of the house masters at the time of my death.

"£100 to the head master for the time being of Aldenham School upon trust to use the interest for a prize in books to be given every year for classics in the sixth form.

"£100 to the head master for the time being of Aldenham School upon C trust to use the interest to provide a prize for some event in the school athletic sports every year, to be agreed upon by the Committee of the athletic sports."

The testator died on June 14, 1914, and his will was duly proved on Aug. 1, 1914.

The testator had been a master at Aldenham School for more than twenty-four D years. Aldenham School formed part of a charity founded by Richard Platt, a brewer of London, under letters patent granted by Queen Elizabeth I on Feb. 18, 1596. The charity was for the foundation of a school and almshouses on land in the parish of Aldenham belonging to Richard Platt, and Aldenham School was founded as a free grammar school in 1597. Under a scheme dated May 13, 1875, made by the Charity Commissioners, Aldenham School was established as E a grammar school for home boarders and school boarders and opened to all boys of good character and bodily health between the ages of ten and eighteen. The scheme provided that management of the income of the charitable trust should be vested in the Brewers' Company but that the management of Aldenham School should be vested in a governing body of fifteen persons. By the first clause of the scheme the object of the charity was to supply sound practical and liberal F education in accordance with the doctrines of the Church of England for boys and girls by means of schools in the parish of Aldenham, and to provide for the relief of poor people. By cl. 51 of the scheme the governors had power to assign out of the income of the trust a sum for proper plant or apparatus for carrying on the instruction given in Aldenham School, for giving prizes or rewards for meritorious scholars, for aiding the games of scholars, and generally for pro- G moting the spirit and the efficiency of the school. The governors were also empowered to enlarge and improve the school buildings and playgrounds. By cl. 97 the governors might receive additional donations or endowments for the general purposes of the trusts and might receive donations or endowments for any special objects directed by the donors provided that the objects were certified by the Charity Commissioners to be for the general benefit of the trust, and in the case H of donations for educational purposes, were not calculated to give privileges to any scholar without regard to merit or otherwise inconsistent with or calculated to impede the working of the scheme. There were 208 boys at the school, all but four being boarders. The Brewers' Company contributed £2,500 each year for carrying on the school out of the general funds at their disposal.

During recent years considerable sums had been given to the school to improve I its general efficiency by providing extra facilities for outdoor games and different kinds of prizes. In particular large sums had been given for the erection of a swimming-bath and fives courts. The governors had from time to time expended considerable sums upon playgrounds and buildings for athletic purposes, and had for some time past given prizes for classics and athletic sports out of their income as part of the general purposes of the school.

The head master stated in an affidavit that it had always been the practice of the school to encourage the usual games, among which fives had proved very popular; that it had been found that this course promoted the general efficiency

of the school, and that the present number of fives courts was insufficient for the number of boys who wished to play the game, which could be played at a time of year when there were no other suitable games; and that, in his opinion, to provide extra fives courts was calculated to maintain the utility of the school and to promote its general educational efficiency. It was proposed to expend the legacy of £1,000 in the erection of four additional covered Eton fives courts, or at least six open courts on a site adjacent to the existing fives courts, and on land forming part of the property of the trust. The head master was of opinion that the existence of prizes for classics and for events in the school athletic sports was desirable, as they were calculated to encourage a healthy spirit of rivalry among the boys, and thereby to promote the general well-being of the school.

By orders in council, made pursuant to the Board of Education Act, 1899, the powers of the Charity Commissioners in respect of endowed schools were transferred to the Board of Education. By a certificate dated June 14, 1915, the Board of Education certified that the special object directed by the testator in his bequest of the £1,000 was for the general benefit of the school, and not calculated to give privileges to any scholar without regard to merit, and was not otherwise inconsistent with or calculated to impede the due working of the provisions of the scheme regulating the foundation. By a letter to the governors, dated May 17, 1915, the Board of Education stated that they did not consider that the two legacies of £100 each for prizes came within the provisions of the scheme.

The residuary legatees other than Frank Auguste Mariette, one of the executors and trustees of the will, objected to the payment of the three legacies on the ground that they constituted a perpetuity and were not valid charitable legacies.

The executors issued an originating summons, to which the governing body of Aldenham School, the chairman of the governing body, the head master, and Richard Lionel Mariette, one of the residuary legatees, were defendants, asking whether the three legacies were respectively valid, and, if so, to whom payment thereof respectively should be made, and that Richard Lionel Mariette should be appointed to represent the residuary legatees, all of whom, except Frank Auguste Mariette, were resident abroad.

F. E. Farrer for *T. Pakenham Law*, serving with His Majesty's forces, for the executors.

Maugham, K.C., and *J. F. W. Galbraith* for the governing body of the school, their chairman, and the head master. It makes no difference that a school is endowed. All schools fall within the statute of Elizabeth (43 Eliz. 1, c. 4) and are charities. Any gift to a school for its educational purposes is a charitable gift. There is no question that the legacy for prizes for classics is valid. Classics are obviously learning and fall within the statute of Elizabeth. As regards the other legacies, it is a fallacy to suggest that schools exist only to teach Latin and Greek. They exist for education in its widest sense, and every school must provide for recreation and games. The provision of fives courts must benefit a school. If the bequest aids in a particular way the carrying out of the objects of the charity it is a valid bequest. *Re Nottage*, *Jones* v. *Palmer* will no doubt be cited against us, but there were none of the elements of a charitable bequest. If the cup in that case had been given for competition among the seamen of the Royal Navy no doubt the decision would have been different. We submit that the legacy of £1,000 is a good charitable legacy as given for one of the proper objects of the school, and that the legacy of £100 for prizes for athletic sports stands on the same footing, though the hand to distribute is that of the head master and not of the governing body.

Clayton, K.C., and *W. A. Peck* for the residuary legatees other than the executor. We have no doubt an invidious task in disputing bequests for purposes with which everyone will sympathise, but we submit that the legacies of £1,000 and £100 for athletic prizes tend to a perpetuity and are not for charitable purposes.

A and therefore fail. We cannot dispute that the £100 legacy for prizes for classics is valid. We concede that the school is a charity and if the legacies were for the general purposes of the school they would be good charitable legacies. If you give to an institution for the blind the gift is obviously for the benefit of the blind and so a general gift to a school would be for the purposes of learning. But the gift to a charitable institution may be for purposes not essential to the purposes
B of the institution and then it ceases to be charitable. You must not look at the medium but at the destination of the gift. The word charity does not include purposes of philanthropy. It applies to a school by analogy from the words used in the statute of Elizabeth. Whether a gift is a good charitable gift or not depends upon whether its object is per se charitable. Here the testator has picked out a particular element which is not charitable. If he had given the
C legacy of £1,000 to the general purposes of the school the governing body could have applied it as they thought fit, and even to the object he has named, but still it would have been charitable. *Re Nottage*, *Jones* v. *Palmer* clearly shows that such a bequest is void, and that sport though of great utility is not charitable. So exercise though desirable is not charitable. *Re Good*, *Harington* v. *Watts* and *Re Donald*, *Moore* v. *Somerset* are, we submit, decided as falling within the
D words in the statute of Elizabeth "setting up of soldiers." Schools are not for the setting up of boys, but for instruction in learning, and except for that purpose do not fall within the statute. If the bequest did not tend to perpetuity there would be no question, but here if it is not charitable it is void for perpetuity. The legacy of £100 for athletic prizes is void on the same principle.

E **EVE, J.**—The admonition with which counsel for the residuary legatees commenced his argument is by no means to be disregarded. One must be careful not to allow one's natural inclination to give effect to a gift of this sort to lead one to disregard well-established principles. The gift in question is a gift by a gentleman who had served the school for twenty-four years as an assistant master and who had obviously come to entertain for it in a marked degree that affection
F which most men feel for the old school, and which would certainly tend to increase in the case of a man who had given the best part of his life to its services. The amount is to be laid out in the erection of additional fives courts at the school, and the question is whether it is a gift which in law can be supported or whether it is void as not being charitable and tending to a perpetuity.

It is a gift to an institution which is admittedly a charity within the statute
G of Elizabeth, but I accede to the argument of the residuary legatees that it is quite possible that a gift to a charity may be of such a character as not to be in itself a charitable gift. On the other hand, I think in considering whether a gift is charitable or not one must not confine oneself to the character of the gift itself, but must pay regard also to the character and objects of the charity, who are the intended recipients of the gift.

H The object of this charity is the education, in the widest sense, of boys and young men between the ages of ten and nineteen years. No one of sense could be found to suggest that between these ages any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind. This involves periods of relaxation and leisure, and no one with experience of youth will deny that, unless these periods are
I usefully occupied, the truth of the old saying that there is a certain individual always ready to find mischief for idle hands will soon be demonstrated. It is necessary, therefore, in any satisfactory system of education to provide for both mental and bodily occupation; mental occupation by means of the classics and those other less inviting studies to which a portion of the day is devoted, and bodily occupation by means of regular and organised games. To leave 200 boys at large and to their own devices during their leisure hours would be to court catastrophe; it would not be educating them, but would probably result in their relapsing quickly into something approaching barbarism. For these reasons I

think that it is essential that in a school of learning of this description, a school receiving and retaining as boarders boys of these ages, there should be organised games as part of the daily routine, and I do not see how the other part of the education can be carried on successfully without them. It is not disputed that if this sum—I am dealing now with the £1,000 legacy—had been left to the charity for the general purposes of the charity, it might have been applied to any of the purposes to which moneys coming to the hands of the governing body are in fact applied; it might have been expended in the repair of or additions to the class rooms, laboratory, and other buildings of that sort; or it might equally, as it seems to me, have been applied to the repair or enlargement of the swimming bath, the gymnasium, the fives courts, or other buildings employed in those branches of education which have exclusively to do with the bodily welfare of the students. I cannot in these circumstances bring myself to think, because the testator has indicated his intention that in the hands of the charity the money shall be used for the particular purposes stated in his will, that the gift is thereby vitiated. On the contrary, I think that the gift is a good charitable gift. It is a gift to a charity for purposes which seem to me to be included in the objects of the charity.

The same reasoning applies to the £100 legacy. It is given not to the charity, but to the head master; but it is given for a purpose which, though not quite so specific as the purpose for which the £1,000 is given, is, in my opinion, within the objects of the charity—that is to say, the advancement of that part of the educational work of the charity which has to do with the bodily and physical development of the students. I think that both legacies are valid charitable legacies, and I so hold. I have said nothing about the £100 legacy for a classical prize; that is clearly good, and the contrary has not really been argued.

Solicitors: *Evans, Wadham & Co.; Druces & Attlee.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

YORKE *v.* REGEM

[King's Bench Division (Lush, J.), February 9, 1915]

[Reported [1915] 1 K.B. 852; 84 L.J.K.B. 947; 112 L.T. 1135; 31 T.L.R. 220]

Pension—Public servant—Right of court to review and rectify calculation of pension—Superannuation Act, 1834 (4 & 5 *Will.* 4, *c.* 24), *s.* 30—*Superannuation Act*, 1859 (22 *Vict.*, *c.* 26), *s.* 2.

The decision of the Commissioners of the Treasury under the Superannuation Acts on any question relating to the pension of a public servant is final, and no court of law has any jurisdiction in such a matter.

Notes. Distinguished: *Wigg* v. *A.-G. for Irish Free State*, [1927] A.C. 674. Considered: *Re Transferred Civil Servants (Ireland) Compensation*, [1929] A.C. 242. Approved: *Nixon* v. *A.-G.*, [1930] All E.R.Rep. 487.

As to the rights of a public servant to superannuation, see 7 Halsbury's Laws (3rd Edn.) 431 et seq. For the Superannuation Act, 1834, s. 30, and the Superannuation Act, 1859, s. 2, see 17 Halsbury's Statutes (2nd Edn.) 817, 818.

Case referred to:

(1) *Cooper* v. *R.* (1880), 14 Ch.D. 311; 49 L.J.Ch. 490; 42 L.T. 617; 28 W.R. 611; 16 Digest 240, *360*.

Demurrer to petition of right.

In 1899, the suppliant retired from the army with the rank of lieutenant colonel, and became entitled to military pay at the rate £450 per annum. In 1900, he was appointed Chief Inspecting Officer of Railways. Under the Superannuation Act, 1887, he received as Chief Inspector the full amount of salary attached to that post—viz., £1,400 per annum, less his non-effective pay of £450. On his retirement in 1913 the suppliant received a pension calculated on £950, being the difference between the £1,400 and the £450, and petitioned that the pension should have been calculated on his full salary of £1,400 without deduction, and that the arrears due on that basis should be paid to him.

The Solicitor-General (*Sir Stanley Buckmaster, K.C.*) (*G. A. H. Branson* with him) for the Crown.—The petition is brought by a civil servant in respect of superannuation allowance, and such a matter cannot be entertained by the courts. The matter is governed by the Superannuation Acts, 1834 and 1859. The former statute establishes the scale of allowances in regard to pensions payable to civil servants, and by s. 30 provides that nothing in that Act shall give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under the Act. The Act of 1859, by s. 2, amends the provisions relating to pensions, and enacts, "provided always that if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause it shall be referred to the Commissioners of the Treasury, whose decision shall be final." The same statute provides by s. 18 that that Act is to be read with the Act of 1834. It has been clearly held that a civil servant has no right to take proceedings in respect of a superannuation allowance.

Grimwood Mears for the suppliant.

LUSH, J.—The Superannuation Acts, 1834 and 1859, must be looked at to see whether they give to a person placed in the position of the suppliant the right to come to the court in a case such as the present. It appears to me clear, on looking at s. 30 of the earlier Act, that the legislature, although apparently conferring on certain persons the right, in certain circumstances, to receive a superannuation allowance, safeguards the position by enacting that the words which might be thought to confer a legal right shall not in fact be treated as doing so. The method of calculation of pensions is altered by the Act of 1859, which, in s. 2, contains a proviso that all disputes in relation to pensions shall be referred to the Commissioners of the Treasury, whose decision is to be final. I have been asked by the suppliant to say that the proviso only means that, if the question of the right of a person or a class of persons to receive pensions should arise, that question should be referred to the Treasury and that the proviso must be limited in that way. I can see no ground for doing so. It appears to me that the proviso to s. 2 follows the same line of reasoning as s. 30 of the Act of 1834, and that it is intended by it again to make it clear to those who claim to be entitled to pensions that their right is not a legal right, and that, if any question arises, either as to their status or to the amount of their pension, or any question touching their claim, it shall be referred to the Treasury, whose decision is to be final. Almost precisely the same question has arisen in *Cooper* v. *R.* (1), in which the court had to consider these same Acts. It was there held that s. 30 did not relate only to the question whether the suppliant was entitled to compensation at all, but covered the whole question of the calculation of the amount as well. In my opinion, the suppliant is not entitled to come to the court, either in regard to his right to a pension or the method in which the amount is to be arrived at. The petition will be dismissed.

Solicitors: *F. W. Langton*; *Treasury Solicitor.*

[*Reported by* WILFRID PRICE, ESQ., *Barrister-at-Law.*]

SMITH AND OTHERS *v.* COLBOURNE

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.JJ.), July 22, 30, 1914]

[Reported [1914] 2 Ch. 533; 84 L.J.Ch. 112; 111 L.T. 927; 58 Sol. Jo. 783]

Sale of Land—Incumbrance—Light—Agreement by vendor to enjoy light under neighbour's licence—Obligation to brick up windows on termination of licence—Misdescription—Failure to disclose windows not ancient lights.

By an agreement contained in a lease dated Nov. 21, 1900, the defendant agreed to purchase, within one year of the death of the lessor, which took place on Oct. 7, 1912, premises of which he was in occupation as a lessee. Part of the premises was a warehouse in the east and west walls of which were windows which were not ancient lights, and in 1890 the lessor had entered into agreements with his neighbours on both sides by each of which he agreed that his enjoyment of the windows referred to in the agreement should be by licence granted by the neighbour in question, that the windows should not open outwards and should be glazed with opaque glass, and that within one month after the determination of the licence he would fill up the windows. It was admitted that the light through the windows was material to the premises. No notice of these agreements was given to the defendant, and when the lessor's personal representatives, as vendors, sought to enforce the contract of sale he objected to the title. In an action by the personal representatives for specific performance,

Held: the fact that none of the windows in question was an ancient light would not be an objection to title or description in the absence of an express representation or warranty on the subject, of which there was none; the agreements to enjoy the light through the windows by licence of the neighbours were not binding on a purchaser save so far as he chose to continue to enjoy light by virtue of the agreements, whereas he could denounce them at any time, and under the principle of *Tulk* v. *Moxhay* (1) (1848) 2 Ph. 774, he could not be called on to do anything involving the expenditure of money, e.g., to brick up the windows; accordingly, the existence of the agreements did not create an incumbrance, there was no need to put it on the abstract, and the plaintiffs were entitled to succeed.

Notes. Applied: *Johnson* v. *Clarke*, [1928] Ch. 847. Considered: *Wilson* v. *Thomas*, [1958] 1 All E.R. 871.

As to abstract and proof of title, see 34 HALSBURY'S LAWS (3rd Edn.) 210–223, 274 et seq.; and for cases see 40 DIGEST (Repl.) 45–53, 143 et seq.

Cases referred to:

(1) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774*.

(2) *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324; 70 L.J.Ch. 740; 84 L.T. 763; 49 W.R. 597; 17 T.L.R. 574; 45 Sol. Jo. 576; 40 Digest (Repl.) 48, *298*.

(3) *Bewley* v. *Atkinson* (1879), 13 Ch.D. 283; 49 L.J.Ch. 153; 41 L.T. 603; 28 W.R. 638, C.A.; 19 Digest 132, *896*.

(4) *Haywood* v. *Brunswick Building Society* (1881), 8 Q.B.D. 403; 51 L.J.Q.B. 73; 45 L.T. 699; 46 J.P. 356; 30 W.R. 299, C.A.; 40 Digest (Repl.) 331, *2714*.

(5) *Austerberry* v. *Oldham Corpn.* (1885), 29 Ch.D. 750; 55 L.J.Ch. 633; 53 L.T. 543; 49 J.P. 532; 33 W.R. 807; 1 T.L.R. 473, C.A.; 40 Digest (Repl.) 331, *2717*.

(6) *Thomas* v. *Sorrell* (1673), Vaugh. 330; 1 Lev. 217; 1 Freem. K.B. 85, 137; 3 Keb. 264; 124 E.R. 1098, Ex. Ch.; 19 Digest 196, *1496*.

(7) *Wallis* v. *Harrison* (1838), 4 M. & W. 538; 1 Horn & H. 405; 8 L.J.Ex. 44; 2 Jur. 1019; 150 E.R. 1543; 19 Digest 28, *130.*

(8) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 40 Digest (Repl.) 331, *2716.*

(9) *Alexander* v. *Mills* (1870), 6 Ch. App. 124; 40 L.J.Ch. 73; 24 L.T. 206; 19 W.R. 310, L.JJ.; 40 Digest (Repl.) 770, *2541.*

Also referred to in argument:

Wood v. *Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 19 Digest 26, *115.*

Oldershaw v. *King* (1857), 26 L.J.Ex. 384; subsequent proceedings, 2 H. & N. 517; 27 L.J.Ex. 120; 29 L.T.O.S. 364; 3 Jur.N.S. 1152; 5 W.R. 753; 157 E.R. 213, Ex. Ch.; 26 Digest (Repl.) 25, *144.*

Wolverhampton and Walsall Rail. Co. v. *London and North Western Rail. Co.* (1873), L.R. 16 Eq. 433; 43 L.J.Ch. 131, L.C.; 42 Digest 429, *22.*

Whitwood Chemical Co. v. *Hardman*, [1891] 2 Ch. 416; 60 L.J.Ch. 428; 64 L.T. 716; 39 W.R. 433; 7 T.L.R. 325, C.A.; 1 Digest (Repl.) 524, *1564.*

Lumley v. *Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, *726.*

South Eastern Rail. Co. v. *Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865; 74 J.P. 21; 26 T.L.R. 61; 54 Sol. Jo. 80, C.A.; 19 Digest 26, *112.*

Re Marsh and Earl Granville (1882), 24 Ch.D. 11; sub nom. *Marsh* v. *Earl Granville*, 52 L.J.Ch. 189; 47 L.T. 471; 31 W.R. 239; on appeal (1883), 24 Ch.D. 20; 48 L.T. 947; 31 W.R. 845, C.A.; 40 Digest (Repl.) 143, *1094.*

Smith v. *Baker* (1873), L.R. 8 C.P. 350; 42 L.J.C.P. 155; 28 L.T. 637; 37 J.P. 567; 1 Digest (Repl.) 470, *1169.*

Pemsel and Wilson v. *Tucker*, [1907] 2 Ch. 191; 76 L.J.Ch. 621; 97 L.T. 86; 71 J.P. 547; 40 Digest (Repl.) 276, *2300.*

Bristow v. *Wood* (1844), 1 Coll. 480; 14 L.J.Ch. 50; 4 L.T.O.S. 92; 9 Jur. 99; 63 E.R. 508; 42 Digest 590, *1585.*

Emery v. *Grocock* (1821), 6 Madd. 54; 56 E.R. 1010; 40 Digest (Repl.) 159, *1227.*

Appeal by the vendor from a decision of ASTBURY, J., in an action for specific performance of a contract for the sale of land.

Upjohn, K.C., and *J. G. Wood* for the vendor.

Younger, K.C., and *Sheldon* for the purchaser.

Cur. adv. vult.

July 30, 1914. The following judgments were read.

LORD COZENS-HARDY, M.R.—This is an action for specific performance of a contract to purchase some houses at Brighton. The purchaser has objected to the title, and ASTBURY, J., has allowed the objection and dismissed the action with costs. The contract to purchase is contained in a lease dated Nov. 21, 1900, under which in an event which has happened, the defendant agreed to purchase the demised property for £16,875. The property is described as messuages, shops, warehouse, showrooms, buildings and premises delineated on a plan. There is no express mention of windows. In my opinion, there is no warranty in such a contract that the de facto windows are ancient lights. *Greenhalgh* v. *Brindley* (2) is a direct authority on this point, and I desire fully to adopt FARWELL, J.'s judgment—a judgment based upon general principles and not upon the facts of that particular case.

Does a consent in writing which prevents the statutory period of prescription from beginning to run create an encumbrance on the property? I think not. FARWELL, J.'s judgment is again a distinct authority ([1901] 2 Ch. at p. 328):

"The vendor does not fail to possess the fee simple free from encumbrances of a house because he has not got the easement of light over the adjoining

property, nor because the time necessary for acquiring that easement has not commenced to run."

If the consent in writing does not create an encumbrance, there is no obligation to put it on the abstract.

The only objection taken before us is based upon an agreement dated in 1890 between adjoining owners named Crunden and Joseph Smith, a predecessor in title of the defendant. The agreement is positive in form, not negative. A purchaser from Smith would not be under any liability to perform the obligations entered into by Smith. He could not, under the principle of *Tulk* v. *Moxhay* (1) be called upon to do anything involving the expenditure of money. The agreement can be denounced at any time by Smith or persons claiming under him, and the statute which had no operation during the continuance of the agreement would immediately begin to run. But it is said that *Bewley* v. *Atkinson* (3) is inconsistent with this view. I think a careful examination of that case will show that the argument has no foundation. It was an action to restrain the owner of the servient tenement from blocking up windows which had been enjoyed since 1814. The defence was that the windows had been opened and allowed to remain open under the written licence, consent, or agreement of the defendant's predecessor in 1814. Sixpence a year was paid up to 1859, but no longer. The agreement had never been denounced. The decision was that notwithstanding the cessation of payment of 6d. a year in 1859, the agreement was, under s. 3 of the Prescription Act, 1832, sufficient to prevent the acquisition of an indefeasible title to the light. That is the only point which was decided. The case has been often cited—by FARWELL, J., among others—but never for the purpose of establishing that the agreement imposed obligations upon the purchaser. It was a weapon of defence, not of offence. Any expressions which, apart from the context, might be held to have a larger meaning, cannot properly be so regarded. It is beyond controversy that the purchaser could not be liable to pay the 6d. a year or spend money in blocking up the windows.

It was further urged that the agreement, though affirmative in form, implied a negative. This, however, is not correct, except in the sense that every agreement to do A. implies an agreement not to do B., and this court has repeatedly held that such an implied negative is not sufficient to bring a case within *Tulk* v. *Moxhay* (1). It was further urged that the words at the end of cl. 4 of the agreement gave a right of entry, and, therefore, an interest in the land. I think it is a mere licence, but if it is more, it seems to be void as a perpetuity. Lastly, it was urged that the title is too doubtful to be forced upon a purchaser. The courts have in modern times not listened with favour to such a defence. It is the duty of the court, unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser even though a third person not a party to the action will not be bound by the decision. For these reasons I think the appeal must be allowed. The usual decree for specific performance must be made, and the defendant must pay the costs here and below.

SWINFEN EADY, L.J.—The plaintiffs claim specific performance of an agreement by the defendant to purchase certain shops, warehouses, and premises at Brighton for £16,875. The agreement is contained in a lease dated Nov. 21, 1910, under which the purchaser is in possession. He agreed to purchase within one year from the death of Joseph Smith, which happened on Oct. 7, 1912. The premises are partly freehold and partly leasehold. The defendant raises an objection to title or, as he puts it, to subject-matter.

The premises agreed to be sold include a warehouse at the rear. In the east wall of this warehouse there are three ancient windows or lights on the ground floor, and there are five windows on the first floor of which two only are ancient and the remaining three are the subject of an agreement dated Mar. 31, 1890, entered into between Joseph Smith, the plaintiffs' testator, and Henry John

A Infield, the owner of the adjoining premises. In the west wall of the warehouse there are two windows, neither of which is ancient, and they are the subject of an agreement of the same date and to the same effect as the last-mentioned agreement, but made between Joseph Smith and Mrs. Crundon and others, owners of the adjoining premises on the west side. The defendant objects to complete the purchase alleging that the rights which exist in the adjoining owners by reason B of these agreements constitute a material misdescription of the premises of such a character as to relieve the defendant from his obligations under the contract for sale.

The fact that none of the five windows in question (three in the east wall and two in the west wall) is ancient would not alone be an objection to title or description, in the absence of any express representation or warranty on the subject. In C *Greenhalgh* v. *Brindley* (2), FARWELL, J., said ([1901] 2 Ch. at p. 328):

> "But a contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land."

In my opinion, this accurately states the law.

D It was then urged that the agreements would be binding upon the defendant if he were to complete his purchase as he now has notice of them, and that he would be prejudiced thereby. In my opinion, the agreements will only be binding upon the defendant in the sense and to the extent that, so long as he enjoys unobstructed the access of light through the five windows in question under and by virtue of the agreements, it will be enjoyed by consent or agreement expressly E made or given for that purpose by writing within s. 3 of the Prescription Act, 1832, and the period for acquiring a statutory right to light will not have begun to run. In no other sense will the agreements be binding upon the purchaser. The agreements contain provisions that, during the continuance thereof, the windows shall at all times be kept glazed with opaque glass; and that, after receipt of notice determining the licence, Joseph Smith, his heirs, or assigns will remove the F windows and fill up the openings with like material as the wall—that is, with brick. These agreements to do something on the land involving the expenditure of money will not be binding on the purchaser: *Haywood* v. *Brunswick Building Society* (4), *Austerberry* v. *Oldham Corpn.* (5).

It was also contended that another clause in the agreements would remain in force and bind the purchaser after conveyance, viz., the clause that the grantors of G the licence, and all persons deriving title under them, might at any time thereafter at the expense of Joseph Smith, his heirs, or assigns enter upon the premises, remove the windows, and fill up the openings, in default of Smith doing so. In my opinion, this clause is a mere licence, passing no interest and not binding upon the purchaser after conveyance: *Thomas* v. *Sorrell* (6), *Wallis* v. *Harrison* (7). If it amounted to an easement, which, in my judgment, it does not, it would be H void, under the rule against perpetuities: LEWIS ON PERPETUITIES, pp. 619, 620; *London and South Western Rail. Co.* v. *Gomm* (8).

The purchaser may, after conveyance, determine the agreement by giving notice to the adjoining owners that he will not be bound by its provisions, and after that date he may commence to enjoy the access of light as of right, and not by consent or agreement. *Bewley* v. *Atkinson* (3) is important on this point. The short facts I were that when Kirkbride, in 1814, put out four new windows he signed a document that they were put out and remained upon the leave of Spencer, his adjoining neighbour, and that he would, upon the request of Spencer at any time thereafter, block up the same, and in the meantime and until such request would pay 6*d.* a year. The rent was paid down to 1859. In 1865 the plaintiff's predecessor bought Kirkbride's house with notice of the document. In 1877 Spencer's successor required the windows to be blocked up, and in default of this being done built on his own land a wall obstructing the access of light to the windows. The plaintiff brought the action to obtain a mandatory injunction to have the wall

pulled down, but the action was dismissed by HALL, V.C., and by the Court of Appeal. The Vice-Chancellor held that the document was binding upon Kirkbride's alienee, but that it might be brought to an end by a refusal to pay rent, by a refusal to perform the obligation and otherwise. I understand the Vice-Chancellor to mean that the agreement was binding on Kirkbride's alienee in the sense that, so long as he enjoyed the access of light under the agreement, there was a consent or agreement which would prevent the statutory easement from being acquired. The Vice-Chancellor did not mean that the agreement was binding on the alienee in the sense that he could have been compelled to pay the rent of 6d. or to block up his own windows. On the contrary, he treats the refusal by the alienee to pay the rent or to perform the obligation as terminating the agreement and thereby enabling the adjoining owner, if he pleased, to obstruct the light, but not as giving the adjoining owner any cause of action against the alienee for the rent or for the breach of the agreement. The same opinion is expressed by the Court of Appeal. JAMES, L.J., pointed out that a simple agreement, such as he suggested, would be binding in equity on the owner of the house with the new windows, and upon all persons who took the ownership of that estate with notice. But he then proceeds to point out the sense in which alone such an agreement would be binding on a new owner of the estate. He could not claim an indefeasible right to light, while enjoying it only under the agreement, with the equitable obligation to block up when called upon. JAMES, L.J., did not (in my opinion) mean that the equitable obligation to block up was one which a court of equity would enforce against a new owner of the estate, but only that, in such circumstances, the new owner had no cause of complaint when his neighbour obstructed the light, and this upon the ground that the new owner had not, under the circumstances, acquired any easement of light. In *Greenhalgh* v. *Brindley* (2), FARWELL, J., also points out that a purchaser may put an end to an agreement about windows by repudiating it and refusing to enjoy any light by virtue of it. Upon his so doing, the twenty years under s. 3 of the Prescription Act, 1832, will begin to run.

It was then urged by the defendant that the position of a purchaser with regard to these windows would be one of some doubt, and that the title ought not to be forced upon him. But the rule of the court is that enunciated by JAMES, L.J., when delivering the judgment of the Court of Appeal in *Alexander* v. *Mills* (9) (6 Ch. App. at pp. 131, 132):

> "As a general and almost universal rule, the court is bound as much between vendor and purchaser as in every other case, to ascertain and determine, as it best may what the law is, and to take that to be the law which it has so ascertained and determined."

In my opinion, the position of the purchaser, after completion, with regard to these five new windows will not be one of any doubt. These are not ancient lights, and the twenty years will not begin to run so long as the purchaser enjoys the light under the agreement. But he may repudiate the agreement or his neighbour may determine it, in which case the right to obstruct light will arise. The purchaser, however, cannot be compelled to block up the windows or to glaze with opaque glass or to do any other act occasioning any expenditure of money. Nor can the purchaser be prevented from keeping open these windows or opening any new ones, subject only to the right of his neighbour to obstruct the light to any windows not ancient. In my opinion, the appeal should be allowed, and judgment given for specific performance.

PICKFORD, L.J. This was an action for specific performance in which the purchaser objected to accept the vendors' title because of agreements which were made with regard to some windows in the premises agreed to be sold.

The plaintiffs' predecessor in title had entered into two agreements in identical terms with the owners of adjoining premises on the east and west by which he

A agreed that the enjoyment of the user of the windows should be by licence, that the windows should not open outwards and should be glazed with opaque glass, and that the plaintiffs' predecessor in title, his heirs or assigns would within one month after the determination of the licence remove the windows and fill up the openings with like materials as the wall in which they were, and that in default the adjoining owners and all persons deriving title under them might at their B expense enter upon the premises and remove the windows and fill up the openings. The agreement was determined by notice given by the adjoining owners. No notice of these agreements was given to the defendant who was the purchaser, and he objected to the plaintiffs' title because of them. It was admitted that the light through the windows was material to the premises.

I do not think that the defendant's objection is good. I think that the general C proposition as to the representation made by a vendor who sells a house with windows was correctly laid down by FARWELL, J., in *Greenhalgh* v. *Brindley* (2) ([1901] 2 Ch. at p. 328), and he held that an agreement by which the vendor in that case held the right of light by the licence of the corporation of Stockport, did not afford ground for a valid objection to the title. In this case the only difference is that there is in addition to the agreement for a licence an agreement by which D the vendors' predecessor in title agreed to do certain work in any case—i.e., glaze the windows and keep them glazed with opaque glass and certain other work if called upon, to remove the windows and make good the wall, and also that in default of his doing the latter work the adjoining owners might enter and do it at his expense. These are agreements which, in my opinion, would not bind the purchaser within the principle of *Tulk* v. *Moxhay* (1), as they were positive agree- E ments involving the spending of money. There was a negative agreement that the windows should not open outwards, but without any such agreement there would be no right to open windows so as to project over another person's ground. The defendant relied upon *Beasley* v. *Atkinson* (3) as supporting his contention that the purchaser would be bound by the agreement to glaze with opaque glass and to remove the windows. The decision does not establish any such proposition, but F there are expressions in the judgments which, read by themselves, seem to support it. I am not clear that the learned judges had the point present to their minds and did intend to support any such proposition. If they did, the remarks were obiter only, and we are not bound by them. I think that the appeal should be allowed and judgment given for specific performance.

Appeal allowed.

G Solicitors: *Light & Fulton*, for *W. E. Kersey*, Ipswich; *Routh, Stacey & Castle*, for *E. M. Marx & Colbourne*, Brighton.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A.-G. *v.* FOUNDLING HOSPITAL GOVERNORS AND GUARDIANS

[CHANCERY DIVISION (Joyce, J.), January 20, 21, 22, March 5, 1914]

[Reported [1914] 2 Ch. 154; 83 L.J.Ch. 673; 110 L.T. 894; 78 J.P. 233; 12 L.G.R. 500]

Charity—Sale of property—Mixed charity—Income derived from investments in land and voluntary contributions—Need of consent of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 *Vict.*, *c.* 137), *ss.* 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict.*, *c.* 124), *ss.* 29, 48.

An educational charity, which was incorporated in 1739, with power to buy and sell land, derived its income partly from the investment in land of moneys given to the institution for the general purposes of the charity, which could have been spent as income, and partly from voluntary contributions of a small amount.

Held: at the time of the passing of the Charitable Trusts Act, 1853, the charity was, and it had ever since been, supported in part, although to a comparatively small extent, by voluntary subscriptions; consequently, it was a charity "maintained partly by voluntary subscriptions and partly by income" within s. 62 of the Act, and under that section any donations or voluntary subscriptions which had been invested by the governing body of the charity to be held and applied for the purposes of the charity were not subject to the jurisdiction of the Charity Commissioners [now Minister of Education] or to the provisions of the Act; therefore, by s. 48 of the Charitable Trusts Amendment Act, 1855, the charity was exempt from the provisions of s. 29 of the Act of 1855 prohibiting the sale of charity estates except with the permission of the Charity Commissioners, and the governors of the charity were free to sell the whole or any part of the land held by them.

Notes. As to the jurisdiction of the Charity Commissioners and the Ministry of Education, see 4 HALSBURY'S LAWS (3rd Edn.) 423–439; and for cases see 8 DIGEST (Repl.) 511 et seq. For the Charitable Trusts Acts, 1853 and 1855, see 2 HALSBURY'S STATUTES (2nd Edn.) 838, 868.

Cases referred to:

(1) *Charity for the Relief of the Poor Widows and Children of Clergymen (Commonly called Corpn. of the Sons of the Clergy) (Governors) and Skinner*, [1893] 1 Ch. 178; 62 L.J.Ch. 148; 67 L.T. 751; 41 W.R. 461; 9 T.L.R. 105; 3 R. 161; 8 Digest (Repl.) 478, *1804*.

(2) *Re Orphan Working School and Alexandra Orphanage's Contract*, [1912] 2 Ch. 167; 81 L.J.Ch. 627; 107 L.T. 254; 8 Digest (Repl.) 477, *1802*.

(3) *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. 596; 65 L.J.Ch. 439; 74 L.T. 161; 44 W.R. 339; 12 T.L.R. 236; 40 Sol. Jo. 352, C.A.; 8 Digest (Repl.) 475, *1790*.

(4) *A.-G.* v. *National Hospital for Relief and Cure of the Paralysed and Epileptic*, [1904] 2 Ch. 252; 73 L.J.Ch. 677; 91 L.T. 63; 20 T.L.R. 592; 8 Digest (Repl.) 475, *1791*.

(5) *Re Church Army* (1906), 75 L.J.Ch. 467; 94 L.T. 559; 22 T.L.R. 428, C.A.; 8 Digest (Repl.) 477, *1799*.

Also referred to in argument:

Re Clergy Orphan Corpn., [1894] 3 Ch. 145; 64 L.J.Ch. 66; 71 L.T. 450; 43 W.R. 150; 10 T.L.R. 672; 38 Sol. Jo. 695; 7 R. 549, C.A.; 8 Digest (Repl.) 476, *1796*.

A.-G. v. *Mathieson, Re Wilkinson and Fell's Contract*, [1907] 2 Ch. 383; 76 L.J.Ch. 682; 97 L.T. 450; 23 T.L.R. 754, C.A.; 8 Digest (Repl.) 476, *1792*.

A *Royal Society of London and Thompson* (1881), 17 Ch.D. 407; 50 L.J.Ch. 344; 44 L.T. 274; 29 W.R. 838; 8 Digest (Repl.) 511, *2374*.

Charity for the Relief of Poor Widows, etc., of Clergymen (*Governors*) v. *Sutton* (1860), 27 Beav. 651; 54 E.R. 258; sub nom. *Sons of the Clergy Corpn.* v. *Sutton*, 29 L.J.Ch. 393; 1 L.T. 386; sub nom. *Sons of the Clergy Corpn.* v. *Stock Exchange* (*Trustees*), 24 J.P. 180; 6 Jur.N.S. 84; 8 W.R. 167; 8
B Digest (Repl.) 511, *2382*.

Re Society for Training Teachers of the Deaf and Whittle's Contract, [1907] 2 Ch. 486; 76 L.J.Ch. 656; 97 L.T. 538; 71 J.P. 454; 23 T.L.R. 693; 51 Sol. Jo. 673; 8 Digest (Repl.) 477, *1800*.

Action for a declaration.

C The Foundling Hospital was constituted a corporate body by Royal Charter in 1739 under the name of "The Governors and Guardians of the Hospital for the Maintenance and Education of Exposed and Deserted Young Children." By the charter power was given to the hospital to purchase manors, messuages, lands, rents, tenements, annuities and hereditaments, and to sell, grant, demise, exchange and dispose of such lands. In 1739 an Act was passed confirming the charter and
D empowering the charity to purchase lands for the purpose of erecting the hospital. In or about 1741 the Foundling Hospital purchased for the sum of £6,500 certain lands containing fifty-six acres or thereabouts in Bloomsbury. The hospital was erected on part of these lands, and a large portion of the lands was granted or demised on building leases. Subsequently other lands were purchased by the hospital, and certain parts of these other lands were sold. In 1855 the Foundling
E Hospital Act (48 & 49 Vict., c. vi) was passed. This was a private Act passed for the purpose of regulating the dealings of the hospital in respect of land in accordance with the provisions of the charter, and excepting the hospital from the operation of certain statutes passed in the reign of Queen Elizabeth. In the Act it was recited that there were, at the time of the passing of the Act, vested in the hospital certain lands in the city of London, and also the property in BloomsF bury, and that the purchase money of the Bloomsbury property represented moneys received by the hospital in donations and subscriptions. At the date of the commencement of this action the income of the hospital was upwards of £27,000, of which £26,000 or thereabouts was derived from the lands and investments, a small sum from donations, legacies and other benefactions, and £11 or thereabouts from annual subscriptions. This action was commenced against the hospital for
G a declaration that the lands vested in the hospital for the purposes of their charity, and particularly the property in Bloomsbury and in the city of London, could not be sold, granted, demised, exchanged or disposed of under the charter or under the Acts of 1739 and 1885, except in accordance with the provisions of s. 29 of the Charitable Trusts Amendment Act, 1855, which were as follows:

H "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed, or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration
I wholly or in part of any fine, or for any term of years exceeding twenty-one years."

The hospital being an educational charity, the "Board" referred to in the above section to which an application by the charity for consent would, if necessary, be made, was the Board of Education [now Minister of Education].

The Solicitor-General (*Sir Stanley Buckmaster, K.C.*), *Tomlin, K.C.*, and *Austen-Cartmell* for the Attorney-General.

Hughes, K.C., *Younger, K.C.*, and *Method* for the defendants.

Cur. adv. vult. A

Mar. 5, 1914. **JOYCE, J.**—This is an action upon an information by the Attorney-General ex officio against the governors and guardians of what we know as the Foundling Hospital, asking for a declaration that the lands vested in the defendant corporation, the hospital, for the purposes of their charity, and particularly what I may call the Bloomsbury estate and the city property, cannot be sold, granted, demised, exchanged or disposed of under the charter of 1739, or under the Act of 1739 which confirmed the charter, or under the Foundling Hospital Act, 1885, except in accordance with the provisions of s. 29 of the Charitable Trusts Amendment Act, 1855. B

This charity was constituted by Royal Charter in the year 1739, which charter gave various powers (I need not go through them in detail) as to the purchasing and holding of lands and so on, and power C

> "to sell, grant, demise, exchange, and dispose of any of the same manors, messuages, lands, and tenements whereof and wherein they shall have any estate of inheritance, or for life, lives, or years as aforesaid";

the point of that being that there is a distinct power to sell in the charter constituting the charity. In the ordinary sense of the term, this is not an endowed charity. D It has, I will not say capital, that is an ambiguous term, but real estate which has now become very valuable, the whole of which, with one exception (which will be mentioned presently) was purchased out of contributions in money made to the charity—contributions which, upon the evidence, in my opinion, might have been expended as income or in whatever manner the governors pleased for the purposes of the charity, although, no doubt, and this must be admitted, in obtaining contributions generally, there was an idea that the governors (I am not sure that they were called governors then) of the charity would not immediately spend everything they got, but if possible would make investments as and when it might be found possible and expedient to do so in property producing income for the maintenance of the charity. E The principal investment made by the governors was the purchase of their Bloomsbury estate bought in some year before 1750 of the Earl of Salisbury for £6,500, and now producing a considerable net income, as well as comprising the land utilised in part as the site of the hospital buildings including the chapel. There is also some property in the city of London which I may call the city property, purchased in 1744 for between £700 and £800, and at once presented by the purchasers to the charity without special or, indeed, any express trust being imposed. F This constitutes the exception I mentioned just now. G I may observe that this gift of land to the charity is very similar to what happened in *Corpn. of the Sons of the Clergy and Skinner* (1), where it was held by NORTH, J., that the consent of the Charity Commissioners to a sale was not necessary in the case of some land which had in effect been presented to the charity as land. I should also mention that the governors erected a chapel many years ago at a cost of some thousands of pounds, and there is some evidence that sums of money, amounting altogether to less than £900—something like £875 or thereabouts—were contributed nominally towards the expense of the erection of this building. H *Re Church Army* (5), before the Court of Appeal, was referred to in the argument as furnishing, as it does, an instance of a very similar proceeding: see also *Re Orphan Working School and Alexandra Orphanage's Contract* (2).

In 1853 an Act called the Charitable Trusts Act, 1853, was passed with the object of providing for the better administration of charitable trusts. I Section 66 of that Act, the interpretation clause, enacts, amongst other things, that

> "the expression 'endowment' [of course, only for the purpose of the Act] shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, money, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof."

In s. 62, which is rather a long section, of the same Act, we find this:

> ". . . where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment [here 'endowment' means endowment as interpreted by s. 66] the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now, or shall, or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held, and applied or expended for or to some defined and specific object or purpose connected with such charity, . . . shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act."

Giving the widest possible meaning to the term "endowment" as interpreted by s. 66, it appears to me that upon the evidence in the present case, and I found my judgment upon it, the fact is that at the time of the passing of the Act of 1853 this charity was and has ever since been supported in part (it may be to a comparatively small extent) by voluntary subscriptions. Consequently, if I am right as to this, the charity is at least one of those maintained partly by voluntary subscriptions and partly by income arising from "endowment" in the sense in which that term is used in the Act, so that the last provision in s. 62 is applicable, viz., "no donation or bequest" not particularly appropriated or invested, and so on, "shall be subject to the jurisdiction or control of the Board."

In the Act of 1853 there is no prohibition or restriction upon charities selling or leasing. Soon afterwards, however, came the Act of 1855, containing s. 29. [HIS LORDSHIP read the section.] That is the section upon which this information is founded. By s. 48 of the Act, this is provided:

> "In the construction of the principal Act [i.e., the Act of 1853] and this Act, the word 'charity' shall include every institution in England or Wales endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853."

Therefore, if this charity is exempted from the operation of the Act of 1853, it is exempted from the operation of the Act of 1855, including s. 29.

Referring to the provision or saving clause in s. 62 of the Act of 1853, it appears to me, although the governors had invested in land a considerable part of their funds derived from voluntary and unfettered contributions (and it makes not the slightest difference for this purpose whether the investment was in land or securities), that all they possessed, endowment or not, was and is exempt from the jurisdiction or control of the Board and from the provisions of the Act of 1855, as well as those of the Act of 1853, and having regard to what is said in *Corpn. of the Sons of the Clergy and Skinner* (1) there is no material difference, in point of law, between the position of the Bloomsbury property and the city property of the charity.

There are certain statutes of Elizabeth imposing restrictions with reference to leases, and so on, of charity lands, and among others there is a recital of the charity purposes, and in or prior to 1885 someone—presumably a very careful conveyancer—I suppose, suggested in regard to the charter, and so on, that this charity was subject to the provisions of this statute of Elizabeth. Probably it had been forgotten up to that time in connection with this charity. Thereupon the charity applied for and obtained their Act of 1885, which recites these statutes

of Elizabeth and various other matters of importance, among others that the Bloomsbury estate was purchased "with moneys received by the corporation in donations and subscriptions," and so on, a statement in the recital of the private Act of Parliament which, if it were not otherwise provided, is ample evidence for all purposes, and then it recites that a portion of the said land was appropriated for gardens, and so on. Then it recites leases and sales, and that the governors, relying on the express terms of the charter, by force of those express terms were enabled to dispose of their lands in manner authorised by the charter without reference to the Acts of Elizabeth. The recital then refers to doubts having been entertained, and so on. It is further provided that

> "Notwithstanding anything contained in the three hereinbefore recited Acts [of Elizabeth] or any other law or statute to the contrary, the several conveyances and leases, the short particulars whereof are contained in the schedule [those are leases which had been made without reference to the Act of Elizabeth] shall be as valid in law and of the same force and effect in all respects as if the said three recited Acts of Elizabeth had never been passed."

The fourth clause, which it is suggested, I understand by the Crown, assists us very much, provides:

> "Provided always that this Act or anything herein contained shall not operate to make valid any sale, grant, demise, exchange, or disposition, or any other act or thing purported to be made or done by virtue of the said charter further or otherwise than the same would have been valid under the said charter in case the said three recited Acts of Queen Elizabeth had never been passed."

My opinion of that section is that it simply means or was intended to mean what is stated in the marginal note—I do not say because it is the marginal note—that this Act was not to make valid any Act not authorised by the charter. It seems to me in fact, and I have no doubt, that that Act was supposed to set everything right, and was enacted upon the basis that the charity could, under the terms of their charter and by force thereof, make the sales and grant the leases referred to.

So far as I understand, no one suggested or thought—indeed, it was not supposed until long afterwards—that s. 29 of the Act of 1855 had any operation with respect to a charity constituted by Royal Charter containing a full power of sale. In *Re Mason's Orphanage* v. *London and North Western Rail. Co.* (3), where there was a question whether a deed founding a charity was a scheme legally established within s. 29 of the Charitable Trusts Amendment Act, 1855—the point being whether a certain scheme gave a sufficient authority for a sale, it being held that the instrument founding the charity was not a scheme within the meaning of the terms of the section—in giving judgment, KAY, L.J., expressly excepts, in the opinion he gave, charities constituted by the Crown or by Royal Charter. I have not the slightest doubt that he thought the Act had nothing whatever to do with such charities. However, if he did think so, he turned out to be wrong, because in a later case it was ultimately held, I think in *A.-G.* v. *National Hospital for Relief and Cure of the Paralysed and Epileptic* (4), that s. 29 of the Charitable Trusts Amendment Act, 1855, did apply to charities governed by Royal Charter, if that were all. After more than fifty years have elapsed since the Act of 1855, the Crown for the first time, as I understand, sets up the present claim, and, notwithstanding the Act of 1885, to which I have adverted, and as to the meaning and intention of which I cannot help thinking that the advisers of the Crown hold an opinion very different from that which I entertain, we have this action. But apart altogether from the Act of 1885, it appears to me that the real estate held by this charity, the Bloomsbury estate, is derived from the investment of donations of which no special application or appropriation was directed or declared by the donors, and which might legally have been applied as income. With regard to the city estate, that was presented to the charity. The case I referred to does not

bring it within this section. Consequently, seeing that this charity has been and is maintained partly by voluntary subscriptions, in my opinion it is exempt from s. 29 of the Act of 1855 under the express provisions of s. 62 of the Act of 1853, coupled with s. 48 of the Act of 1855; in other words, I am of opinion that this action fails.

Solicitors: *Treasury Solicitor*; *T. H. Gardiner.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

JAY'S FURNISHING CO., LTD. *v.* BRAND & CO. AND ANOTHER

COURT OF APPEAL (Buckley, Phillimore and Pickford, L.JJ.), December 5, 10, 1914]

[Reported [1915] 1 K.B. 458; 84 L.J.K.B. 867; 112 L.T. 719; 31 T.L.R. 124; 59 Sol. Jo. 160]

Hire-Purchase—Distress—Exemption—Agreement determinable on hirer failing to perform agreement—Right of owner to enter hirer's premises and re-take goods—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4 (1).

The plaintiffs let certain furniture to one B. under a hire-purchase agreement by cl. 1 of which it was provided: "The hirer agrees with the owners as follows: (a) To pay punctually rent weekly . . . and all expenses incurred in the collection of any arrears thereof. . . . (f) If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith, at his own expense, return the said goods to the owners, and the owners shall be entitled to re-take possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be." B. having fallen into arrear with the payments under the agreement, the plaintiffs sent a notice to him that the hiring agreement entered into by them with him had been terminated and that they demanded the return of the goods. They sent a van for the goods, but there was no one on the premises. Subsequently B.'s landlord distrained upon the furniture for rent. The plaintiffs served upon him and his agents a notice under the Law of Distress Amendment Act, 1908, s. 2, declaring that B. had no beneficial interest in the goods, which were the plaintiffs'. The defendants refused to give up the goods. In an action for illegal distress brought by the plaintiffs against the defendants:

Held: by reason of the provision in the agreement conferring on the owners the right of entering and re-taking the goods, the agreement was not determined, but was determinable, by the breach of the hirer to carry out its terms: and, consequently, at the date of the distress, the goods were comprised in a hire-purchase agreement, and, by virtue of s. 4 (1) of the Act of 1908, were not within the provisions of that statute exempting from distress goods of persons other than the tenant.

Notes. Distinguished: *Smart Bros., Ltd.* v. *Holt*, [1929] All E.R.Rep. 322. Considered: *Drages, Ltd.* v. *Owen*, [1935] All E.R.Rep. 342. Referred to: *Times Furnishing Co.* v. *Hutchings*, [1938] 1 All E.R. 422.

As to distraining on goods comprised in hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 559–562; and for cases see 18 DIGEST (Repl.) 294–296. For Law of Distress Amendment Act, 1908, see 6 HALSBURY'S STATUTES (2nd Edn.) 170.

Case referred to:

(1) *Hackney Furnishing Co.* v. *Watts*, [1912] 3 K.B. 225; 81 L.J.K.B. 993; 106 L.T. 676; 28 T.L.R. 417, D.C.; 28 Digest (Repl.) 295, *424*.

Also referred to in argument:

Doe d. Bryan v. *Bancks* (1821), 4 B. & Ald. 401; 106 E.R. 984; 31 Digest (Repl.) 524, *6471*.

Roberts v. *Davey* (1833), 4 B. & Ad. 664; 1 Nev. & M.K.B. 443; 2 L.J.K.B. 141; 110 E.R. 606; 31 Digest (Repl.) 524, *6475*.

Davenport v. *R.* (1877), 3 App. Cas. 115; 47 L.J.P.C. 8; 37 L.T. 727, P.C.; 31 Digest (Repl.) 525, *6480*.

Cookson v. *Swire* (1884), 9 App. Cas. 653; 54 L.J.Q.B. 249; 52 L.T. 30; 33 W.R. 181, H.L.; 7 Digest (Repl.) 162, *869*.

Appeal by the plaintiffs from a decision of the Divisional Court (RIDLEY and BANKES, JJ.).

By the terms of a hire-purchase agreement dated Mar. 8, 1913, the plaintiffs, Jay's Furnishing Co., Ltd., let certain furniture to one P. D. Bray for a consideration of a weekly payment of 11s. 6d. The agreement in question provided:

"The hirer agrees with the owners as follows: (a) To pay punctually the said rent weekly . . . and all expenses incurred in the collection of any arrears thereof. . . . (f) If the hirer does not duly perform and observe this agreement the same shall ipso facto be determined and the hirer shall forthwith at his own expense return the said goods to the owners, and the owners shall be entitled to re-take possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be."

The hirer fell into arrear with the instalments due under the agreement, and on May 14, 1913, the plaintiffs wrote to him as follows:

"We beg to give you notice that the hiring agreement which we entered into with you has now been terminated, and that we demand the return of our goods. Please see same are handed over to our representative."

The plaintiffs upon two occasions sent a van to Bray's premises to re-take the furniture, but, as there was no one there, they were unable to do so. On May 5 the defendants, who were Bray's landlords, seized the furniture under a distress for rent. On the following day the plaintiffs served upon the defendants a declaration in writing under s. 1 of the Law of Distress Amendment Act, 1908, that Bray had no right of property or beneficial interest in the furniture distrained, and that it was the property of the plaintiffs and, therefore, exempt from seizure under the Act. It was contended on behalf of the defendants in an action brought against them by the plaintiffs in the county court for damages for illegal distress that the Act did not protect the furniture from being seized for rent, since s. 4 (1) of the Act provided that it should not apply "to goods comprised in any . . . hire-purchase agreement," and they contended that at the date of the distress the furniture was still comprised in the hire-purchase agreement of Mar. 8. They, therefore, proceeded with their distress. The Divisional Court held that by reason of the provision in the agreement conferring on the owners the right of entering and re-taking the goods, the agreement was not determined by the breach of the hirer to carry out its terms, and that consequently at the date of the distress the goods were comprised in a hire-purchase agreement, and by virtue of s. 4 (1) of the Act of 1908 were not within the provisions of that statute exempting from distress goods of persons other than the tenant. The plaintiffs appealed.

P. O. Lawrence, K.C., and *Schwabe*, K.C. (*Hinde* with them), for the plaintiffs.

Grimwood Mears, for the defendants, was not called on to argue.

BUCKLEY, L.J.—The question in this case arises under the Law of Distress Amendment Act, 1908. That is an Act which, when you commence to read it,

seems to apply to a case in which there is a superior landlord, a tenant of the superior landlord who becomes an intermediate landlord and is in fact the landlord of an ultimate tenant in possession. It would appear from the first section, which uses the words: "If any superior landlord shall levy," that the Act was addressed to the case where there is a superior landlord, a tenant, and an under-tenant, but it is quite plain when you read on that the Act is not confined to that; for instance, in s. 4 a provision is to be found that the Act shall not apply "to goods belonging to the husband or wife of the tenant whose rent is in arrear." The tenant whose rent is in arrear there is tenant of what is called the superior landlord in s. 1, and, therefore, the Act applies to the case in which the tenant is the husband or wife, as the case may be, and the goods in question are those of the wife or husband, as the case may be. In that case there is no under-tenant, and the matter is made more plain by s. 9, because that section goes on to define that "superior landlord shall be deemed to include a landlord in cases where the goods seized are not those of an under-tenant or lodger."

The facts here are that there was a landlord of a flat named Palliser, one of the defendants in the action, whose agents were Messrs. Brand & Co., the other defendants in the action, and he had a tenant of the flat named Bray, who hired certain furniture from the plaintiffs in the action, Jay's Furnishing Co. In that state of things the persons referred to in s. 1 of the Act mean by the words "superior landlord" Palliser, and by the words in sub-s. (c) "any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or any part thereof," the plaintiffs in the action, Jay's Furnishing Co. Under a certain hiring agreement dated Mar. 8, 1913, the plaintiffs, Jay's Furnishing Co., had let out on hire to the tenant certain furniture, and the agreement provided for payment of rent, the first payment of which was to be made on Mar. 27, 1913. He paid certain instalments, but he made default in the payment of others, and on May 14 Jay's Furnishing Co. wrote a letter addressed to him which they put through the letter-box of the flat in question, but which in fact never reached Bray's hands. In that note they gave him notice that "the hiring agreement which was entered into with you has now been terminated, and that we demand the return of our goods." On the same day, May 14, the company sent to fetch the goods, but the flat was closed so that they could not get in, and they went away, having left that letter in the box because they could do nothing more. On May 15 the landlord put in a distress, and on the same day Jay's Furnishing Co. came again and found that the landlord had done so. On May 16, they made the declaration which is referred to in s. 1 of the Act of 1908, and on May 21 paid the rent, which was a small sum of £9 or £10, to the lessor under protest. They have brought the present action to recover the money. The question is whether they are entitled to recover or not.

For that purpose the relevant provisions of the Act are these. As against the landlord, his common law right to distrain is by this Act diminished as regards certain goods having a certain character, but s. 4 provides that the Act shall not apply to goods comprised in any hire-purchase agreement. The question, therefore, is whether, in the events which I have stated, these goods, at the relevant date, were comprised in a hire-purchase agreement, and if they be, then the Act does not apply to them—that is to say, the landlord is not prevented from distraining upon the goods—the right of distress is good and the plaintiffs fail.

A point I will mention first was raised before us, upon which I will express no opinion, because it was not, I think, open to the plaintiffs. That point was that in s. 4 (1) the sequence of words is this, "nor to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant." It is pointed out, and quite accurately, that as regards a bill of sale made by the tenant, that must mean that the tenant is grantor of the bill of sale and as regards a settlement made by such tenant, it must mean that the tenant is the grantor, the settlor in that case. It is said that in the third case, which is sandwiched between those two,

"hire-purchase agreement made by such tenant" must mean hire-purchase agreement in which the tenant is grantor and not grantee. That point was not taken in the county court; it was not taken in the Divisional Court. It is for the first time sought to be taken before us, and, in my opinion, it is not open because it is a point of law that was not taken in the county court. With that I dismiss it, because it is not competent for us to express any opinion upon it. I, therefore, assume, for the purposes of this judgment, that the hire-purchase agreement mentioned in the Act of Parliament may be a hire-purchase agreement under which the tenant is grantee.

That being so, I have to see what the agreement in question is. It is one under which the hirer agrees with the owners "to pay punctually the said rent weekly, commencing on 27th day of March, 1913, and all expenses incurred in the collection of any arrears there." By cl. (f):

> "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith at his own expense return the said goods to the owners, and the owners shall be entitled to re-take possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be. Notwithstanding such return or re-taking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination of this agreement."

As a matter of dates, these events took place. The first instalment, which was due on Mar. 27, was not paid, and, therefore, default was made on that date. The first instalment was not paid until Mar. 31; the second instalment fell due on April 3, and was not paid until the 5th; the next instalment fell due on the 10th, and was not paid until the 15th. The result of that, therefore, is that there was default to pay punctually the weekly rent on Mar. 27. It has been contended that the words of the agreement, "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined," mean exactly what they say, neither less nor more. If that be true, this consequence results, that when on Mar. 27 the tenant failed to observe that agreement by failing to pay punctually the rent due on that date, the agreement was ipso facto determined. Was that right? In my opinion, that was not right. It seems to me that there are many grounds upon which that could be shown to be wrong. The first is that cl. (a) provides:

> "To pay punctually the said rent weekly, commencing on the 27th day of March, 1913, and all expenses incurred in the collection of any arrears thereof."

On Mar. 28, 29, and 30, therefore, the agreement was still in force, because there remained available to Jay's Furnishing Co., Ltd., on those three days a contractual obligation to pay the arrears which had fallen due on the 27th. You cannot give effect to that stipulation at all if you say that the agreement was ipso facto determined on the 27th. You could not collect arrears after that date if that was so. Further, looking at cl. (f), after the words "shall ipso facto be determined," there remains after this event has happened an obligation on the part of the hirer, arising under the agreement, to return the goods, and a right in Jay's Furnishing Co., Ltd., to re-take possession of the goods, "and for that purpose to enter upon any premises where the goods may be." Unless the last words are still operative, the entry would be a trespass, whereas the force of these words is that it would not be a trespass. That goes to show, of course, that the agreement is not determined by the mere fact that the hirer did not pay on the 27th. Clause (f) concludes with the words:

> "Notwithstanding such return or re-taking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination of this agreement."

If the determination be not, as I have shown that it is not, an ipso facto determination on Mar. 27, it must, of course, be some other and necessarily some later date. The clause, I think, is to be read as providing that the agreement is not ipso facto determined, but is determinable at the election of Jay's Furnishing Co., Ltd. They may exercise their various powers to enter upon the premises, to retake possession of the goods, and enforce the obligation on the hirer to return the goods, and so on, under the agreement, and they can claim, I think, the arrears of hire up to the date of the determination de facto of the agreement. They have a contractual right to do that.

If that be the true construction of the agreement, the only question which remains is this. On May 15, when the landlords distrained, were those goods still comprised in a hire-purchase agreement? I apprehend that chattels remain comprised in a hire-purchase agreement when there is still subsisting some contractual obligation in the agreement dealing with those chattels. There remained under the agreement as regards those chattels, at the date that the distress was made, the right in Jay's Furnishing Co., Ltd., to enter upon the premises and retake possession of those chattels. Even if so much of the hire-purchase agreement as consisted of the demise had been brought to an end by the exercise by Jay's Furnishing Co., Ltd., of a right to determine it, the agreement was still subsisting and bound the chattels in the sense that it gave the company certain rights as against the chattels to go in and take the chattels, to deal with the chattels, and under those circumstances it seems to me that the chattels were still comprised in a hire-purchase agreement. This is what was held in the court below, and is, I think, the whole question to be determined in the case. In that state of things it seems to me that the goods in question were goods to which s. 4 of the Act applied—that is to say, that s. 4 excluded those goods from the operation of the Act, and preserved the right of the landlords to distrain upon them. On these grounds I think that this appeal fails and should be dismissed.

PHILLIMORE, L.J.—I agree that the first point raised is not open for our decision because of the reasons given by the lord justice. As to the second point, cl. (f) is in these words: "If the hirer does not duly perform and observe this agreement the same shall ipso facto be determined," and then certain consequences shall follow. It is not that the bailment shall ipso facto be determined, but the agreement shall ipso facto be determined. Does that mean "determined" or "determinable"? It would be so clearly a disadvantage to the furnishing company that it should be determined instead of determinable, and such an unbusinesslike proceeding, that I think we must construe the word as "determinable" and not "determined." That being the case, the agreement and the bailment, which is part of the agreement, becomes determinable at the option of the grantor or the devisor of this furniture, and no doubt when he has manifested his determination the bailment is determined, but it is doubtful whether he has manifested his determination if he has not actually taken physical possession, nor communicated to the hirer his intention to determine it. Be that as it may, we have still to consider whether these goods can be said to be comprised in a hire-purchase agreement so as to bring them within s. 4 of the Law of Distress Amendment Act, 1908. *Hackney Furnishing Co., Ltd.* v. *Watts* (1), in the Divisional Court of which I was a member, decided, no doubt upon a less advantageous form of agreement, that the goods remained comprised. That judgment is open to review by us in this court, but as counsel for the plaintiffs has truly said, it does not go to the length of deciding this case, because, although it does not happen that this present form of agreement has been prepared in order to stop up holes found by that case, still it is a different form of agreement and is more to the advantage of the furnishing company than the agreement in the *Hackney Case* (1). I do not say that by apt words furnishing companies might not accomplish that which they seek to do in this class of case, but I do say that in this case the furnishing company have not done it, because I think that these goods are still comprised in a hire-purchase

agreement, and I rest my judgment entirely upon the licence to enter upon the premises in order to re-take these goods. For that purpose the hire-purchase agreement remains in force.

I do not say that the fact that contractual rights, as for instance, for payment or for damages for breach, may not remain and yet the goods might cease to be comprised in a hire-purchase agreement, but I do say that when any right in respect of the goods, to handle the goods, to obtain possession of the goods, remains for which you must go upon the operative agreement, so long as the goods are comprised in a hire-purchase agreement within the meaning of this statute. It seems to me that that is the sense and intention of the statute, and that here it is necessary to have recourse to the licence. It would be necessary to have recourse to the licence contained in this hire-purchase agreement for the furnishing company to obtain the benefit which they seek. For these reasons I think that the judgment of the court below was right and the appeal must be dismissed.

PICKFORD, L.J.—I agree.

Appeal dismissed.

Solicitors: *Tredgolds*; *W. H. Bellamy.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re CROXON. FERRERS *v.* CROXTON

[CHANCERY DIVISION (Eve, J.), July 7, 1915]

[Reported [1915] 2 Ch. 290; 84 L.J.Ch. 845; 113 L.T. 1103; 59 Sol. Jo. 693]

Annuity—Insufficiency of estate—Annuities charged on income and capital—Annuities made up out of capital—No recoupment of capital out of future surplus income.

The testator bequeathed three annuities charged on the income and corpus of his estate. The income produced by the testator's estate proved insufficient to pay the annuities in full, and the trustees used capital to augment income for the purpose of paying the annuities both before and after the death of one annuitant. The trustees having asked whether, as between the tenant for life and those entitled in remainder, payments made from capital ought to be recouped out of income,

Held: the tenant for life was entitled to have the deficiency satisfied out of capital without liability to resort to future income to recoup capital.

Prince v. *Cooper* (1) (1853), 17 Beav. 187, applied.

Administration of Estates—Annuity—Payment quarterly out of capital and income—Adjustment of charge between capital and income.

Under the will the annuities were payable quarterly.

Held: for the purpose of adjusting the charge between capital and income the annuities should be treated as payable annually on the anniversary of the testator's death, and on each anniversary any deficiency in the income then available should be recouped out of capital, without any right to resort to future income for recouping capital.

Re Grant, Walker v. *Martineau* (2) (1883), 52 L.J.Ch. 552 applied.

Notes. Distinguished: *Re Strict, Vivers* v. *Holman* (1922), 67 Sol. Jo. 79. Applied: *Re Lord Westbury's Settlement, Westmacott* v. *Bethell*, [1948] 2 All E.R. 463.

As to distribution of surplus income of a fund, see 32 HALSBURY'S LAWS (3rd Edn.) 564; and for cases see 39 DIGEST 158–160.

Cases referred to:

(1) *Playfair* v. *Cooper*, *Prince* v. *Cooper* (1853), 17 Beav. 187; 1 Eq. Rep. 137; 23 L.J.Ch. 341, 343; 21 L.T.O.S. 177; 1 W.R. 376; 51 E.R. 1004; 39 Digest 151, *446*.

(2) *Re Grant*, *Walker* v. *Martineau* (1883), 52 L.J.Ch. 552; 48 L.T. 937; 31 W.R. 703; 39 Digest 173, *633*.

Also referred to in argument:

Coote v. *O'Reilly* (1844), 1 Jo. & Lat. 455; 7 I.Eq.R. 356; 40 Digest (Repl.) 758, **476*.

Hongwood v. *Hongwood*, [1902] 1 Ch. 347; 71 L.J.Ch. 174; 86 L.T. 214; 40 Digest (Repl.) 754, *2406*.

Re Popham, *Butler* v. *Popham* (1914), 111 L.T. 524; 58 Sol. Jo. 673; 39 Digest 173, *637*.

Adjourned Summons.

The testator, Boydell Jones Croxon, made his will, dated June 19, 1898, whereby (vide 80 L.T.Rep. 733) he appointed his sons, the plaintiff, Herbert Ferrers Ferrers, and the defendant, Compton Herbert Croxton, executors, and, after making specific bequests and bequeathing pecuniary legacies, devised and bequeathed the residue of his estate unto and to the use of trustees on trust to raise thereon (in the event which happened) an annuity of £50 and to pay the same to the testator's daughter, Cicely Margaret Batstone, quarterly during her life, and upon trust to raise thereon a further like annuity of £50 and to pay the same quarterly to the testator's daughter, Constance Henrietta Anne Crane and upon trust to raise thereon an annuity of £50 (for which by codicil an annuity of £12 per annum was substituted), and to pay the same to Clara Price quarterly during spinsterhood, and upon trust to permit certain furniture and effects to be enjoyed as heirlooms as in the testator's will mentioned, and subject to the provisions thereinbefore contained upon trust as to the testator's real estate in his will mentioned for the defendant, Compton H. Croxton, during his life without impeachment of waste with remainder to his sons in tail male with remainder to the testator's grandson the defendant, Francis Charles Cecil Ferrers, for life with divers remainders over, and as to the residue of the testator's personal estate upon similar trusts as to the proceeds to those declared of the residue of his real estate subject to defeasance in certain events which had not happened. The testator died on Oct. 15, 1902, and his will and codicil were duly proved. By an order dated Mar. 7, 1904, it was declared that the pecuniary legacies given by the testator's will were payable out of the whole of his real and residuary personal estate including settled chattels, and that the annuities given by his will and codicil were, subject to the payment of his pecuniary legacies, payable out of the whole of the testator's real and residuary personal estate with the exception of the settled chattels, and that as between the pecuniary legatees and the annuitants the annuitants were entitled to marshal the assets. The testator's real estate consisted of a freehold house which realised £635, and another freehold house sold in 1914 for £510. His personal estate consisted of two sums of railway consols and deferred ordinary stock, settled chattels which had been sold, and furniture and cash realising £740. The testator's daughter, Cicely M. Batstone, died on July 14, 1911. The other two annuitants were living. Clara Price had never married. The defeasance clauses in the testator's will had not taken effect. The income produced by the testator's estate had never been sufficient to pay the annuities in full, and the trustees had drawn upon the capital in order to pay them in full. At the death of the testator's daughter, Cicely M. Batstone, the amount of capital which had been expended for the purpose of making up the annuities was £43 1s. 4d., of which £19 4s. 7d. represented capital expended to make up her annuity. Since Cicely M. Batstone's death further capital had been expended to make up the annuities of £50 and £12 respectively to the other

annuitants, the total capital expended in making up such annuities up to Oct. 15, 1914, being £51 8s. 5d. Compton H. Croxton had no children. The trustees caused an originating summons to be issued to which the tenant for life and first remainderman under the testator's will were made defendants, asking whether the payments out of capital in respect of the annuity to the deceased annuitant, Cicely M. Batstone, ought to be recouped to capital out of income of trust estate accruing since her death, and whether payments made in the past or to be made in the future out of capital to pay in full the subsisting annuities ought to be recouped out of income before any payment should be made of income to the defendant tenant for life.

Austen-Cartmell for the trustees of the testator's will.

J. E. Harman for the tenant for life.

A. B. Marten (for *Garin T. Simonds* serving with His Majesty's forces) for the remainderman.

EVE, J.—The testator bequeathed three life annuities charged upon the income and corpus of his residuary estate. Unfortunately the income has throughout been insufficient to keep down the annuities, but in consequence of the death of one annuitant in 1911, and the recent sale of an unproductive asset and the investment of the proceeds, it is anticipated that there will now be forthcoming sufficient income to keep down the remaining annuities and to leave a small annual surplus. To satisfy the annuity of the annuitant, who died in 1911, the sum of £19 4s. 7d. in all was raised out of capital, and there have also been paid to the annuitants who still survive capital moneys amounting to £32 3s. 10d. The question is whether the surplus income which will, it is anticipated, be coming to the hands of the tenant for life, ought to be applied in recouping to capital the sums of £19 4s. 7d. and £32 3s. 10d., or either of them. The £19 4s. 7d. is entirely covered by the decision in *Prince* v. *Cooper* (1). If I were to direct recoupment out of future income, I should be ignoring the fact that the annuity is charged upon capital as well as income. No doubt such a charge is primarily for the benefit of the annuitant, but in adjusting the rights of tenant for life and remainderman, I do not think the court can properly disregard the fact that the annuity is so charged, and I adopt the reasoning of the Master of the Rolls in *Prince* v. *Cooper* (1), and hold that there is no right to have the £19 4s. 7d. recouped to capital out of future income. The same considerations apply to the £32 3s. 10d. raised in respect of the continuing annuities. Strictly speaking, the annuitant is entitled on the recurring days on which his annuity becomes payable to call upon the trustees to apply the income in hand in or towards satisfying the instalment of his annuity, and if the income be deficient, he may require them to make good the deficiency out of capital. If this course were strictly pursued, the life tenant could not, as it seems to me, be called upon subsequently to replace the deficiency raised and paid out of capital. The instalment of the annuity could have been properly paid out of the two sources made available by the testator for its payment, and I see no valid reason why the life tenant should be ordered to forgo future income to replace capital properly applied in the discharge of a liability imposed upon it.

In the present case the annuities are payable quarterly. It would obviously be inconvenient to adjust the charge as between capital and income four times in each year, and I think for this purpose the proper course is to treat the annuities as payable annually on the anniversary of the death of the testator, and on each anniversary to apply the income then available in keeping down the annuities, and, if there is a deficiency to make up, such deficiency out of corpus, starting de novo for the next year, and without any right to resort to future income for recouping capital. That was the effect of the decision in *Re Grant, Walker* v. *Martineau* (2), which I respectfully accept as good sense and good law.

Solicitors: *Patersons, Snow & Burney*, for *Longueville & Co.*, Oswestry.

[*Reported by* W. P. PAIN, ESQ., *Barrister-at-Law.*]

R. *v.* TAYLOR. R. *v.* AMENDT

[King's Bench Division (Lord Reading, C.J., Bray and Lush, JJ.), March 15, 26, 1915]

[Reported [1915] 2 K.B. 593; 84 L.J.K.B. 1489; 113 L.T. 167; 79 J.P. 332; 31 T.L.R. 317]

Licensing—New licence—Full on-licence in force—Purported grant of "new licence" with alteration of monopoly value—Validity—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *ss.* 12, 14, 16.

When a full on-licence has been granted in respect of premises and is in force in respect of those premises, the licensing justices have no jurisdiction to grant, or the confirming authority to confirm, a new on-licence of a similar kind in respect of the same premises; if, on an application to grant a new on-licence of a similar kind to the one then in force, the justices grant what purports to be a new on-licence, such grant is not a "new licence" within the meaning of the Licensing (Consolidation) Act, 1910, [now the Licensing Act, 1953] but, if valid, is merely a "renewal" of the existing licence.

If in such case the licensing justices, on the grant of the so-called new licence, alter the conditions attached to the existing licence as to the payment of monopoly value by reducing the amount of such payment, the grant is void as a renewal of the existing licence, as, on a renewal, the conditions attached to the existing licence as to monopoly value cannot be altered. It is also void as a new licence as the premises are then licensed with a similar licence.

Notes. The Licensing (Consolidation) Act, 1910, has been repealed, but the definitions contained in the current Act, the Licensing Act, 1953, are so similar to those of the 1910 Act that this case remains authority for the propositions stated in the headnote. Sections 165 (1), 6 (2) and 11 (1) of the 1953 Act contain the provisions set out below formerly contained in ss. 12 (1), 14 (1), and 16 (1) respectively of the 1910 Act.

Considered: *Carter* v. *Pickering*, [1949] 1 All E.R. 340. Distinguished: *Godalming Licensing Committee, Ex parte Knight*, [1955] 2 All E.R. 328. Referred to: *R.* v. *Corfield*, [1922] All E.R.Rep. 376; *Appenrodt* v. *Central Middlesex Assessment Committee*, [1937] 2 All E.R. 325; *R.* v. *Weston-super-Mare Licensing Justices, Ex parte Powell*, [1939] 1 All E.R. 212; *Henriksen* v. *Grafton Hotel, Ltd.*, [1942] 1 All E.R. 678.

As to new justices' licences, see 22 Halsbury's Laws (3rd Edn.) 539–549, as to renewals, see ibid. 549; for cases see 30 Digest (Repl.) 12 et seq.; and for the Licensing Act, 1953, see 33 Halsbury's Statutes (2nd Edn.) 142.

Cases referred to:

(1) *Marwick* v. *Codlin* (1874), L.R. 9 Q.B. 509; 43 L.J.M.C. 169; 30 L.T. 719; 38 J.P. 518; 22 W.R. 823, D.C.; 30 Digest (Repl.) 37, *287*.

(2) *R.* v. *Customs and Excise Comrs.*, [1914] 2 K.B. 390; sub nom. *R.* v. *Sunderland Customs and Excise Comrs.*, 83 L.J.K.B. 555; 12 L.G.R. 580; sub nom. *R.* v. *Sunderland Customs and Excise Comrs., Ex parte Jenkins*, 110 L.T. 527; sub nom. *R.* v. *Customs and Excise Comrs., Ex parte Jenkins*, 78 J.P. 185; 30 T.L.R. 298, C.A.; 30 Digest (Repl.) 21, *132*.

(3) *Gandy* v. *Gandy* (1885), 30 Ch.D. 57; 54 L.J.Ch. 1154; 53 L.T. 306; 33 W.R. 803; 1 T.L.R. 520, C.A.; 21 Digest 329, *1238*.

Rules Nisi for writs of certiorari calling upon the respondent licensees Taylor and Amendt to show cause why two orders made on April 16, 1913, by justices for the county of Essex, acting as the confirming authority under the Licensing (Consolidation) Act, 1910, each confirming the grant of a so-called new licence, should not be quashed.

By the Licensing (Consolidation) Act, 1910: A

"Section 12 (1) [see now Licensing Act, 1953, s. 165 (1)]. For the purposes of this Act, a new justices' licence is a justices' licence granted at a general annual licensing meeting otherwise than by way of renewal or transfer as defined by this Act. Section 14 [see now s. 6 (2) of the Act of 1953]. The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence, and as to any other matters, as they think proper in the interests of the public; subject as follows: (a) Such conditions shall in any case be attached as . . . the justices think best adapted for securing to the public any monopoly value. Section 16 (1) [see now s. 11 (1) of 1953 Act]. For the purposes of this Act, the renewal of a justices' licence means the grant of a justices' licence at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application. . . ." B C

Wootten (*Curtis Bennett* and *St. John Hutchinson* with him) showed cause for the respondent Taylor.

Ryde, K.C., and *C. E. Jones* showed cause for the respondent Amendt. D

The Attorney-General (*Sir John Simon*, K.C.), *the Solicitor-General* (*Sir Stanley Buckmaster*, K.C.), and *Daldy* in support of the rules.

Mar. 26, 1915. The following judgments were read.

LORD READING, C.J.—The respondents, Taylor and Amendt, showed cause against a rule obtained by the Attorney-General to quash two orders made by the confirming authority for the county of Essex, whereby they confirmed the grant by the licensing justices of a new licence to each of the respondents. E

The facts, so far as material, are as follows: In 1905 the respondent Taylor obtained a new licence in respect of premises occupied by him. Under s. 4 of the Licensing Act, 1904, now s. 14 of the Licensing (Consolidation) Act, 1910, a new licence was granted subject to conditions of payment of monopoly value of the licence. The licence was a full publican's licence, and the conditions of payment were £200 per annum for the first five years, £300 per annum for the next five years, and thereafter the sum of £400 for every year. There were restrictions and other conditions which are not material to the point now raised. The licence granted was an annual licence, and every year till 1913 application was made for the renewal of the licence, and the renewal was granted. In Feb. 1913 the application was made on behalf of Taylor for a new licence in respect of the same premises. The justices intimated that they were disposed to grant a new licence with a revision of the monopoly value. Objection was taken on behalf of the Commissioners of Customs and Excise that such a licence would, in fact, be a renewal of the old licence, and in the circumstances could not be a new licence, and could not be subject to the payment of a reduced monopoly value. The justices, however, granted a new licence subject to a reduction of monopoly value, namely, payment of £100 per annum till 1917, and thereafter of £150 per annum. The new licence was subject to the same restrictions and other conditions as the old licence, and the renewals of the same. Further, the justices provisionally renewed the existing licence on condition that the renewal should be surrendered on the confirmation of the grant of the new licence. On April 16, 1913, the confirming authority of the county confirmed the licence granted by the justices. In 1906 the respondent Amendt obtained a new licence in respect of premises occupied by him subject to the conditions of payment for monopoly value of £30 per annum for five years, and thereafter of £40 per annum. The licence was a full publican's licence, and was renewed from year to year until 1913. In February of that year application was made on behalf of this respondent for a new licence in respect of the same premises. The same objection was taken on behalf of the Commissioners of Customs and Excise on Mar. 11, 1913. F G H I

On that date the justices granted a new licence for a term of five years at the monopoly value of £15 on condition that the existing licence, which was provisionally renewed, should be surrendered immediately upon the new licence becoming effective. On April 16, 1913, the grant of this licence was confirmed by the confirming authority of the county.

In both these cases the effect of the grant of the new licence with revised conditions is to reduce the annual payments for monopoly value. It is clear law, and it is not in dispute, that when a licence has been granted with conditions attached for payment of monopoly value there is no jurisdiction in the justices to revise the conditions of payment attached to the licence or to the renewal of the licence. The objects of the respondents in applying for and obtaining a new licence instead of a renewal of the old licence was to enable the justices to impose new and reduced conditions of payment of monopoly value, and the question is whether there was jurisdiction in the licensing justices to grant these new licences, or in the confirming authority to confirm them. A new licence is a licence granted "otherwise than by way of renewal or transfer"; (s. 12 (1), of the Act of 1910). The renewal of a licence is a grant "by way of renewal of a similar licence which is in force in respect of the premises at the date of the application": (s. 16 (1)). This definition of a renewal embodied the law as it was before the passing of this consolidating statute. Under the Licensing Act, 1872, s. 74, a renewal of a licence meant "a licence granted at a general annual licensing meeting by way of renewal." As was said by Cockburn, C.J. in *Marwick* v. *Codlin* (1) (L.R. 9 Q.B. at p. 514): "A renewal of a licence is a repetition of an old one." By the Licensing Act, 1874, s. 32, a new licence meant

> "a licence for the sale of any intoxicating liquor granted at a general annual licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted."

The effect of these two statutory definitions is comprised in the definition in s. 16 (1) of the Act of 1910.

The applications for the new licences were made, and the licences were granted by the justices at a time when there were similar licences in existence—that is, licences of a similar class, in those cases full publican's licences in respect of the same premises. In form, the applications were not made by way of renewal, but were for new licences, which were therefore subject to confirmation by the confirming authority, but in truth they were applications for a repetition of the old licences. It appears to me that when there is at the time of the application a similar licence in force in respect of the same premises the justices cannot grant a new licence of a similar class in respect of the same premises; they can only grant a licence by way of renewal, and in that case cannot revise the conditions of payment of monopoly value. If the means adopted in these cases for the purpose of securing a reduction of the terms of payment succeeded, the result would be that applications for new licences instead of renewals would only be made when it was reasonably certain that there would be a reduction in the terms of payment for monopoly value. There are no means by which the Commissioners of Customs and Excise could approach the licensing justices for the purpose of obtaining an increase in the payments. The commissioners could not initiate proceedings for revising the conditions of payment however great the increase might be in the value of the licence, although in the public interest they are entitled to be heard on the question of the payments to be imposed for the purpose of securing monopoly value to the public: (Finance (1909–10) Act, 1910, s. 87). The monopoly value must be a definite capital sum ascertained by the justices once for all, and the conditions of payment to secure it must be fixed once for all when the licence is applied for, and before it is granted, and subject only to the power of reduction given to the Commissioners of Customs and Excise under s. 47 of the Finance (1909–10) Act, 1910. Once that capital sum has been

ascertained by the justices they cannot alter it: *R.* v. *Customs and Excise Comrs.* (2) ([1914] 2 K.B. at p. 399). On the application for a new licence the licensing justices may grant the licence for a term, in which case no renewal is necessary (s. 14 (2) (a)), or they may grant an annual licence subject to renewal. In either case such conditions shall be attached as the justices think are best adapted for securing to the public the monopoly value of the licence (s. 14 (1) (a)). I do not think that a licence which is in fact a repetition of an old licence becomes in law a new licence merely because it is in name or in form a new licence. The character of a licence as defined by the statute cannot be varied merely by calling it a licence of a different character.

In my judgment, as soon as it is apparent that these licences were granted in respect of the same premises, and were of the same class as the existing licences, they cannot be new licences. Notwithstanding that they are in form new licences, they are in substance and in fact renewals of old licences. In both the present cases the new licences were granted on the terms of the surrender of the old licences as soon as the new licences became effective. This was done, presumably, in order that there might never be an interval of time during which no licence was in force in respect of the premises. At each of the stages of the application for the new licence care has to be taken by the applicant to preserve the old licence in order that when he presented himself to the justices he could say in effect: "I have a licence in existence in respect of my premises, and it is a full publican's licence; in truth I want a renewal of my old licence, but I want to call it a new licence so that you may revise the terms of payment imposed upon me for monopoly value." In my judgment the licensing justices had no jurisdiction to grant these so-called new licences.

On behalf of the respondent Amendt counsel took the further point that at the time of the application in 1913 for a new licence there was no similar licence in force in respect of the premises, inasmuch as the licence granted in 1906, and all subsequent renewals, were void according to the principles laid down by the Court of Appeal in *R.* v. *Customs and Excise Comrs.* (2). The argument, as I understood it, is that as that licence, and the renewals, did not fix a definite period for the payment of the annual sums to secure the monopoly value, it must be taken that the justices had not ascertained the capital value of the monopoly, or had not fixed payments representing a capital value, and that therefore the licence was void. I do not decide whether licences granted in such a form are within the powers of the licensing justices or not. Before arriving at a conclusion upon so important a point I should desire more information than is before the court. In particular it appears to me that it would be desirable to learn how the justices arrived at the conditions of payment, and why they fixed no period of time for the continuance of the definite payments. It is, in my opinion, plain that the Court of Appeal did not in terms decide the point now raised, but it is said that it follows logically from the reasoning of the court that licences granted subject to conditions of payment for an indefinite period of years are ex facie void, and that this court must now so hold in respect of the renewal licence last granted to Amendt before the date of his application in 1913 for the new licence.

In *R.* v. *Customs and Excise Comrs.* (2) the commissioners had refused to grant an excise licence on the ground that the justices' licence authorising the grant of the excise licence was void. The justices had attached to the grant of the licence conditions providing that the annual payments to secure the monopoly value should be a percentage of each year's gross takings from the sale of intoxicants. It was held that the justices had no jurisdiction to grant licences with such conditions attached, inasmuch as it was apparent on the face of the licence that they had not first fixed a capital sum to represent the monopoly value of the licence, but had made the monopoly value dependent on the future annual takings, which would consequently vary according to the amount of liquor sold. The court held that monopoly value could not be an indefinite sum varying in the future according to the annual trade of the premises, and that the commis-

sioners were justified in refusing the excise licence, and that no mandamus should issue directing them to grant it. The objection to the licence was taken by the commissioners in the exercise of their duty in the public interest. In the present case the holder of the licence, who obtained it in 1906 and annually renewed it, and has traded under licences in this form since 1906, and was trading under such a licence at the time of his application for the so-called new licence, and agreed to surrender it to the justices, and did surrender it, in exchange for the new licence, now comes forward in a court of justice to say that these licences were all void. I do not think it is open to him to raise this contention before this court on this application. A person who has upon his own application and for his own purposes and profit obtained a licence in this form, and made use of it when obtaining the new licence, is not entitled, when it appears to his own interest, and after having had all the advantages and benefit of the licence, to repudiate it as a valid licence, and to contend that it is void. In the words of BOWEN, L.J., in *Gandy* v. *Gandy* (3) (30 Ch.D. at p. 82), "it would be playing fast and loose with justice if the court allowed that." In my judgment the grant of the so-called new licences must be quashed, and the rules must be made absolute in both cases.

BRAY, J.—A good many questions were raised in the course of the argument in these cases. The more important were as follows: (i) Whether in fact the justices when they granted the original licence did fix a capital monopoly value, and whether they can attach conditions to a new licence making the monopoly value payable annually, but providing that the annual payments shall cease when the licences are no longer in force, and whether that can be the mode best adapted for securing the monopoly value to the public. (ii) If they cannot, whether licences so granted are void. (iii) Whether the licences granted here were granted by way of renewal. (iv) Whether a new licence (other than a re-grant under s. 14 (2)) can be granted in respect of premises then licensed with a similar licence. In my opinion it is not necessary for the court to decide points (i) and (ii), which are both important and difficult, because in my opinion it is not open to the respondents to raise them. They had obtained these licences and had had them renewed annually, and had had the benefits of them and made their applications to the justices for the licences now in dispute upon the footing that they were existing valid licences, and that they were to continue in force, and indeed were to be renewed, until their surrender. They treated them as existing valid licences, and we must also treat them as existing valid licences. I prefer not to express any opinion upon these two points. It is also unnecessary to answer (iii), because, for the reasons I am about to state, the court ought to quash the granting of these licences even if they were not granted by way of renewal.

It remains, therefore, to consider the fourth question. We are dealing here with on-licences. Can new on-licences be granted in respect of premises then having an on-licence? The on-licences which the justices have jurisdiction to grant under s. 9 may be divided into four classes: (i) New licences. (ii) Re-grants under s. 14 (2). (iii) Licences by way of renewal. (iv) Licences by way of transfer. There are no others that I know of. We have not to deal here with (ii) or (iv), nor with (iii), for if these licences were granted by way of renewal they were clearly bad, because the conditions as to the payment of monopoly value were altered. Then, if the respondents are to succeed, these must be new licences. What are new licences? If the definition clause in the Act of 1874 were still in force, a new licence could not be granted because there was an existing similar licence; but this clause is repealed, and s. 12 (1) is substituted for it. Does that make any difference? If it be right to say that the on-licences which the justices have jurisdiction to grant must fall within one of the four classes I have mentioned, and the licences in question do not fall within three of them, then those licences in order to be valid must fall within the fourth class—namely, they must be new on-licences. What is the ordinary meaning of a

new licence with respect to premises? Surely it means a licence granted in respect of premises which have not then a similar licence. These premises had a similar licence, consequently these licences were not new licences, and the justices had no jurisdiction to grant them. In my opinion the rule nisi to quash should be made absolute in both cases.

LUSH, J.— The short question in these two cases which we have to decide is whether the "new" on-licences which were granted and confirmed in 1913 in respect of premises in respect of which there were similar licences then in existence are valid licences. In my opinion they are invalid, and there was no jurisdiction to grant them. It is, I think, clear that if a similar licence is in force no application can be successfully made for a new licence in respect of the same premises. A new licence is thus defined by s. 32 of the Act of 1874: a licence "in respect of premises in respect of which a similar licence has not theretofore been granted." Although by the Act of 1910 a new licence is now defined as "a justices' licence granted at a general annual licensing meeting otherwise than by way of renewal or transfer as defined by this Act," the change in the definition has not made any change in the law. If the licensee of an already licensed house applies for a similar licence to that already existing it must either be granted by way of renewal or it cannot be granted at all. If, therefore, these licences were really new licences they are void for the reason I have mentioned. If they were granted by way of renewal they are void because the conditions for securing the monopoly value were altered. This would be sufficient to dispose of the cases, but counsel for Amendt contended that the existing licence was void when the new licence was granted, and that therefore there was no similar licence in existence. This point was not open in Taylor's case, because there the new licence would be void if the existing one was void, the alleged defect being common to both. In Amendt's case it was not so, as the new licence was for a fixed term of five years. The reason why counsel said that the existing licence was void was this. It was decided in *R.* v. *Customs and Excise Comrs.* (2) that if it appeared clear, as it did there, that the justices had secured a yearly payment only, as representing the annual as distinguished from the capital value, they had not dealt with or secured the capital monopoly value at all, which is what the Act requires should be secured, and that the conditions precedent to the grant of a licence had therefore not been complied with. It was said that as the annual payments in this case were only to be made as long as the licence existed or "by the licensee for the time being," which I think is the same thing, and were to continue to be payable without limit of time if the licence was continually renewed, it was equally clear that the capital monopoly value had not been considered or dealt with. I do not think it is necessary to say if this contention is well founded or not, because in my opinion it was not competent to the respondent to contend that the existing licence was void. He had before the justices contended that the licence was valid, and had even obtained a renewal of it, and had undertaken to surrender it when the new licence on more favourable terms was granted, and on that contention the new licence was granted. He accordingly continued to trade under the old or renewed licence, which he now says was void, and in pursuance of the undertaking he surrendered it in exchange for the new licence. In my opinion it is not now open to him to contend that the old licence was void.

I feel some doubt whether a licensee can assert as against the Crown that the licence which he applied for and obtained, and under which he has traded and which has not been declared void, was void, and to set up his own illegality. But, be that as it may, I do not see how a party who has set up one contention in one court and obtained an order on that contention and availed himself of it (this respondent actually obtained and traded under a renewal on this contention) can afterwards turn round in another court and raise the opposite contention in order to obtain a decision from that second court. To do that would, in the language of BOWEN, L.J., in *Gandy* v. *Gandy* (3), "be playing fast and loose with

justice." This is what this respondent seems to me to be doing, and I do not think he can do it. The justices have never considered an application by the respondent as a person who had no existing licence in respect of the premises. This is, I think, the answer to counsel for Amendt's argument. I confess I should feel some difficulty in saying that the method adopted in these licences of providing for an annual payment, to last so long as a licence continues to be renewed, can be said to be a method of securing a fixed and definite capital sum representing the monopoly value, especially having regard to s. 14 (1) (b) of the Licensing (Consolidation) Act, 1910, which provides that the total payments shall not exceed that fixed sum. But it is unnecessary to decide the question. For the reasons I have stated I think that the existing licence must, as against this respondent, be treated for the present purpose as valid. I think that the rules should be made absolute.

Rules absolute.

Solicitors: *James Turner*; *E. Moore*; *Solicitor for Customs and Excise.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

SCOTT *v.* DIRECTOR OF PUBLIC PROSECUTIONS

[King's Bench Division (Channell, Lush and Atkin, JJ.), February 27, March 13, 1914]

[Reported [1914] 2 K.B. 868; 83 L.J.K.B. 1025; 111 L.T. 59; 78 J.P. 267; 30 T.L.R. 396; 24 Cox, C.C. 194]

Gaming—Lottery—Prize competition Element of skill—Some degree of literary merit—No evidence of conduct of competition as lottery—Lotteries Act, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

The appellant sold copies of a newspaper containing an advertisement of a competition called "Bounties," by which £1,000 was offered in prizes. By the scheme the competitor was to select a word from a specified list of words and was then to write down two or three words the meaning of which had some relation to the meaning of the word chosen, each of the words so written being required to begin with one of the letters in the word chosen, but so that not more than one word was to begin with the same letter unless it appeared more than once in the selected word. A coupon containing the word selected and the answer sent in by the competitor was to be sent to the office of the newspaper, with a postal order for 6d. in respect of each coupon. The editor undertook that all "Bounties" reaching him should receive careful consideration, but his decision as to the prize-winners was to be accepted as final and the names of the prize-winners were to appear in an issue of the paper about ten days after the entries were closed. The prizes varied from £500 to 10s. The appellant having been convicted under s. 41 of the Lotteries Act, 1823 [repealed: see note infra], of publishing a lottery, and the editor having also been convicted of aiding and abetting,

Held: the competition required some degree of skill and of literary merit although not of a high order, and so, on the face of the scheme the distribution of the prizes did not depend entirely on chance; there was no evidence that,

despite this, the circumstances were such that the appellant must have contemplated that the scheme would be conducted, and it must, in fact, have been conducted, as a lottery; and, therefore, the appellant was not guilty of the offence charged against him.

Hall v. *Cox* (1), [1899] 1 Q.B. 198, applied.

Notes. The Lottery Act, 1823, was repealed by the Betting and Lotteries Act, 1934 (10 HALSBURY'S STATUTES (2nd Edn.) 785), s. 22 of which replaced s. 41 of the Act of 1823. As to amending provisions see the Small Lotteries and Gaming Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 361), and also the Betting and Gaming Act, 1960 (40 HALSBURY'S STATUTES (2nd Edn.) 328), which amends the Acts of 1934 and 1956.

Distinguished: *Hobbs* v. *Ward* (1929), 93 J.P. 163. Considered: *Coles* v. *Odhams Press Ltd.*, [1935] All E.R.Rep. 598. Applied: *Moore* v. *Elphick*, [1945] 2 All E.R. 155. Referred to: *Minty* v. *Sylvester* (1915), 84 L.J.K.B. 1982.

As to lotteries, see 18 HALSBURY'S LAWS (3rd Edn.) 238 et seq., and for cases see 25 DIGEST 452 et seq.

Cases referred to:

(1) *Hall* v. *Cox*, [1899] 1 Q.B. 198; 68 L.J.Q.B. 167; 79 L.T. 653; 47 W.R. 161; 15 T.L.R. 82; 43 Sol. Jo. 95, C.A.; 25 Digest 465, *505*.

(2) *Hall* v. *McWilliam* (1901), 85 L.T. 239; 65 J.P. 742; 45 Sol. Jo. 579; 20 Cox, C.C. 33; sub nom. *Hall* v. *M'William*, *M'William* v. *Bottomley*, 17 T.L.R. 561, D.C.; 25 Digest 455, *445*.

(3) *Willis* v. *Young and Stembridge*, [1907] 1 K.B. 448; 76 L.J.K.B. 390; 96 L.T. 155; 71 J.P. 6; 23 T.L.R. 23; 51 Sol. Jo. 28; 21 Cox, C.C. 362, D.C.; 25 Digest 454, *434*.

(4) *Blyth* v. *Hulton & Co., Ltd.* (1908), 72 J.P. 101; 24 T.L.R. 719; 52 Sol. Jo. 599, C.A.; 25 Digest 464, *503*.

(5) *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (1910), 26 T.L.R. 335; 54 Sol. Jo. 341, C.A.; 25 Digest 465, *504*.

(6) *Taylor* v. *Smetten* (1883), 11 Q.B.D. 207; 52 L.J.M.C. 101; 48 J.P. 36, D.C.; 25 Digest 455, *443*.

(7) *Barclay* v. *Pearson*, [1893] 2 Ch. 154; 62 L.J.Ch. 136; 42 W.R. 74; 3 R. 388; sub nom. *Barclay* v. *Pearson*, *Oppler* v. *Pearson*, 68 L.T. 709; 9 T.L.R. 269; 37 Sol. Jo. 268; 25 Digest 464, *502*.

Case Stated by an alderman of the city of London.

At the Mansion House Justice Room in the city of London on June 11, 1913, informations were laid in behalf of the respondent under s. 41 of the Lotteries Act, 1823, against the appellant William Scott "for that he in the said city on April 23, 1913, did unlawfully publish a certain proposal and scheme for the sale of certain chances in a certain lottery not then authorised by any Act of Parliament, to wit, a proposal and scheme published in the issue of the 'Sunday Chronicle' newspaper dated April 20, 1913, for the sale of chances in a lottery called 'Bounties,' contrary to the statute," and against the appellant Arthur Wellesley Woodbridge "for that he on the said April 23 did unlawfully and knowingly in the said city aid, abet, counsel, and procure the commission by the said William Scott of the said offence." The informations against the appellants were heard together on June 18, and there were proved or admitted before the magistrate in the course of the hearing the following facts. (a) That William Scott was a servant in the employ of Messrs. E. Hulton & Co., Ltd., at their premises, No. 17, Tudor Street, in the city of London, on April 23, 1913. (b) That he there sold on that day certain copies of the "Sunday Chronicle" newspaper of the issue of Sunday, April 20, 1913, to a police officer acting on behalf of the respondent. (c) That Arthur Wellesley Woodbridge was throughout April and May, 1913, the editor of the "Sunday Chronicle," acting as such in Manchester, where the

newspaper was published. (d) That the appellant Arthur Wellesley Woodbridge on being served with the summons by Inspector Phillips (who had gone to Manchester for that purpose) said: "I am not the man you want. You should see the competition editor, who is responsible for the competitions," meaning the editor or person employed by the proprietors of the "Sunday Chronicle" to superintend certain competitions advertised therein and hereinafter referred to. (e) A copy of the "Sunday Chronicle" issued under date of May 4, 1913, and containing the names of the prize-winners in a competition advertised in the issue of the paper of April 20 was admitted by the appellants to have been published for the same proprietors and edited by the appellant Woodbridge and sold by the appellant Scott in the same manner as the issue of April 20. There appeared in the "Sunday Chronicle" for April 20, 1913, an advertisement of a competition called "Bounties," in which prizes aggregating to £1,000 were offered to competitors therein. The advertisement was as follows:

> "£1,000 in Prizes! Offered this week for 'Sunday Chronicle' Bounties in conjunction with 'Ideas.' First prize, £500; Second prize, £100; Third prize, £50; Twenty prizes of £5 each; 200 prizes of £1; 100 prizes of 10s. What you have to do—Choose one word from those given below: [A list of forty-two words was then given.] Having chosen a word, think of two or three other words which, in their meaning, have some bearing on the meaning of the word chosen. Each of the two or three words must begin with one of the letters in the word chosen from the list, but not more than one word must begin with the same letter unless it appears more than once in the selected word. For example:
>
> Word chosen. Bounty.
> Coincidence—Naturally impresses one.
> Reformation—Easy in theory.
> Servant—Appreciates respect.
>
> "Bounties must be plainly written on the coupon. Not more than two Bounties must be written on one coupon. Each coupon must be accompanied by a postal order for 6d., made payable to 'Sunday Chronicle' and crossed '/& Co./.' If more than one coupon is sent, one postal order for the full amount should be inclosed. . . . The editor undertakes that all Bounties reaching him shall receive careful consideration, but his decision as to the prize-winners must be accepted by all competitors as final and legally binding in all respects, and entries are accepted only on this understanding. The editor will not hold himself responsible for coupons lost or mislaid. The published decision may be amended by the editor as the result of successful scrutinies. In the event of two or more competitors sending in the same winning Bounties the prize will be divided."

Attached to the advertisement were coupon forms wherein answers sent in by competitors with names and addresses were to be entered and, by the rules of the competition, the coupons with a postal order for 6d. in respect of each coupon, were to be sent in envelopes marked "Bounties" addressed to the "Sunday Chronicle," Withy-grove, Manchester, and to reach that office not later than Thursday, April 24, 1913. It was announced in the advertisement that the result of the competition would be announced in the "Sunday Chronicle" dated May 4. The rules of the competition appeared from the advertisement. In the issue of May 4 appeared the names of the prize-winners in the competition of April 20. The "Bounties" which won the first three prizes were given as follows: (i) Undertaking—Terminates doctors' experiments; (ii) Covetousness—Sickens the charitable; (iii) Rapacity—Punishes itself repeatedly.

It was contended before the magistrate on behalf of the respondent that the appellants were upon this evidence shown to be guilty of the offences respectively

charged against them; that the competition was a "lottery" within the prohibitions of s. 41 of the Lotteries Act, 1823; that the result of the competition could not in fact depend upon any skill, knowledge, or judgment on the part of the competitors; that unless the competitions were carried on at a loss it must be assumed that at least 40,000 coupons were sent in as the prizes amounted to £1,000 and there were 40,000 sixpences in £1,000; that the time allowed for the determination of the prize-winners was ten days, and that it was impossible that 4,000 coupons a day could be examined or considered in accordance with the rules of the competition; that there was no standard of literary skill which could determine to which competitor in the competition a preference over any other competitors could be given. *Hall* v. *McWilliam* (2), *Willis* v. *Young and Stembridge* (3), *Blyth* v. *Hulton & Co., Ltd.* (4), and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (5), were cited on behalf of the respondents in support of the contentions that the appellants were guilty of the offences charged against them. On behalf of the appellants it was contended that there was no evidence in law before the magistrate on which he could convict either or both of the appellants of the offences: that there was no evidence before him that the competition scheme was a "lottery" within the Lotteries Act, 1823; that there was no evidence as to the numbers of competitors in the competition, or that it was impossible for each competitor's solution to be considered in accordance with the rules thereof, or that the competition was one which did not involve skill or judgment or knowledge on the part of the competitors; that the rules of the competition were not shown to have been departed from and that they provided for a proper scrutiny of the coupons before or after the determination of the prize-winners in the competitions; that the magistrate was not entitled in law to assume without evidence that the competition was a lottery, or that the rules of the competition were not complied with, or that the prize-winners were not selected otherwise than upon a scrutiny and by the judgment of the person described as "the editor" in the advertisement and not arbitrarily. *Hall* v. *Cox* (1) and *Taylor* v. *Smetten* (6) were cited on behalf of the appellants.

The magistrate was of opinion that there was evidence before him upon which he was justified in coming to the conclusion that the competition was a lottery, and that the appellants were guilty of the offences respectively charged against them. He thereupon convicted them.

By s. 41 of the Lotteries Act, 1823:

> "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, in any lottery or lotteries authorised by any foreign potentate or State, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorised by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid, then such person or persons shall, for every such offence, forfeit and pay the sum of £50, and shall also be deemed a rogue and vagabond, or rogues and vagabonds, and shall be punished as such in the manner hereinafter directed. . . ."

Gordon Hewart, K.C. (*Bodkin* with him), for the appellants.—There is no evidence that this scheme was a lottery, and there is no evidence that the conditions in the scheme were not complied with, and, if they were complied with, the scheme would not be a lottery. It cannot be said that no degree of skill is required; on the contrary, there is a marked degree of skill required. In *Blyth* v. *Hulton & Co., Ltd.* (4) it was held that the competition was a lottery, but the main ingredient in that case was that some 60,000 last lines had been sent in to be adjudicated upon, and the decision went on the ground that, the numbers being so large, there was no possibility of having any real adjudication on the whole, and.

therefore, to that extent the question of skill was eliminated and the element of chance came in. In the present case the numbers were not nearly so large, and the first preliminary adjudication would throw out a large number as not complying with the conditions. A lottery must be an intentional scheme for distributing money according to lot or chance, and if this scheme is considered as a whole it is clear that it is not a lottery, because it is not a competition in which the prizes are to be allotted by mere chance, but is one where the prizes are to be given on the merits. The decision of the Court of Appeal in *Hall* v. *Cox* (1) shows that to constitute a lottery it must be a matter depending entirely upon chance, and if the result depends largely on chance, but not entirely so, then the competition is not a lottery. If there is an element of skill required for the investigations necessary for sending in the answers, it is not a lottery. In the judgment of VAUGHAN WILLIAMS, L.J., in *Blyth* v. *Hulton & Co., Ltd.* (4), one of the main ingredients upon which he decided that the competition was a lottery was that having regard to the very large number of competitors, being about 60,000, and the short space of one week allowed for the adjudication, it was impossible that there could have been any real comparison of the lines, and that, therefore, the result must have depended on chance. That cannot apply in this case, as there is no such evidence as to the numbers as there was in that case. The other cases relied on before the justices were *Hall* v. *McWilliam* (2) in which the competition took the form of a scheme called "Spots," where the winning spots were arbitrarily selected by the proprietors of the newspaper, and the winning of the prizes depended wholly upon chance; and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (5), in which the plaintiffs were employed by the defendants to advertise the conditions of certain "Limerick" competitions, and it was held that the advertisements were simply invitations to people to come in and win prizes by chance and were lotteries. *Blyth* v. *Hulton & Co., Ltd.* (4), and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (5) were civil cases and there were consolation prizes in both, whereas the present is a criminal case in which the burden is on the prosecutor to prove the case beyond a reasonable doubt. Upon the advertisement of this competition it is sufficiently plain that a degree of literary skill is involved, and when the conditions are taken as a whole the proper conclusion is that this was a competition involving a certain amount of skill and that negatives the view that this was a lottery. That which was sought to be proved was really assumed, and that which was proved did not establish beyond a reasonable doubt that this was a lottery. There was no evidence upon which the magistrate could come to the conclusion that it was a lottery, and therefore the conviction ought to be quashed.

The Solicitor-General (*Sir Stanley Buckmaster, K.C.*), (*R. D. Muir* and *Branson* with him) for the respondent.—The distinction between a civil and a criminal case in this connection has been insisted upon when distinguishing some of the cases, but there is no difference between a criminal prosecution and a civil action in this respect. The true test is this: Does the advertisement offer inducements to people to come in and win prizes by chance? It makes no difference that people should exercise skill if there is not some skill required in the advertisement. What has to be shown in the advertisement is a scheme requiring skill, something requiring a skilful judgment, and even if there were some slight degree of skill shown by the competitors that is not enough to prevent the competition from being a lottery if there is no skilful judgment required in the adjudication of the prizes. There are six classes of prizes, and if this is not a lottery, these classes would be graded according to skill, but it is impossible that that can be done here. There is nothing to show that there is anything in point of skill to take any one contribution out of one class and put it in another. But the matter does not stop there, because the editor does not profess to decide on any principle of skill. The critical part of the scheme is that there is an invitation to the public to come in, and the scheme in which they are invited to take part is one in

which the editor informs them that all the Bounties reaching him will be carefully considered, but there is nothing to show through how many hands they will pass before they come to him, and when they do come to him all he says is that they will be carefully considered. There is no statement as to who will carefully consider them; it might be done by the office boy, and the scheme intentionally omits any such reference to the editor as would show that they are to be considered by the editor, though his decision is to be final and there is reserved to him an arbitrary discretion to award as he pleases, and if he merely drew the names out of a box that would satisfy the scheme. The person who selects the winning contributions may select them for any reason which is not associated with skill at all. The scheme is an invitation to persons to send in any contributions they please, and, having sent them in in conformity with the initial conditions, there is nothing in the way of skill which determines the placing of them in any one of the classes. Some standard is necessary, and here there is no standard at all. The principle laid down in *Blyth* v. *Hulton & Co., Ltd.* (4) and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (5) is exactly applicable to the present case and would cover a case far stronger than the appellants have. Here there was no standard at all, but the very condition insisted upon in *Blyth* v. *Hulton & Co. Ltd.* (4) was that there must be some standard, and that the adjudication must be on the merits in reference to that standard. That precisely applies here, where there is neither a standard nor an adjudication on the merits. That was followed in *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (5), as to advertising certain "Limerick" competitions. FARWELL, L.J., said that it was a question of construction, and, if on the construction of the advertisements they were held to be lotteries, it did not matter what the parties thought. He considered that the advertisements invited to a gamble and were a pure lottery, and that *Blyth* v. *Hulton & Co., Ltd.* (4) was not distinguishable. KENNEDY, L.J., said that it was impossible to contend that any reasonable person could read these advertisements as indicating that any real competition was to take place. The advertisements in that case said that the solutions sent in by competitors would be examined by an expert literary staff. That was a far stronger case than this, and yet it was held that the competitions were lotteries. If the prize is to go to one of a group of two persons by chance, that is a lottery. In such a case as this it is impossible to apply a standard of literary merit, and, that being so, the matter falls to be decided by chance. If the determination is left to these conditions, there is no skill at all used, and no standard can possibly be assigned. Further, there is the inference that a very large number of competitions come in, which would make it impossible to consider them all on their merits in the short space of ten days. On both these grounds the case was rightly decided. [LUSH, J., referred to *Barclay* v. *Pearson* (7).]

Cur. adv. vult.

Mar. 13, 1914. The following judgments were read.

LUSH, J.—The appellant Scott was summarily convicted of an offence under s. 41 of the Lotteries Act, 1823. The magistrate who convicted stated a Case for the opinion of the court, and the question that we have to consider is whether, upon the facts stated in the Case, the appellant was properly convicted.

The Act makes it an offence to sell tickets or chances in any unauthorised "lottery" or to publish any scheme for the sale of any such tickets. Any person who commits such offence is to be deemed a rogue and vagabond. The word "lottery" indicates clearly enough what is the offence aimed at by the statute, and the Act has been interpreted in accordance with the obvious meaning of the term as applying only to distributions of money by chance, and nothing but chance—that is, by doing that which is equivalent to drawing lots. If merit or skill plays any

part in determining the distribution, there has been no lottery, and there is no offence: *Hall* v. *Cox* (1). What the appellant did was this. He published in his newspaper a scheme to be conducted on the following lines. The competitor was to select one of a number of words, and was to compose a sentence (the initial letters being fixed by certain rules) having some appropriate bearing on the selected word. The following instances were given: "Coincidence" (that is the selected word) and the sentence is: "Naturally impresses one." "Reformation—Easy in theory." "Servant—Appreciates respect." The editor undertook to consider carefully all the sentences that reached him (this was obviously to guard against a claim by an alleged competitor who asserted that he had sent in a sentence which had been lost), but stipulated that his decision was to be final. Provision was made for a scrutiny, if necessary. Prizes were offered of amounts varying between £500 (first prize) and 10s., of which a large number were offered. A large number of persons competed and sent in answers, and prizes were awarded, the names of the winners being duly published. The first three answers to which the first three prizes were awarded were also published. They were as follows: (i) "Undertaking—Terminates doctors' experiments." (ii) "Covetousness—Sickens the charitable." (iii) "Rapacity—Punishes itself repeatedly." On these facts it was contended that the "competition" was a lottery; in other words, that the competitors were invited to take part, and had taken part, in a scheme for the distribution of money by chance and nothing but chance. It was contended, first, that the appellant must be taken to have contemplated that no less than 40,000 answers would be sent in, as one ought to assume that he would not carry on the competition at a loss. Secondly, that the time allowed for deciding as to the respective merits of the answers was so short (ten days from the sending in of the last answer) that he must have known that he could not consider all the answers. Thirdly, that there was no standard of literary skill by which to determine to which competitor preference should be given. It was also contended that the case was concluded by two recent decisions of the Court of Appeal to which I will refer. With regard to the last contention, I do not think that it is sound, for the reasons which I will state when I come to consider the decisions. We must, I think, consider for ourselves, giving, of course, proper weight to the decisions, whether the appellant was properly convicted.

Now, a scheme may either be on the face of it a lottery—that is, a scheme for distributing money according to mere chance—or, if it is not, it may be shown by extraneous evidence that the parties concerned contemplated that it would be conducted in that way. I agree with what was contended before us, that if reasonable people ought to contemplate from the facts made known to them that it would be so conducted, the scheme is none the less a lottery, although on the face of it it appears not to be; and I also agree that if the appeal to skill and merit was a mere blind or cloak to cover up the true nature of the scheme, if all the sentences, for example, which would be composed under this scheme would have practically an equal chance of obtaining the prizes, one being as "appropriate" as the other, it would be just as much a distribution by mere chance as if the scheme were so described. The Solicitor-General contended that the literary merit was of such a low order that one cannot say that one answer is "better"—that is, more appropriate and more happily and neatly put together—than another. This I take to be the argument raised before the magistrate—namely, that there was no standard by which to adjudicate—in another form. The literary merit was, no doubt, not of a high order, and if the Lotteries Act had made it an offence to distribute money prizes unless it was of a high order, it would be an important observation. But, unless one is prepared to say that no honest person can come to the conclusion that such answers as those to which the first three prizes were awarded are more pointed, more amusing, than any other answers would be—unless he must, if he expresses an honest view say, for example, that the sentence given in the newspaper, "Appreciates respect," for the word "Servant," is as

appropriate a sentence as "Terminates doctors' experiments" for the word "Undertaking"—I do not see how the poor degree of literary merit can convert the competition into a scheme for distributing money by mere chance. The answers appeal, no doubt, only to the taste or fancy of the person who is to adjudicate, and there was an element of chance in that sense in the competition, but that does not make the adjudication a mere determination by chance and nothing but chance. The same observation appears to me to apply to the other way of stating the contention namely, that there was no standard by which to adjudicate.

I am aware that there is a dictum in the case *Blyth* v. *Hulton & Co., Ltd.* (4), to which I will refer in a moment, which supports the Solicitor-General's argument as to this, but it was not the decision in the case, and the view was expressed with regard to a different subject-matter, so that I cannot treat it as concluding my own opinion. With all respect to the dictum and to the argument, I cannot see how the absence or presence of a "standard" can convert an adjudication into a lottery or not a lottery according as the merit is of a low or high order. Taste and fancy are as much the test in one case as in the other. I do not know that there is any standard by which one can even discriminate between the two classes of merit, and the division itself seems to break down under the same test. At all events, it appears to me that a decision according to honest taste or fancy is not a decision by chance and nothing else, however justly one may belittle the class or degree of merit. The distinction is a very plain one between a person who buys a ticket for a lottery and a person who competes even in a scheme like this. Nothing that the former does or can do can affect the result. He only awaits the result of the drawing of lots. The other invents an answer which he thinks most likely to appeal to the taste or fancy of the editor; and, if the competition is honestly conducted, it is what he does that determines the result. So far, therefore, as the scheme appears on the face of it, I am of opinion that it was not a lottery.

Now, was there any evidence on which the appellant could properly be convicted, because it must have been contemplated that the scheme would be conducted as a lottery—that is, that the moneys would be distributed according to chance and nothing but chance? The prosecution relied on two assumptions: first, that the editor would not contemplate selling his paper at a loss, and, therefore, must have expected 40,000 answers; and, secondly, that, on that footing, there would be no sufficient time for him to look through and consider the answers. To convict an accused person of a criminal offence on such assumptions seems to me to be of more than doubtful propriety, but I do not see that they are well founded in fact. It is a much more probable assumption that a large number of the answers would be rejected either through not complying with the conditions or through their being so pointless in comparison with the others as not to be worth considering. But one must take the published answers into consideration, and, poor as the degree of literary merit may be, I cannot doubt that they show that mere chance was not in fact the only determining factor. They not only do not indicate that, but they indicate the contrary. These assumptions are, I think, purely gratuitous and not founded on any real basis, and this contention also, in my opinion, fails.

It remains to consider whether we are bound by the authorities that were cited to us namely, *Blyth* v. *Hulton & Co., Ltd.* (4) and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (5). In those cases—they were civil actions—the Court of Appeal on different facts and with respect to different competitions arrived at the conclusion of fact that the parties did contemplate that the scheme would be conducted as a lottery. I have already referred to the dictum on which the Solicitor-General relied, which was not the decision of the court, and which, again, related only to the facts of the particular case. I fail to see how a finding of fact on one set of circumstances can be said to establish a legal principle which

A we are bound to apply to a different set of circumstances. The decision in *Hall* v. *Cox* (1), which was also a decision by the Court of Appeal, was certainly not overruled. I do not see how, if this case could have been, and had been, tried by a jury, one could have directed them as a matter of law, because of those authorities, that the scheme was a lottery. Further, I do not think, for the reasons I have given, that there was any evidence on which they could properly B have found that it was. It is to be observed that in *Barclay* v. *Pearson* (7), which was cited by BUCKLEY, L.J., in *Blyth* v. *Hulton & Co., Ltd.* (4) without disapproval, STIRLING, J., citing a judgment of the chief magistrate at Bow Street, apparently assented to the view that if the object of the competition was to find the most "appropriate" word, that is, most appropriate in the opinion of the editor—which is very similar to the object of this competition—the scheme would C not be a lottery.

I wish to add that I have realised that the consequences of these competitions where the sums offered are very large and the degree of skill is very small may be, and probably are, mischievous, and that in many cases the real incentive to the readers of the newspapers to take part in them is something not far removed from the spirit of gambling. It is not perhaps to be wondered at that an Act D which was passed nearly one hundred years ago, when the conditions were so different, is not effective to deal with this state of things. Newspapers circulate more widely now than they did then, and the competitive spirit has stimulated those who desire to find fresh fields for their enterprise. But if a case is plain, as I think this is on these facts, such considerations cannot affect the interpretation of a statute not ambiguous in its terms. They are for the legislature, and E not for the court. I think that the conviction must be quashed.

ATKIN, J.—The appellant was prosecuted and convicted under the Lotteries Act, 1823, for unlawfully publishing a proposal and scheme for the sale of chances in a lottery not sanctioned by Act of Parliament. The proposal and scheme was contained in an issue of the "Sunday Chronicle" dated April 20, 1913, and took F the form of a prize competition entitled "Bounties." In order to succeed, the prosecution have to establish that the winning of a prize depends entirely upon chance.

> "The result, no doubt, depends largely on chance, but not entirely, and the cases show that to constitute a lottery it must be a matter depending entirely upon chance":

G

Hall v. *Cox* (1), [1899] 1 Q.B. at p. 200, per A. L. SMITH, L.J. This is a decision of the Court of Appeal which, as far as I am aware, has never been questioned, and is binding on us. The only evidence apart from evidence of publication produced by the prosecution was copies of issues of the "Sunday Chronicle" of April 20, 1913, containing the terms of the competition, and of May 4, H 1913, containing the names of the prize-winners. The defendants called no evidence, and the question is whether there was evidence before the alderman on which he could find that the scheme was one the result of which depended entirely upon chance. It is unnecessary to read the whole of the terms, which have been referred to by LUSH, J., but I should call attention to the fact that, in addition to the suggestions made and the illustrations given, the terms contained I at the bottom: "A full list of prize-winners in 'Bounties' No. 11 is given on p. 13," and on p. 13 the winning competitions there were under apparently similar conditions: First prize: "Pensioner—Enjoys prolonged existence." Second prize: "Subterfuge—Brings temporary relief." Third prize: "Remuneration—"Regulates toilers' exertions."

It was contended by the Solicitor-General that the scheme on the face of it was one that depended entirely on chance. First, it was said that the regulations nowhere stated that the prizes would be given for the best answers, and that

there was no criterion of merit, and that the offer was, therefore, merely to give prizes in accordance with chance only. It appears to me plain that reading the offer as a whole, even without the examples of prize-winning answers, and certainly with them, the offer was intended to be, and would reasonably be understood to be, an offer of prizes for the best answers. The quality of goodness would be neatness, appropriateness, truth, humour; the test of merit would be the individual taste of the editor. Apart from considerations of money prizes, if this were a proposal written out for a family game I cannot imagine its being understood in any other way. Secondly, it was said that, even if it were an offer of prizes for the best answers, yet the competition was such as to admit of no gradation of merit at all. No literary skill, it was said, was required or could be shown; one answer equalled another answer in inanity, and where all were equal prize-winning could depend only upon chance. I do not agree that literary skill is essential. Any kind of skill or dexterity, whether bodily or mental, in which persons can compete would prevent a scheme from being a lottery if the result depended partly upon such skill or dexterity. Many innocent puzzles or parlour games require no literary skill, and yet lend themselves to competition not merely the result of chance. It seems to me impossible, having in view the conditions and taking into account the prize-winning examples, to say that no varying degrees of skill and ingenuity can be shown or would be shown in complying with the terms of the proposal.

Thirdly, it was said that the prizes offered amounted to £1,000, and that to recoup such a sum would require 40,000 entries at 6d. each; that the time between the last date of entry, April 24, and the day of publishing the answers, May 4, was only ten days; and that, therefore, the proper inference was that the answers could not in the time be examined for merit, and the prizes must, therefore, be taken to be awarded by chance. I do not think this a legitimate inference from the facts above stated. I see no reason for inferring that the proprietors expected or received a sufficient number of coupons with 6d. to recoup themselves £1,000. Advertisement and competition might well account for the offer. No doubt they would receive large numbers of entries. Still less do I see any reason for inferring against a person charged with a crime that he must have intended, or committed, a fraud. There seems to me no reason to suppose that many more than 40,000 answers could not have been examined in the time if a sufficient staff were brought to bear upon them. In the two cases cited to us in the Court of Appeal the actual facts had been investigated and the case did not rest on inference from the amount of the proposed prizes.

I think, therefore, that on the points urged by the prosecution there was no evidence upon which the alderman could find that the offence had been committed. I am far from saying that upon an investigation of the facts it was impossible for the scheme to be proved to have been a lottery. If, for example, it was found that in fact the prizes, or some of them, were distributed by chance, I think the offence might be proved. I doubt whether it is necessary for the prosecution to prove that some or all of the competitors intended to take part in a lottery. If a man publishes a scheme which he intends to conduct as a lottery by making the prizes depend entirely upon chance, it appears to me that he might be said to publish a proposal or scheme for the sale of chances in a lottery, though they are not bought as chances. It is not, however, necessary to decide this. In my opinion, in this case the copies of the newspapers alone were not evidence on which the defendants could have been convicted. I think, therefore, the conviction should be quashed.

CHANNELL, J. (read by LUSH, J.).—I have had the opportunity of reading the judgments of my brothers LUSH and ATKIN in this case, and I concur with some reluctance in the result at which they have arrived. The competition in question seems to me within the mischief of the Lottery Acts, but the reasoning of my brothers' judgments seems to me to be quite sound. Here there is no extrinsic

A evidence upon which it could properly be held that the competition could not be, and could not have been intended to be, carried out according to its terms. That distinguishes the case from *Blyth* v. *Hulton & Co., Ltd.* (4), at least so far as the main ground is concerned upon which the lords justices proceeded in that case. Looking at the terms of the advertisement, although it is not stated expressly here (as it was in the advertisement the subject of *Blyth* v. *Hulton & Co., Ltd.* (4)) that the prizes are to be adjudged according to merit, yet I agree that, looking at it as a whole, it does bear the interpretation that the prize is to be given to the most witty or epigrammatic sentence which complies with the conditions as to the initial letters of the words. That being so, the appointment of a judge whose decision is to be final does not make it a lottery any more than the appointment of such a judge to decide a horse race or a lawsuit makes either a lottery. I have no doubt, therefore, that, so far as regards the first, second, and third prizes, the competition cannot be held proved to be a lottery, but I have much more doubt so far as regards the 200 prizes of £1 and 100 prizes of 10s. These are very like the "consolation" prizes which FLETCHER MOULTON, L.J., much relied on in his judgment in *Blyth* v. *Hulton & Co., Ltd.* (4), but those were boldly stated to be "consolation" prizes, which does not appear to oblige the judge to decide by his idea of merit at all, and I think that the editor, who was the judge there, might according to the terms, and very likely would, give a consolation prize to a person who had frequently competed without success. Here the terms of this competition suggest that the editor can distinguish between the 203rd and the 204th competition in order of merit, and between the 303rd and the 304th. I suspect that long before he got so far in placing his competitors he would be driven by what one of my brothers called the "inanity" of the sentences to decide by chance or even by favouritism. This, perhaps, is only a suspicion. I do not myself think there is much, if any, difference between a criminal case and a civil case on such a point as this, but I think that neither in a civil case nor a criminal case is the burden of proof satisfied, or even shifted, by mere suspicion. I agree that the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors: *R. B. Wheatly, Son, & Daniel*, for *Cobbett, Wheeler & Cobbett*, Manchester; *Director of Public Prosecutions.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

HURST *v.* PICTURE THEATRES, LTD.

[COURT OF APPEAL (Buckley, Kennedy and Phillimore, L.JJ.), July 7, 8, 1914]

[Reported [1915] 1 K.B. 1; 83 L.J.K.B. 1836; 111 L.T. 972; 30 T.L.R. 642; 58 Sol. Jo. 739]

B

Licence—Revocation—Licence coupled with grant—Irrevocability—Licence to enter theatre to see performance—Payment by licensee for seat.

The plaintiff entered a cinematograph theatre belonging to the defendants, paid for a seat, entered the auditorium, and was shown to a seat. Later, servants of the defendants alleged that he had not paid, requested him to leave the theatre, and, when he refused, removed him by force. In an action by the plaintiff claiming from the defendants damages for assault and false imprisonment,

C

Held (by BUCKLEY and KENNEDY, L.JJ., PHILLIMORE, L.J., dissenting): the plaintiff paid his money to enjoy the sight of a particular spectacle during the time that spectacle last, the licence to enter the defendants' premises was only given to him to enable him to see that spectacle, and, therefore, the right to enter those premises was a licence coupled with a grant, and was irrevocable; alternatively, there was a term implied in the licence that it would not be revoked until the spectacle was ended; and, therefore, the plaintiff was entitled to succeed.

D

Wood v. *Leadbitter* (1) (1845), 13 M. & W. 838, criticised, and distinguished.

E

Notes. Considered: *Cox* v. *Coulson*, [1916] 2 K.B. 177; *Said* v. *Butt*, [1920] All E.R.Rep. 232; *Joel* v. *International Circus and Christmas Fair* (1920), 124 L.T. 459; *Winter Garden Theatre (London), Ltd.*, [1947] 2 All E.R. 331. Referred to: *British Actors Film Co.* v. *Glover*, [1918] 1 K.B. 299; *Messenger* v. *British Broadcasting Co.* (1928), 97 L.J.K.B. 251; *Fraser-Wallas* v. *Elsie and Doris Waters*, [1939] 4 All E.R. 609; *Nuthall (1917), Ltd.* v. *Entertainments and General Investment Corpn., Ltd.*, [1947] 2 All E.R. 384; *Bendall* v. *McWhirter*, [1952] 1 All E.R. 1307.

F

As to licences, see 23 HALSBURY'S LAWS (3rd Edn.) 427–433; and for cases see 30 DIGEST (Repl.) 526 et seq. See also tit. THEATRE, 32 HALSBURY'S LAWS (2nd Edn.) 96, and cases at 42 DIGEST 905 et seq.

G

Cases referred to:

(1) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 542, *1771*.

(2) *Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q.B.D. 207; 57 L.J.Q.B. 564; 60 L.T. 89; 52 J.P. 612; 36 W.R. 726; 4 T.L.R. 607, C.A.; 8 Digest (Repl.) 124, *802*.

H

(3) *Frogley* v. *Earl of Lovelace* (1859), John. 333; 70 E.R. 450; 25 Digest 359, *99*.

(4) *McManus* v. *Cooke* (1887), 35 Ch.D. 681; 56 L.J.Ch. 662; 56 L.T. 900; 51 J.P. 708; 35 W.R. 754; 3 T.L.R. 622; 12 Digest (Repl.) 192, *1329*.

(5) *Hewlins* v. *Shippam* (1826), 5 B. & C. 221; 7 Dow. & Ry. K.B. 783; 4 L.J.O.S.K.B. 241; 108 E.R. 82; 19 Digest 7, *2*.

I

(6) *Lowe* v. *Adams*, [1901] 2 Ch. 598; 70 L.J.Ch. 783; 85 L.T. 195; 50 W.R. 37; 17 T.L.R. 763; 30 Digest (Repl.) 541, *1757*.

(7) *Walsh* v. *Lonsdale* (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 W.R. 109, C.A.; 30 Digest (Repl.) 415, *590*.

(8) *James Jones & Sons, Ltd.* v. *Earl of Tankerville*, [1909] 2 Ch. 440; 78 L.J.Ch. 674; 101 L.T. 202; 25 T.L.R. 714; 2 Digest (Repl.) 119, *878*.

(9) *Kerrison* v. *Smith*, [1897] 2 Q.B. 445; 66 L.J.Q.B. 762; 77 L.T. 344; 30 Digest (Repl.) 539, *1732*.

(10) *Tayler* v. *Waters* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E.R. 150; 30 Digest (Repl.) 530, *1680.*

(11) *Malone* v. *Harris* (1859), 11 I.Ch.R. 33; Drury, temp. Nap. 655; 42 Digest 905, *n.*

(12) *Adams* v. *Andrews* (1850), 15 Q.B. 284; 20 L.J.Q.B. 33; 15 L.T.O.S. 499; 117 E.R. 466; sub nom. *Andrews* v. *Adams*, 15 Jur. 149; 19 Digest 28, *122.*

(13) *Taplin* v. *Florence* (1851), 10 C.B. 744; 20 L.J.C.P. 137; 17 L.T.O.S. 63; 15 Jur. 402; 138 E.R. 294; 30 Digest (Repl.) 539, *1729.*

(14) *Cornish* v. *Stubbs* (1870), L.R. 5 C.P. 334; 39 L.J.C.P. 202; 22 L.T. 21; 18 W.R. 547; 30 Digest (Repl.) 540, *1745.*

Also referred to in argument:

Wood v. *Manley* (1839), 11 Ad. & El. 34; 3 Per. & Dav. 5; 9 L.J.Q.B. 27; 3 Jur. 1028; 113 E.R. 325; 18 Digest (Repl.) 342, *904.*

Frith v. *Frith*, [1906] A.C. 254; 75 L.J.P.C. 50; 94 L.T. 383; 54 W.R. 618; 22 T.L.R. 388, P.C.; 28 Digest (Repl.) 823, *678.*

Dauncy v. *Chatterton* (1875), 45 L.J.Q.B. 293; 33 L.T. 628; sub nom. *Dawney* v. *Chatterton*, 40 J.P. 180, C.A.; 42 Digest 907, *34.*

Coleman v. *Foster* (1856), 1 H. & N. 37; 4 W.R. 489; 156 E.R. 1108; 30 Digest (Repl.) 541, *1752.*

Sealey v. *Tandy*, [1902] 1 K.B. 296; 71 L.J.K.B. 41; 85 L.T. 459; 66 J.P. 19; 50 W.R. 347; 18 T.L.R. 38; 20 Cox, C.C. 57, D.C.; 30 Digest (Repl.) 114, *831.*

Duke of Devonshire v. *Eglin* (1851), 14 Beav. 530; 20 L.J.Ch. 495; 51 E.R. 389; 19 Digest 28, *131.*

Wilson v. *Tavener*, [1901] 1 Ch. 578; 70 L.J.Ch. 263; 84 L.T. 48; 30 Digest (Repl.) 541, *1754.*

Appeal by defendants from a decision of CHANNELL, J., in an action tried by him with a jury.

The plaintiff, J. P. Hurst, sued the defendants, Picture Theatres, Ltd., who were the proprietors of a cinema theatre in High Street, Kensington, to recover damages for assault and false imprisonment in removing him from his seat in the theatre which, as he alleged, he was peacefully occupying and for which he had paid. According to the plaintiff's evidence he had visited the theatre several times before Mar. 17, 1913, and was known to the commissionaire who stood at the door of the theatre. On Mar. 17 he went to the pay box, tendered a florin, and asked for a sixpenny seat, and received a metal check and his change. He then went up the passage towards the theatre, but turned back to speak to the commissionaire at the door about certain advertisements with regard to the pictures. He then returned, and was shown to his seat after giving up his check. He was subsequently asked if he came in with a ticket, and was requested to go out and see the manager, which he refused to do. Ultimately a porter, a servant of the defendants, lifted the plaintiff out of his seat, using no unnecessary force, and the plaintiff then walked quietly out. The defendants at the trial sought to prove that the plaintiff had not taken a ticket on the day in question, and, relying on *Wood* v. *Leadbitter* (1), they contended that they were justified, without giving any reason, in calling upon the plaintiff to leave the theatre and, if necessary, to have him forcibly removed. CHANNELL, J., held that, if a visitor to a place of public entertainment had paid for a seat at a performance, he was entitled to retain his seat during the performance, provided he conducted himself properly and observed the regulations of the management, and he expressed the opinion that *Wood* v. *Leadbitter* (1) was now obsolete. He left to the jury the question whether the plaintiff had paid for his seat, and the jury found that he had and returned a verdict for the plaintiff for £150 damages. The defendants appealed.

F. D. Mackinnon for the defendants.

J. A. Hawke, K.C., and *T. E. Haydon* for the plaintiff.

BUCKLEY, L.J.—We have listened in this case to a very ingenious and interesting argument from counsel for the defendants, but, if I may borrow the words of LORD ESHER in *Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (2), although it may have been quite right for him to suggest the point, it seems to me, when considered, to be contrary to good sense. I may add to that that I think it is not only contrary to good sense, but it is contrary to good law as administered since the Judicature Act in this court.

The proposition which counsel sets out to affirm is that if a man has paid for his seat at the opera, or the theatre, and has entered and taken his seat, and is behaving himself quite properly, it is competent to the proprietors of the theatre, merely because they choose so to do, to call upon him to withdraw before he has seen the performance for the enjoyment of which he has paid, and that what he holds, and what he has obtained for his money, is a mere revocable licence to come upon the land of the proprietor of the theatre, who, simply because he chooses, may say, "I revoke that licence. Go." If that proposition be true, it involves the most startling results. KENNEDY, L.J., has suggested one. Suppose that there be sitting in the stalls a man who is a constant patron of the opera or the theatre, to whom the management pay great deference, whether from his rank or his habit of attendance, and he goes to the management and says: "I do not like the person sitting in front of me or next to me; ask him to go." It would be competent to the management to go to that person and say, "Please go. You cannot have your money back. Go." For my own part, I do not see that there is anything to prevent this if the proposition is right, that, having let the seat to A., the management may come to A. at the end of the first act, or before it, and say: "I revoke your licence. Go," and A. has to go out. The management may let the seat to B. for the rest of the performance, and at the end of the second act or sooner they may come to B. and say: "I revoke your licence. Go." He will have to go, and they may let the seat a third time to C. Those are consequences which ensue from this proposition if it be well founded. It was for that reason I said at the outset of my remarks that it seems to me, when the point comes to be considered, it is contrary to good sense. And to my mind it is also contrary to good law.

The proposition is based upon the well-known decision in *Wood* v. *Leadbitter* (1). I want, at the outset, to say what it seems to me *Wood* v. *Leadbitter* (1) decided. In the first place, it affirmed that a mere licence, whether it be under seal, by which I mean a licence not coupled with an interest or a grant, is revocable. It does not matter whether it is sealed or not; it may be revoked. On the other hand, also, it affirmed that if there be a licence coupled with an interest or coupled with a grant, that is not, or at any rate in general is not, revocable. For those two propositions, I read these two sentences from *Wood* v. *Leadbitter* (1) (13 M. & W. at p. 844):

> "A mere licence is revocable; but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may be further observed that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol, and on the other hand a licence by parol coupled with a grant is as irrevocable as a licence by deed provided only that the grant is of a nature capable of being made by parol."

Those are propositions with which, as it seems to me, no one can quarrel. What was decided in *Wood* v. *Leadbitter* (1), I think, was this. The decision might have been on either of two grounds—I will indicate them both—but I think it was on the second of those which I am going to mention. It may have been on the ground that the plaintiff who had bought his ticket for the race meeting had not obtained any grant of the right to come during the currency of the meeting

to see a particular spectacle from its commencement to its termination. If that were the ground, I think that would be erroneous, and that there was a grant, when he paid for his ticket, of the right to go on each day. I conceive he had the right to see what was to be seen on those days, and to do that which he was minded to do in connection with racing during those days. But I do not think that was the ground on which the court decided the case. They decided it upon the ground that no incorporeal right affecting land could be created or transferred otherwise than by deed, a proposition which was discussed with some elaboration in the course of the judgment. What ALDERSON, B., was saying there was: This man has no deed; he has nothing under seal; he has, therefore, no grant; he cannot in this court be heard to say he is a grantee, and because he is not a grantee he is a mere licensee, and being a mere licensee (whether it is under seal, or not under seal, does not make any difference) the licence is revocable.

Let me for a moment discuss this present case upon the footing that *Wood* v. *Leadbitter* (1) stands as good law at this date. I am going to say presently that, to my mind, it does not, but suppose it does. What are the facts of this case, and what is the grant? What the plaintiff in the present action paid his money for was to enjoy the sight of a particular spectacle. He was anxious to go into a picture theatre to see a series of moving pictures during an hour or a couple of hours, whatever the time might be. That which was granted to him, that which was sold to him, was a right of enjoyment by looking at something or other, to attend a performance from its beginning to its end. That which was called the licence, the right to go upon the premises, was only something granted to him for the purpose of enabling him to enjoy that which had been granted him—namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him—namely, the right to see the moving pictures. So that here, to my mind, there was a licence coupled with a grant. If so, *Wood* v. *Leadbitter* (1) does not stand in the way at all. A licence coupled with a grant is not revocable. *Wood* v. *Leadbitter* (1) affirmed as much.

So far I have been treating the case as if *Wood* v. *Leadbitter* (1) were law now as administered in every court. Let us see how that matter stands. *Wood* v. *Leadbitter* (1) was decided in a court of law before the Judicature Acts. Therefore, it was a case to be decided simply upon the principles which are applicable in a court of law as distinguished from a court of equity. What was the principle which would have been administered in a court of equity in the year 1845, the date of *Wood* v. *Leadbitter* (1), or subsequently? I find that elicited best, I think, from looking at the decision of PAGE WOOD, V.-C., in *Frogley* v. *Earl Lovelace* (3). Other cases have been cited to us, but I select this one because it seems to me the most pertinent, and to state the proposition in the most plain manner. The facts in *Frogley* v. *Earl of Lovelace* (3) were these. The defendant was lessor to the plaintiff of certain lands for twenty-one years; he had executed a lease to him, but previously to the execution of the lease this memorandum, which was not under seal, was indorsed on the lease:

> "It is hereby agreed that the lessee should have the exclusive right of sporting over, and killing the game upon, the lands included in the within written lease, and also upon the lands adjacent thereto belonging to the said earl during the continuance of the said term, if the lessee shall so long live; he undertaking to keep and leave a fair stock of game thereupon, and not to keep such an excessive quantity of hares and rabbits as to do damage to the said earl or his under-tenants in the neighbourhood."

On Feb. 9, 1859, the lessor served the lessee with a notice that after that date he revoked, rescinded, and put an end to that agreement. The question was whether

he could do so or not. The suit was brought in a court of equity for specific performance for the execution of a proper instrument under seal giving effect to the document which is not under seal, and the plaintiff moved for an injunction as prayed by his bill, which was an injunction to give effect to his rights until that deed had been executed, and that was the matter which came before the vice-chancellor. The vice-chancellor says this (John. at p. 333):

> "The memorandum is a mere writing not under seal, and the case of *Wood* v. *Leadbitter* (1) has decided that, in order to acquire a right such as that which is here claimed by the plaintiff, an instrument under seal is necessary; and that, at law, an instrument purporting to grant such a right, though given for a valuable consideration, is revocable at any time, and without paying back the money. At law, therefore, the plaintiff has no remedy until the defendant shall have executed a deed containing a proper and legal grant of the exclusive right of sporting in accordance with the terms of the agreement."

Finding, however, that the plaintiff's interest was incapable of being supported at law upon the footing of *Wood* v. *Leadbitter* (1), he gave him relief in equity, and in so doing he says:

> "It appears to me that the plaintiff is clearly entitled to an injunction in the interval until the defendant shall have executed a proper legal grant of the right claimed by the plaintiff."

What could be plainer? According to *Wood* v. *Leadbitter* (1) the plaintiff would have been dismissed from a court of law; he would have had no case. He comes into a court of equity, and he obtains relief in equity his remedy being given until he has been clothed with such rights under a proper instrument as would give him a remedy at law, and then he is left to his legal rights. I will only read a few words from the judgment of KAY, J., in *McManus* v. *Cooke* (4) which is really to the same effect. I need not state the facts. KAY, J., says (35 Ch.D. at p. 695):

> "*Hewlins* v. *Shippam* (5), *Wood* v. *Leadbitter* (1), and other authorities at common law, were cited, and it was argued that the right claimed could only be granted by deed, and that therefore the licence was revocable; but this common law doctrine was not allowed to prevail in equity."

As I have shown in *Lord Lovelace's Case* (3), it was not allowed to prevail in equity.

The position of matters now is, that the court is bound under the Judicature Acts to give effect to equitable doctrines. The question we have to consider is whether, having regard to equitable considerations, *Wood* v. *Leadbitter* (1) is now law, meaning that it is a decision which can be applied in its integrity in a court which is bound to give effect to equitable considerations. In my opinion, it is not. COZENS-HARDY, J., in *Lowe* v. *Adams* (6) said this ([1901] 2 Ch. at p. 600):

> "Whether *Wood* v. *Leadbitter* (1) is still good law having regard to *Walsh* v. *Lonsdale* (7) is very doubtful."

PARKER, J., in *James Jones & Sons, Ltd.* v. *Earl of Tankerville* (8), says this ([1909] 2 Ch. at p. 443):

> "An injunction restraining the revocation of the licence when it is revocable at law may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right of equity which, but for the absence of a seal, would be a right at law, and since the Judicature Act it may well be doubted whether the absence of a seal in such a case can be relied on in any court."

Now, of course, what was relied on in *Wood* v. *Leadbitter* (1), and rightly relied on at that date, was that there was not an instrument under seal, and, therefore,

there was not a grant and the licensee could not say that he was not a mere licensee, but a licensee with a grant. That is now swept away. It cannot be said as against the man that he is a licensee with no grant merely because there is not an instrument under seal which gives him a right at law.

There is another way in which this matter may be put, and that is this. If there be a licence with an agreement to give a person a right (an agreement not to revoke the licence) that, if given for value, is an enforceable right. If the facts here are, as I think they are, that the licence which was granted was a licence to enter the building, and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke that until the play had run to its termination. It was then a breach of contract to break the obligation not to revoke the licence, and for that the decision in *Kerrison* v. *Smith* (9) is an authority. So far I have dealt with the law.

On the facts of the case there was an assault on the plaintiff, and an assault of a grievous kind. He was exposed to indignity, and for that indignity the jury have given him a verdict. The defendants had, I think, for value contracted that the plaintiff should see a certain spectacle from its commencement to its termination, whatever it was. They broke that contract, and it was a tort on their part to remove him. I do not say the assault was of violent kind because, like a wise man, the plaintiff gave way to superior force, and left the theatre. The defendants sought to justify the assault by saying that they were entitled to remove him because he had not paid. He had paid, and the jury have so found. Failing on that question of fact, they say that they were entitled to remove him because his licence was revocable. In my opinion, it was not. There was no justification for the assault here committed, and under the circumstances it was for the jury to give the plaintiff such a sum as was right for the assault which was committed upon him, and for the serious indignity to a gentleman of being seized and treated in this way in a place of public resort. The jury have found that he was originally in the theatre as a spectator, that the assault was committed upon him, and that it was a wrongful act. I think that the appeal fails and must be dismissed with costs.

KENNEDY, L.J.—I am entirely of the same opinion. We have heard a very careful and interesting argument chiefly affecting the character of *Wood* v. *Leadbitter* (1). Personally I am indifferent whether that case has or has not been subjected to some slight imputations upon its character. It was a decision of a great court, and I desire to treat it myself with the utmost respect, but I do not think it touches this case at all.

The plaintiff was in this picture theatre, and was assaulted and subjected to indignities which were entirely unjustifiable by those who handled him and compelled him to go out. What is his position? He says: "I was there by right; I was occupying a seat for which I had paid in a place of public entertainment"; and he says that if you pay a certain price you must be entitled to the possession of the seat. The seat, I understand, is one which he may choose; it is not a reserved seat. He did enter that seat, and they took him out again practically, in the eyes of the law, by force. The defendants have to justify that, and they justify it by saying that there is a point of law apart from the defence in fact which failed—namely, that the plaintiff was not there by right because he had not fulfilled the condition of payment. The defendants say through counsel in this court: "In point of law, even if you did pay, even if you had performed those conditions, I had a right to turn you out, although you might be behaving in the way which those who go into places of public entertainment (by implied contract at any rate) are bound to behave." But the burden, remember, lies upon the defendants. The plaintiff is there primâ facie in possession of a place in the theatre, and they must justify this taking of him out. They say: "In law we are justified because all that you had was a revocable licence. When we use the words 'revocable licence'," says the defendants, "we meant that we can at will require you, and you are bound to obey, to leave this building. Therefore, as we can do so, you

must go quietly, and if you do not go quietly we were right, using no more force than was necessary, in putting you out." For the reasons I ventured to refer to in the course of the argument by way of illustration (which have been better illustrated by BUCKLEY, L.J., in his judgment) such an astounding conclusion is one which one would require, as a matter of law and as a matter of common sense, to be strictly justified. The justification is hung entirely on the peg of the doctrine which is said to be the doctrine established, by the considered decision of a great Court of Exchequer in the year 1845 in *Wood* v. *Leadbitter* (1).

With regard to that decision, I am not going myself to say, and I should feel I was presumptuous in saying, that it was not at the time a perfectly good decision. It has been quoted frequently with respect, and I am not going to say a word in diminution of that respect. But what was the decision? It is stated, and I think with perfect correctness, in 13 M. & W. at p. 838,

> "A right to come and remain for a certain time on the land of another can be granted only by deed; and a parol licence to do so, though money be paid for it, is revocable at any time, and without paying back the money."

One must be to some extent guided by the view which I hold that in this case, as BUCKLEY, L.J., has intimated, the contract would not be correctly expressed by saying that there was a right to come and remain for a certain time on the land of another. In this case, I think there was, if you were to put the contract into terms, a contract that there should be an irrevocable right to remain until the conclusion of this performance which lasted one or two hours, longer or shorter as the case may be. I do not rely upon that, and for this reason, that in *Wood* v. *Leadbitter* (1), which one is bound to examine with absolute candour and frankness—and I will assume it was not absent from the minds of counsel and the judges—the man who was upon the racecourse might have said: "I have the same sort of contract," but he did not say it, and, therefore, I will leave the matter alone. What was decided is stated there, namely, that the grant, to be effectual and irrevocable, must be a grant valid in law, and such a grant could only be made by deed. Passages have been quoted from that judgment, and I am not going to take up time by quoting them again, but I do think that it is important to remember that at the very commencement of the judgment of ALDERSON, B., he points out that the question arose upon the plea and its replication, and the replication, he points out, is that: "At the time of such removal, the plaintiff was in the said close by the leave and licence of Lord Eglintoun." Therefore, it was not there suggested by the plaintiff, who had to reply: "My right to remain is not merely by leave and licence of Lord Eglintoun: I have an implied contract that I should be there without revocation." Therefore, as I say, one must deal with the matter upon that pleading, and upon that pleading the judgment of the court cannot be put more specifically or more correctly than in the passage I have quoted from the headnote (13 M. & W. 838). In order to make good your case, you must show that there was a grant by deed; if you show only a parol licence, you have no case. There are many passages which show that. When the learned ALDERSON, B., is commenting on the case, with which they differ, of *Tayler* v. *Waters* (10), he says (13 M. & W. at p. 854):

> "It was taken for granted that, if the Statute of Frauds did not apply, a parol licence was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in the nature of an easement, was by some inadvertence kept entirely out of sight."

There is language used in the passage (ibid. at p. 845) which has been already cited by BUCKLEY, L.J., to the same effect, and which states this in one sentence only which I need repeat:

> "But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by

A deed, there the licence is a mere licence; it is not an incident to a valid grant, and it is therefore revocable."

Does that apply now? Since the Judicature Acts there is no doubt that we have to apply the principles of equity, and can there be any doubt that according to the principles of the cases which have been cited, there was in this case that B which was not granted by a deed, and which need not be granted by a deed, and that, therefore, there was that which is valid now in equity as a good title upon which the plaintiff, being in possession of a seat, had a right to stay and say: "It is no use your saying to me I am obliged to go because I have not got in the language of *Wood* v. *Leadbitter* (1) a grant by deed; this is an interest which, whether you call it an easement or not, is an interest which I can now acquire C in equity by parol, and I have that interest."

The passage which has been quoted from PARKER, J.'s judgment, in *James Jones & Sons* v. *Earl of Tankerville* (8) states that which I assume to be right—namely, that it is not merely a question of obtaining specific performance and compelling a person to do anything. The right which we have to administer in equity is one which prevents either party from breaking his contract, and protects D a right in equity which, but for the absence of the seal, would be a right of law. There is also the judgment of KAY, J., in *McManus* v. *Cooke* (4), where the learned judge sets out a number of propositions established by the authorities in regard to these questions, and among other things says (35 Ch.D. at p. 697) that the equity applies

E "wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the court would direct to be specifically performed. The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired."

F I have come to the conclusion, therefore, putting aside altogether the question what the contract was in this case, that in fact to treat it upon the basis of *Wood* v. *Leadbitter* (1) being good law is wrong because of modern legislation. It is, and, I will say, happily, no longer good law to justify such an act as the defendants have done here. In this particular case I think I ought to add that that which we are now asserting has already been recognised in the passage to which I referred G in the course of the argument in SIR FREDERICK POLLOCK'S works upon TORTS, and also in ROSCOE'S NISI PRIUS. The former points out carefully, 9th Edn. p. 390, referring to *Wood* v. *Leadbitter* (1), and *Tayler* v. *Waters* (10), which was there overruled, that even in such a case, where there had been part performance, specific performance is sometimes decreed, and equitable rights are now enforced by all the courts. Under those circumstances it seems to me that there was here H a good equitable right which rendered the act of the defendants bad in law.

PHILLIMORE, L.J.—All one's sympathy in this case must be for the plaintiff, and if he had failed in getting his judgment for the sum given to him by the jury for the unjustifiable assault, I should have thought at any rate he ought to have had judgment for his sixpence, and very properly, as the issue which was raised I reflected upon his character, with costs, and I should not have seen any reason to differ from a learned judge who certified for High Court costs. But one must not allow one's sympathy for him to make one decide that which one does not think good law. Although I express my opinion with the very greatest diffidence, and put it, as will be seen later, in the nature of doubts, more as if the matter were non-proven than as a decision, I still feel bound to express those doubts. My diffidence arises, first of all, from the fact that I am differing from an opinion of CHANNELL, J., from whom, in a long course of simultaneous judicial career I

hardly ever found myself in disagreement; secondly, of course, and even more strongly, because my brethren here feel so clearly about the case. With regard to the results which are supposed to flow from an opposite conclusion, I can only say that if people are impracticable and unbusinesslike, very serious results would flow in either direction. Certainly I should advise the owners of places of entertainment, and still more the owners of picture theatres who have not the remedy of refusing to continue the performance if a person is intractable, to put conditions upon their tickets in future.

I start by saying that I think the circumstances in this case make it indistinguishable from *Wood* v. *Leadbitter* (1)—not only from *Wood* v. *Leadbitter* (1), but from *Tayler* v. *Waters* (10) which was overruled by *Wood* v. *Leadbitter* (1) and *Malone* v. *Harris* (11), which is, I think, a case of great importance and approves *Wood* v. *Leadbitter* (1) and the overruling of *Tayler* v. *Waters* (10) by *Wood* v. *Leadbitter* (1). In all these cases for a sum of money a ticket is given which purported to admit to the defendants' close for the purpose of enabling the person admitted, not to have any particular spot which could be said to be in any sense demised to him, but to stand or sit, or stand and sit during the progress of an entertainment which was conducted in the close, or was visible from the close. It seems to me the circumstances, therefore, are indistinguishable from *Wood* v. *Leadbitter* (1). My second stage is that *Wood* v. *Leadbitter* (1), when it was decided, was good law. I am aware that it is only a decision of the Court of Exchequer, and not of the Court of Exchequer Chamber, but it received very shortly afterwards the approval of both the other courts, and, therefore, has the weight of all the common law judges at the time. It was decided in 1845. Incidentally, no doubt, it was referred to and approved in 1850 in *Adams* v. *Andrews* (12) by the Court of Queen's Bench. It was referred to and approved in 1851 in *Taplin* v. *Florence* (13), by the Court of Common Pleas, and a later approval of the same case is furnished by *Cornish* v. *Stubbs* (14) in 1870, when the great weight of WILLES, J., was added. It was also approved (I am speaking again before the Judicature Act) in *Malone* v. *Harris* (11), where the Lord Chancellor stated that an action at law had been brought, but had failed, and rightly failed, on the ground that the case was indistinguishable from *Wood* v. *Leadbitter* (1), and from *Tayler* v. *Waters* (10), which *Wood* v. *Leadbitter* (1) had very properly overruled. Therefore, I think the weight of *Wood* v. *Leadbitter* (1) was exceedingly great. The equity cases—I am speaking of the equity cases before the Judicature Act—do not, in my opinion, detract in any way from *Wood* v. *Leadbitter* (1). All the cases which have been cited relate to an interest given in land, and the whole point of the decision in *Wood* v. *Leadbitter* (1) was that the grant of the ticket there gave no interest in land, but only a licence—it mattered not whether by deed or otherwise, all licences, whether by deed or otherwise, being at law revocable. Not only did *Wood* v. *Leadbitter* (1) receive that approval before the Judicature Act, but, to my mind, it has been inferentially approved in *Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (2), and certainly approved by COLLINS, J., in *Kerrison* v. *Smith* (9) [both after the Judicature Act]. In *Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (2), of course, it was only approved in the sense that it was distinguished, but, without going into detail about it, there are expressions of each of the three judges, the Master of the Rolls, LINDLEY, L.J., and, perhaps most clearly, LOPES, L.J., which show the grounds upon which they distinguish the case without detracting from its value.

The next point I have to consider is: Has the Judicature Act made a difference? If there was a grant of an interest in land, yes. If there was not a grant of an interest in land, no. *Walsh* v. *Lonsdale* (7) is a case very much in point. I assume for this purpose that the law may be taken to be stated by SIR GEORGE JESSEL, M.R., the other learned judges only dealing with details. He puts the point with that breadth and clearness which everybody who has pleaded before that great judge.

A or has read his judgments, knows was his characteristic. In the course of the argument he said (21 Ch.D. at p. 14):

> "A tenant holding under an agreement for a lease of which specific performance would be decreed stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act a tenant from year to year; he holds under the agreement, and every branch of the court must now give him the same rights."

B

Still more clearly in his judgment he says (ibid.):

> "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly: one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it."

C

In other words, the lessee has the estate which equity thinks he ought to have. That has no bearing on the question if there is no estate, and no interest in land given by the document relied on. Assume, therefore, that there was a contract, and assume that the purported revocation was a breach of the contract, and assume that of which I am not certain, that equity would give specific performance of such a contract. Specific performance does not necessarily put a man before he has got specific performance in the legal possession which he gets after he has got specific performance. It does in the case of interests in land, because the interest in land now is the interest which he had before. But it does not necessarily do so with regard to interests arising on a contract. I do not say that from my own view only; it appears to be the view taken by two text-book writers of importance —CLERK AND LINDSELL, and SIR FREDERICK POLLOCK. I should not myself have much relied on text-book writers, but I have the example of COLLINS, J., for citing the one, and KENNEDY, L.J., for citing the other. COLLINS, J., in *Kerrison* v. *Smith* (9), puts it in this way ([1897] 2 Q.B. at p. 448):

D E F

> "It was conceded that the grantor has a right to revoke a licence, but the point set up by the plaintiff that there was a contract, for the breach of which the plaintiff was entitled to recover damages, was never properly dealt with. There appears to be no case in which the point has been specifically raised and decided as to whether there is a right to maintain an action for breach of contract if a licence is revoked, although there is a right to revoke the licence, but on principle it seems to me that the two rights are compatible with one another."

G

That is to say, the licence can be revoked, in which case the licensee becomes a trespasser if he stays on, but nevertheless there may be a contract for which he may recover damages. I do not say myself that that is necessarily sound law, but it is the view taken by COLLINS, J. At the end of his judgment he quotes CLERK AND LINDSELL ON TORTS (2nd Edn.), p. 302:

H

> "Such a licence, though it may have been made by deed and for valuable consideration, is revocable at any time by the licensor; the licensee cannot after revocation justify entering upon the land for the purpose of using the privilege; his only remedy against his licensor where the revocation is wrongful is upon the contract."

I

SIR FREDERICK POLLOCK ON TORTS ((9th Edn.), p. 390) is even more explicit:

> "The revocation of a licence is in itself no less effectual, though it may be a breach of contract. If the owner of land or a building admits people thereto on payment, as spectator of an entertainment or the like, it may be a breach of contract to require a person who has duly paid his money and entered, to

go out, but a person so required has no title to stay, and if he persists in staying he is a trespasser. His only right is to sue on the contract, as he clearly may do where a contract exists, when, indeed, he may get an injunction, and so be indirectly restored to the enjoyment of his licence." A

I repeat some words for particular reasons: "But a person so required has no title to stay, and if he persists in staying, is a trespasser." That is the issue to be determined in this case. The action is for assault, and the defence is: You were a trespasser; you had a warning to go, and I removed you, using no more force than necessary. The question is whether the plaintiff was a trespasser. Therefore, it does not follow, because specific performance of the contract could be obtained, that till the contract has been specifically performed, the plaintiff has the rights which he will get when the contract has been given specific performance. B C

However, there is a possible view of this case which may not make it necessary to take that view. I am not at all sure (here, I think, I differ from COLLINS, J.) that the real construction of *Wood* v. *Leadbitter* (1) is not that the contract is not that which people think it was. I am not at all sure that the contract must not be said to be this: "I cannot grant you a licence because I cannot bind myself not to make it revocable, not even if I do so by deed; therefore, I do not because the law does not allow me to do so. The real contract is this: In consideration of such a sum of pounds, shillings, and pence, I give you a licence to enter my close, and to remain there during a certain entertainment. If I revoke the licence for other than good cause I will repay you the money you have paid." I put carefully "during the entertainment." I think, unless the licensor lets the licensee stop until the end, he must return him all his money, and I throw out for consideration whether the real virtue of the decision in *Wood* v. *Leadbitter* (1) is not that that is the nature of this contract. However that may be, not being able to distinguish this case from *Wood* v. *Leadbitter* (1), and thinking *Wood* v. *Leadbitter* (1) was and remains good law and that the equity doctrines do not affect it, I am obliged to come to the conclusion, which I have tried to express with clearness, and I hope to be considered to express with diffidence, that my view as it at present exists, unmoved by further argument, is that the appeal ought to be allowed. D E F

Appeal dismissed.

Solicitors: *Rooks, Spiers, Wales & Ward*; *Simmons & Simmons*. G

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

SPALDING *v.* A. W. GAMAGE, LTD. AND ANOTHER

[CHANCERY DIVISION (Sargant, J.), June 24, 25, 1914]

[Reported [1914] 2 Ch. 405; 83 L.J.Ch. 855; 58 Sol. Jo. 722; 111 L.T. 829]

Costs—Taxation—Review—Separate defences and counsel of two companies appearing by same solicitor—Disallowance on taxation of separate defence of one company—Discretion of master—Three-fourths of share capital of that company held by other company—R.S.C., Ord. 65, r. 27 (8), r. 27 (41).

G., Ltd., and B., Ltd., the defendants to an action, appeared by the same solicitor, but put in separate defences and employed separate leading counsel at the trial. The plaintiffs won the action at first instance, but on appeal to the Court of Appeal the defendants succeeded and the action was dismissed, with costs in the court below and in the Court of Appeal. On taxation the taxing master, acting under R.S.C., Ord. 65, r. 27 (8), disallowed the costs of the separate defence put in by B., Ltd., and of their counsel on the ground that the two companies were practically identical and should have joined in the same defence. G., Ltd., held three-fourths of the share capital in B., Ltd. On a summons to review the taxation taken out by the defendants,

Held: under Ord. 65, r. 27 (41), the court had power to review the discretion exercised by the taxing master under r. 27 (8) of Ord. 65, and in the present case the court would direct the taxing master to allow the costs he had disallowed because on the facts the two defendants were not practically identical and there was a reasonable probability of there being substantial differences in their defences at the trial.

Ager v. *Blacklock & Co.* (1) (1887), 56 L.T. 890, applied.

Beattie v. *Lord Ebury* (2) (1873), 29 L.T. 419, not applied.

Boswell v. *Coaks* (3) (1887), 36 Ch.D. 444, distinguished.

Notes. The whole of Ord. 65, except certain irrelevant rules, was revoked by the Rules of the Supreme Court (No. 3), 1959, and replaced by the rules set out in Sched. 2 thereto, cited as the Supreme Court Costs Rules, 1959. It would appeal from the discretion of the taxing master. It was held, on appeal to the ANNUAL PRACTICE, 1962, at pp. 1879, 1880, that the present decision remains for consideration under r. 7 of the 1959 rules.

As to costs allowed on taxation, see 30 HALSBURY'S LAWS (3rd Edn.) 430 et seq. as to review of a taxation by the court see ibid., 438. For cases on costs where one solicitor is acting for two or more defendants see DIGEST (PRACTICE) 930.

Cases referred to:

(1) *Ager* v. *Blacklock & Co.* (1887), 56 L.T. 890; Digest (Practice) 930, *4706.*

(2) *Beattie* v. *Lord Ebury* (1873), 43 L.J.Ch. 80; 29 L.T. 419; 22 W.R. 68; Digest (Practice) 930, *4703.*

(3) *Boswell* v. *Coaks* (1887), 36 Ch.D. 444; 58 L.T. 97; 35 W.R. 209, C.A.; Digest (Practice) 930, *4704.*

Summons to review taxation.

On Aug. 30, 1912, A. G. Spalding commenced an action against A. W. Gamage for an injunction to restrain them from selling, advertising, offering for sale, or supplying footballs other than the plaintiffs' "Improved Orb" or "Specially tested Orb" footballs as and for the plaintiffs' "Improved Orb" or "Specially tested Orb" footballs, and damages. In the following October the defendants Messrs. Benetfink & Co., Ltd., a company in which A. W. Gamage held a controlling interest, were added as defendants to the action, and the same relief was sought against both defendants. Both defendants appeared by the same solicitors, but they put in separate defences and employed separate leading counsel at the trial. The plaintiffs won their action before SARGANT, J., and an injunction was granted with an

inquiry as to damages. The defendants appealed, and appeared on the appeal by the same counsel, and the decision of the court below was reversed and the action was dismissed with costs in the court below and in the Court of Appeal. On taxation the taxing master, after considering certain objections carried in by the plaintiffs, disallowed the costs of the separate defence put in by Benetfink & Co. and the costs of their counsel, giving as his reason that the two companies were practically identical, and that the defendants should have joined in the same defence. The defendants then carried in counter-objections to the taxation on the ground that the two defendants were separate and distinct companies and that the severance of the defence of the defendants Benetfink & Co. and their separate representation at the trial were necessary and proper steps for their protection in the circumstances of the case. The defendant companies, A. W. Gamage and Benetfink & Co., were separate companies and separate and distinct entities, although A. W. Gamage, Ltd., had a controlling interest in Benetfink & Co. by reason of the fact that they held upwards of three-fourths of the issued capital. Had Benetfink & Co. appeared in the action by a separate solicitor, it could not be contended that they were not entitled to all their costs under the order of the Court of Appeal herein. Primâ facie, Benetfink & Co. were entitled to their costs (being the items disallowed by the taxing master), and the onus was on the plaintiff to show that the case was within the terms of Ord. 65, r. 27, sub-r. 8. The action was divided into two separate parts, first, the case based on the newspaper advertisements which were complained of, and secondly, the case based upon actual passing off and incidents in the shops of the different defendants alleged to amount to passing off. As regards the first part, the common case of both defendants was that the newspaper advertisements were not actionable, and the separate case of Benetfink & Co. was that they were not responsible for the advertisements or their consequences. This latter defence failed before SARGANT, J., and was not argued in the Court of Appeal, but it was their substantial independent defence and it could not have been properly or conveniently argued together with the defence of A. W. Gamage. As regards the second part of the case, the incidents affecting the two defendants were wholly distinct, and it might well have been necessary or prudent for the counsel representing them to take distinct and even inconsistent lines in dealing with the evidence of the plaintiffs. In any case, Benetfink & Co. were advised by counsel that they should deliver a separate defence and be separately represented at the trial, and it was a reasonable precaution for them to adopt and act upon such advice. In answer to these counter-objections the taxing master stated his reasons for the disallowance as follows:

> "Messrs. Gamage in their advertisements describe Messrs. Benetfink as their city depot. See advertisement herewith. And at the meeting of Gamages, the chairman referred to the profits of their city branch Benetfinks. I have come to the conclusion that as the parties are practically identical and the defences practically identical, separate defences and a separate leader should not be allowed; and these objections are therefore overruled."

This summons was taken out by the defendants, Benetfink & Co. asking that the defendants' counter-objections might be allowed and that it might be referred back to the taxing master to vary his certificate.

Romer, K.C., and *D. M. Kerly* for the defendants.
Martelli, K.C., and *A. F. Topham* for the plaintiffs.

SARGANT, J.—This is a summons asking that certain counter-objections by the defendants to a taxation of costs in the action may be allowed and that it may be referred back to the taxing master to vary the certificate accordingly. The matter arises in this way. [HIS LORDSHIP stated the facts and read the taxing master's reasons, and continued:] With regard to the practical identity of the defendants it seems to me that the taxing master must have been adopting the view put before

him on behalf of the plaintiffs that by reason of the identity of the holding of the share capital in the two companies the two defendants were to be treated as substantially one entity, although I am not in the least suggesting that the taxing master meant to say that they were the same entity in point of law. The facts appear to be that A. W. Gamage hold a controlling interest, that is to say, more than three-fourths of the share capital in Benetfink & Co., but to my mind that makes very little difference. I have to consider at any rate the shareholders who hold the remaining portion of the capital of Benetfink & Co., and I can imagine that when the two concerns are being carried on under different names it may be of great importance to the undertaking carried on under the name of Benetfink & Co. that they should not be held liable in an action of this kind, although at the same time A. W. Gamage should be held liable. With regard to that portion of the taxing master's reasons it seems to me that he has allowed certain considerations to influence him which should not have been allowed to influence him.

Then I come to the more important question whether the defences of Benetfink & Co. and A. W. Gamage were practically identical, because, even though the parties were not practically identical, still, if I thought that the defences were practically identical I should hold, under the circumstances, that they were not entitled to put in separate defences or to appear separately at the trial. [HIS LORDSHIP considered the facts and came to the conclusion that there was a reasonable probability that at the trial the case of Benetfink & Co. would be in one or more respects substantially different from the case of A. W. Gamage, and continued:] Taking that view of the case I am of opinion that the two defendants were entitled to put in separate defences, and if the matter lay with me I should come to the conclusion that they were well advised in so doing. It is extremely awkward for counsel when the cases of two sets of defendants are at all different to throw themselves first into the defence of one set of defendants and afterwards into that of the other set of defendants, although there may not be any material incompatibility between them. I am relieved, however, from pursuing that subject because counsel on behalf of the plaintiffs admitted that for the purposes of the problem which I have to consider, the question is whether there was a reasonable probability of there being a substantial difference in the two defences, and in my opinion there was.

There arises a more important general question whether this is a case in which I am entitled to review the taxation of the taxing master, or whether it is a case in which he has such a discretion that I am precluded from reviewing it. The terms of sub-r. (8) of Ord. 65, r. 27 are these:

> "Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred the same shall be disallowed."

Counsel on behalf of the defendants has contended that this sub-rule does not apply to a case which involves the whole costs of the action when ordered to be paid by one party to the other. He says that, in view of the decision of the Court of Appeal dismissing this action with costs, it was not open to the taxing master to disallow altogether the bill of costs of one set of defendants unless some special direction to that effect had been given by the Court of Appeal. He says that the sub-rule only applies to interlocutory proceedings in the course of an action and not to the defence at the trial. I see no reason for so limiting the general effect of the sub-rule, at any rate, no fresh reason arising since the decisions to which I

am about to refer, and I hold that the sub-rule is one which is applicable to the present case. But is the taxing master under that sub-rule the sole judge? Has he such a discretion that it is not open to review? On that point three cases have been cited to me, one—*Beattie* v. *Lord Ebury* (2)—a case under the old practice of bill and answer decided in 1873, in which BACON, V.-C., undoubtedly came to the conclusion that the discretion was thrown on the taxing master and that the court could not interfere with the exercise of that discretion. The matter afterwards came before KEKEWICH, J., in *Ager* v. *Blacklock & Co.* (1), a case in which the defendants had joined in a statement of defence and afterwards had appeared separately at the trial, so that it was a stronger case than the present in favour of the disallowance of separate sets of costs. The action was brought against printers and publishers, and KEKEWICH, J., held that the matter was not one purely in the taxing master's discretion, and came to the conclusion that the defences of the two defendants were so separate in principle that two sets of costs ought to be allowed, and held that he was entitled, as a question of principle, to overrule the decision of the taxing master, and make an order accordingly under which both sets of defendants would get their costs.

The only other authority is the well-known case of *Boswell* v. *Coaks* (3), where the House of Lords, in allowing an appeal from the Court of Appeal and re-affirming the judgment of FRY, J., made a special order (36 Ch.D. at p. 445) that

> "in taxing the costs below, both in the High Court of Justice and in the Court of Appeal, the taxing master do consider whether any of the defendants in the cause who appeared separately had sufficient reason for severing in their defences, and if and in so far as it shall appear that they had not, then the said taxing master shall allow only one set of costs, or only as many sets of costs as he shall think right."

The taxing master allowed six separate sets of costs to six separate defendants, and, on a summons to review the taxation, NORTH, J., held that there was no appeal from the discretion of the taxing master. It was held, on appeal to the Court of Appeal, that, as the House of Lords had delegated to the taxing master the decision of the question how many sets of costs should be allowed, no appeal would lie from his decision unless he altogether omitted to exercise his discretion. In my opinion, that decision was not a decision at all upon the terms of the sub-rule now in question. It was a decision upon the meaning of the special order made by the House of Lords in that particular case, and the reason for the decision is perhaps most neatly put in an interlocutory observation of BOWEN, L.J., where he says (36 Ch.D. at p. 451), "Has not the House of Lords delegated its jurisdiction as to costs to the taxing master?" That being so, I prefer to follow the decision of KEKEWICH, J., in *Ager* v. *Blacklock & Co.* (1) as against the decision of BACON, V.-C., in *Beattie* v. *Lord Ebury* (2). Taking, as I do, the view that the case is one not purely for the discretion of the taxing master, but that I have power to review the taxation under sub-r. (41) of r. 27 of Ord. 65, and coming, as I do, to the conclusion that no importance is to be attached to the fact that the share capital of Benetfink & Co. is very largely held by A. W. Gamage, and also holding, as a matter of fact, that there were sufficient reasonable grounds for thinking that there would be a divergence between the defences of the two defendants at the trial on material points, I am of opinion that the decision of the taxing master to strike out altogether the items referring to the separate costs of Benetfink & Co. cannot be sustained, and that the matter should be referred back to him to be reviewed in the light of the judgment which I have pronounced.

Order accordingly.

Solicitors: *Lawrance Webster, Messer & Nicholls; Ward, Perks & Terry.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re LANCASHIRE AND YORKSHIRE BANK'S LEASE. W. DAVIS & SON *v.* LANCASHIRE AND YORKSHIRE BANK

[CHANCERY DIVISION (Eve, J.), January 16, 1914]

[Reported [1914] 1 Ch. 522; 83 L.J.Ch. 577; 110 L.T. 571]

Landlord and Tenant—Notice to quit—Time for giving—Tenancy for term of years certain determinable "after expiration of first three years of term"—Notice given before expiration of three years to quit on date after expiration.

Lessors demised premises to lessees for a term of five years from Mar. 25, 1911, at a yearly rent of £225 payable by equal payments on the usual quarter days. The lease provided that "after the expiration of the first three years of the term . . . if the lessees shall desire to determine this lease and shall give to the lessors six calendar months' previous notice in writing . . . such notice to determine on any quarter day" then immediately on the expiration of such notice the lease should cease and be void. On Nov. 14, 1913, i.e., before the first three years of the term had expired, the lessees gave six calendar months' notice to quit the premises on June 24, 1914, which was after the expiry of the first three years of the term.

Held: the notice was invalid since on the true construction of the lease notice to quit could not be given before the expiration of the first three years of the term on Mar. 24, 1914, and, therefore, the earliest date at which the lessees could determine the tenancy was Sept. 29, 1914.

Gardner v. *Ingram* (1) (1889), 61 L.T. 729, applied.

Notes. Distinguished: *British Iron and Steel Corpn., Ltd.* v. *Halpern*, [1946] 1 All E.R. 408. Referred: *Associated London Properties, Ltd.* v. *Sheridan*, [1946] 1 All E.R. 20.

As to notice to quit a tenancy for a term of years certain, see 23 HALSBURY'S LAWS (3rd Edn.) 516. For cases on time for giving notice see 31 DIGEST (Repl.) 485 et seq.

Cases referred to:

(1) *Gardner* v. *Ingram* (1889), 61 L.T. 729; 54 J.P. 311; 6 T.L.R. 75, D.C.; 31 Digest (Repl.) 494, *6202*.

(2) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62; 43 W.R. 228; 11 T.L.R. 154; 39 Sol. Jo. 165; 14 R. 135, C.A.; 31 Digest (Repl.) 488, *6136*.

Also referred to in argument:

Bird v. *Baker* (1858), 1 E. & E. 12; 28 L.J.Q.B. 7; 32 L.T.O.S. 74; 4 Jur. N.S. 1148; 7 W.R. 8; 120 E.R. 812; 30 Digest (Repl.) 487, *1304*.

Thompson v. *Maberly* (1811), 2 Camp. 573, N.P.; 31 Digest (Repl.) 485, *6113*.

Cannon Brewery Co. v. *Nash* (1898), 77 L.T. 648; 14 T.L.R. 158, C.A.; 31 Digest (Repl.) 486, *6116*.

Wride v. *Dyer*, [1900] 1 Q.B. 23; 69 L.J.Q.B. 17; 81 L.T. 453; 64 J.P. 118; 48 W.R. 73; 16 T.L.R. 23; 44 Sol. Jo. 27, D.C.; 31 Digest (Repl.) 499, *6246*.

Langton v. *Carleton* (1873), L.R. 9 Exch. 57; 43 L.J.Ex. 54; 29 L.T. 650; 34 Digest 63, *387*.

Page v. *More* (1850), 15 Q.B. 684; 117 E.R. 618; 31 Digest (Repl.).

Re John Brinsmead & Sons, Ltd. (1912), 56 Sol. Jo. 253; 31 Digest (Repl.) 486. *6118*.

Originating Summons raising the question whether on the true construction of a lease plaintiffs, the tenants, were entitled to determine the lease on June 24, 1914, by six months' prior notice given on Nov. 14, 1913, before the expiry of the first three years of the lease.

The agreed facts were as follows. A ground-floor messuage or shop and yard, No. 381, Lord Street, Southport, were demised by the defendants to the plaintiffs for a term of five years from Mar. 25, 1911, at the yearly rent of £225, to be paid by equal quarterly payments on June 24, Sept. 29, Dec. 25, and Mar. 25 in every year of the tenancy, the first of such payments to be considered due on Mar. 25, 1911, and every succeeding quarter's rent to become due and to be payable (if required) and recoverable in advance. The indenture of lease contained a provision in the following terms:

> "And it is hereby further agreed and declared that after the expiration of the first three years of the term hereby granted, if the lessees shall desire to determine this lease and shall give to the lessors six calendar months' previous notice in writing of such their desire, such notice to determine on any quarter day, and shall up to the time of such determination pay the rent and observe and perform the covenants on their part hereinbefore contained, then and immediately on the expiration of such notice this present demise and everything herein contained shall cease and be void, but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of covenant."

On Nov. 14, 1913, the plaintiffs gave notice to the defendants' agent "in accordance with the option contained in our lease" that it was their "intention to quit and deliver up possession of the messuage and shop," No. 381, Lord Street, Southport, on June 24, 1914.

The plaintiffs contended that, according to the true construction of the lease, they had power to determine the lease on June 24, 1914, on giving six months' previous notice in writing, and that this notice, dated Nov. 14, 1913, was a good and effective notice for this purpose. The defendants' contention was that no notice to determine the lease could, according to the true construction of the lease, be given prior to the expiration of three years of the term—namely, Mar. 24, 1914.

Courthope Wilson for the plaintiffs.
J. Rutherford for the defendants.

EVE, J.—If this question of construction were free from authority, I am by no means certain that my decision would take the form which, since there is authority, it must take.

I think, after a careful examination of the proviso here, it is impossible to distinguish this case from *Gardner* v. *Ingram* (1), on which counsel for the defendants relies. I need not read the proviso over again, but it comes, I think, to this, that the term created shall cease and determine if after the expiration of the first three years thereof the lessees shall so wish and shall give to the lessors six calendar months' notice in writing of their wish, and then, in their favour, it is added that such notice need not expire on the anniversary of the day on which the tenancy commenced, but may expire on any quarter day. So read, the clause in this lease is indistinguishable from the clause construed by Lord Coleridge, C.J., and Bowen, L.J., in the case of *Gardner* v. *Ingram* (1). Counsel for the lessees has endeavoured to distinguish the two cases on the ground that whereas in this case the notice may expire on any quarter day, in *Gardner* v. *Ingram* (1) the notice could only be effective if it expired on the anniversary of the quarter day on which the term commenced, and from this he argues that whereas in this case the notice in fact would take effect after the expiration of the first three years of the term, the notice in *Gardner* v. *Ingram* (1), being given for the third anniversary of the day on which the tenancy commenced, was in substance a notice to determine "at" and not "after" the expiration of the first three years. This element, he urges, sufficiently distinguishes the two cases. The point he takes was not mentioned in *Gardner* v. *Ingram* (1), but it is, I think, disposed of by

what was said by LINDLEY, L.J., in delivering the judgment of himself and LORD HALSBURY in *Sidebotham* v. *Holland* (2) ([1895] 1 Q.B. at p. 383), where he points out that a notice to determine an annual tenancy commencing on or from a particular day in one year is a good notice if given for the day immediately antecedent to the anniversary in another year. From this it follows that in *Gardner* v. *Ingram* (1) the three years could properly be treated as expiring at midnight on Sept. 28, and the notice for Sept. 29 as taking effect after that expiration, and, if so, the point on which counsel for the plaintiffs seeks to distinguish the two cases vanishes. For these reasons I come to the conclusion that the contention put forward on behalf of the landlords is right, and that on the summons I must hold that the notice purporting to determine this tenancy on June 24, 1914, is invalid, and that the earliest date at which the lessees can determine the tenancy is Sept. 29, 1914. The costs must follow the result.

Order accordingly.

Solicitors: *J. Labron Johnson & Son*, Liverpool; *Mawdsley & Hadfield*, Southport.

[*Reported by* W. P. PAIN, ESQ., *Barrister-at-Law.*]

MORISON *v.* LONDON COUNTY AND WESTMINISTER BANK, LTD.

[COURT OF APPEAL (Lord Reading, C.J., Buckley and Phillimore, L.JJ.), January 19, 20, 27, 28, 29, April 8, 1914]

[Reported [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273]

Bank—Negligence—Cheque—Conversion—Cheque signed by agent per pro.—Signature in fraud of principal—Agent credited with proceeds—Money had and received—Forgery—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 25.

The plaintiff, who carried on business under the style of B. M. & Co., gave H. A., his manager, authority to draw cheques, signed by him per pro. B. M. & Co., for business purposes on the firm's account at the N. P. Bank, whom the plaintiff directed to honour such cheques. In 1905 H. A. opened an account at the defendant bank, and from 1907 to 1911 he fraudulently drew fifty per pro. cheques on the plaintiff's account, and paid them into his account at the defendant bank who credited him with the proceeds thereof. In an action by the plaintiff against the defendant bank to recover damages for the conversion of the cheques,

Held: (i) the defendant bank's title to the cheques was defective as H. A. had issued them to the bank in fraud of the plaintiff; the bank had dealt with the cheques in a manner inconsistent with the rights of the plaintiff, their true owner; and, therefore, primâ facie, the bank was liable to him for the conversion of his property, the damages being the face value of the cheques; but, on the evidence, the plaintiff had ratified H. A.'s transactions, and so the action failed.

Per LORD READING, C.J.: [As regards the cause of action] the plaintiff was entitled to waive the tort of conversion and sue for the same amount as money had and received.

(ii) section 25 of the Bills of Exchange Act, 1882, which provides: "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the

agent in so signing was acting within the actual limits of his authority" is declaratory of the common law and does not extend beyond it or alter it. The effect of the section is that, notwithstanding the negotiable character of the instrument, the principal is not liable on the instrument, even to a holder in due course, if the agent in so signing the cheque has exceeded the limits of his authority; when a bill of exchange so signed in excess of authority has been honoured, s. 25 does not confer a right to recover the proceeds—the section goes to the validity of the instrument: it does not deal with rights arising in respect of the disposition of the proceeds; nevertheless, when considering whether a bank has acted negligently in accepting a cheque as valid, the fact that the signature to the cheque was made per pro. and was not the signature of the principal is not to be entirely disregarded.

(iii) the cheques were not forgeries, for, although they had been created for an improper purpose and in fraud of the plaintiff, they had been created by a person authorised to create them, and the plaintiff's bank was bound to honour them, and a signature cannot be valid in the hands of one person today and a forgery in the hands of another person tomorrow.

Notes. Considered: *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia and China*, [1928] All E.R. Rep. 285; *Reckitt* v. *Barnett, Pembroke and Slater*, [1928] 2 K.B. 244; *Midland Bank* v. *Reckitt*, [1932] All E.R. Rep. 90; *Slingsby* v. *District Bank Ltd.*, [1931] All E.R. Rep. 143. Referred to: *Taxation Comrs.* v. *English, Scottish and Australian Bank*, [1920] A.C. 683; *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins*, *Same* v. *Barclays Bank*, [1924] All E.R. Rep. 230; *Goldman* v. *Cox* (1924), 40 T.L.R. 423; *Australian Bank of Commerce* v. *Perel*, [1926] A.C. 737; *Lloyds Bank* v. *Savory & Co.*, [1932] All E.R. Rep. 106; *Carpenters Co.* v. *British Mutual Banking Co.*, [1937] 3 All E.R. 811; *Marquess of Bute* v. *Barclays Bank, Ltd.*, [1954] 3 All E.R. 365.

As to the collection of cheques by a bank, see 2 HALSBURY'S LAWS (3rd Edn.) 176–186, and as to forgery see ibid., vol. 8, p. 836 et seq. For cases see 3 DIGEST (Repl.) 219–223, 253–258, and 15 DIGEST (Repl.) 1228 et seq.

Cases referred to:

(1) *M'Combie* v. *Davies* (1805), 6 East, 538; 2 Smith, K.B. 557; 102 E.R. 1393; 43 Digest 494, *332*.

(2) *Gordon* v. *London, City and Midland Bank*, *Gordon* v. *Capital and Counties Bank*, [1902] 1 K.B. 242; 71 L.J.K.B. 215; 86 L.T. 98; 50 W.R. 276; 18 T.L.R. 157; 7 Com. Cas. 37, C.A.; affirmed sub nom. *Capital and Counties Bank, Ltd.* v. *Gordon, London City and Midland Bank, Ltd.* v. *Gordon*, [1903] A.C. 240; 72 L.J.K.B. 451; 88 L.T. 574; 51 W.R. 671; 19 T.L.R. 462; 8 Com. Cas. 222, H.L.; 3 Digest (Repl.) 264, *754*.

(3) *Fine Art Society, Ltd.* v. *Union Bank of London, Ltd.* (1886), 17 Q.B.D. 705; 56 L.J.Q.B. 70; 55 L.T. 536; 51 J.P. 69; 35 W.R. 114; 2 T.L.R. 883, C.A.; 3 Digest (Repl.) 231, *587*.

(4) *Bobbett* v. *Pinkett* (1876), 1 Ex.D. 368; 45 L.J.Q.B. 555; 34 L.T. 851; 24 W.R. 711; 3 Digest (Repl.) 257, *726*.

(5) *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris*, [1894] 2 Q.B. 157; 63 L.J.Q.B. 674; 10 T.L.R. 424; 10 R. 259; 3 Digest (Repl.) 268, *774*.

(6) *Bavins Junior and Sims* v. *London and South Western Bank, Ltd.*, [1900] 1 Q.B. 270; 69 L.J.Q.B. 164; 81 L.T. 655; 48 W.R. 210; 16 T.L.R. 61; 5 Com. Cas. 1, C.A.; 3 Digest (Repl.) 272, *789*.

(7) *Macbeth* v. *North and South Wales Bank*, [1908] 1 K.B. 13; 77 L.J.K.B. 19; 97 L.T. 699; 24 T.L.R. 5, C.A.; affirmed sub nom. *North and South Wales Bank, Ltd.* v. *Macbeth, North and South Wales Bank, Ltd.* v. *Irvine*, [1908] A.C. 137; 77 L.J.K.B. 464; 98 L.T. 470; 24 T.L.R. 397; 52 Sol. Jo. 353; 13 Com. Cas. 219, H.L.; 43 Digest 484, *207*.

(8) *Hollins* v. *Fowler* (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73, H.L.; 3 Digest (Repl.) 70, *101.*

(9) *R.* v. *White* (1847), 2 Car. & Kir. 404; 1 Den. 208; 9 L.T.O.S. 475; 11 J.P. 806; 2 Cox, C.C. 210, C.C.R.; 15 Digest (Repl.) 1236, *12,623.*

(10) *R.* v. *Holden*, [1912] 1 K.B. 483; 81 L.J.K.B. 327; 106 L.T. 305; 76 J.P. 143; 28 T.L.R. 173; 56 Sol. Jo. 188; 22 Cox, C.C. 727; 7 Cr. App. Rep. 93, C.C.A.; 15 Digest (Repl.) 1235, *12,622.*

(11) *Stagg* v. *Elliott* (1862), 12 C.B.N.S. 373; 31 L.J.C.P. 260; 6 L.T. 433; 9 Jur. N.S. 158; 10 W.R. 647; 142 E.R. 1187; 6 Digest (Repl.) 103, *793.*

(12) *Bissell & Co.* v. *Fox Bros. & Co.* (1885), 53 L.T. 193; 1 T.L.R. 452, C.A.; 3 Digest (Repl.) 262, *742.*

(13) *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.* (1900), 16 T.L.R. 236; 5 Com. Cas. 188; 3 Digest (Repl.) 267, *768.*

(14) *Gompertz* v. *Cook* (1903), 20 T.L.R. 106; 6 Digest (Repl.) 104, *799.*

(15) *Bevan* v. *National Bank, Ltd.*, *Bevan* v. *Capital and Counties Bank, Ltd.* (1906), 23 T.L.R. 65; 3 Digest (Repl.) 264, *756.*

(16) *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q.B. 7; 65 L.J.Q.B. 80; 73 L.T. 473; 1 Com. Cas. 170; 6 Digest (Repl.) 337, *2438.*

(17) *Holland* v. *Russell* (1863), 4 B. & S. 14; 2 New Rep. 188; 32 L.J.Q.B. 297; 8 L.T. 468; 11 W.R. 757; 122 E.R. 365, Ex.Ch.; 1 Digest (Repl.) 773, *3047.*

(18) *Great Western Rail. Co.* v. *London and County Banking Co., Ltd.*, [1901] A.C. 414; 70 L.J.K.B. 915; 85 L.T. 152; 50 W.R. 50; 17 T.L.R. 700; 45 Sol. Jo. 690; 6 Com. Cas. 275, H.L.; 3 Digest (Repl.) 263, *751.*

(19) *Ogden* v. *Benas* (1874), L.R. 9 C.P. 513; 43 L.J.C.P. 259; 30 L.T. 683; 38 J.P. 519; 22 W.R. 805; 3 Digest (Repl.) 270, *781.*

(20) *Cocks* v. *Masterman* (1829), 9 B. & C. 902; Dan. & Ll. 329; 4 Man. & Ry. K.B. 676; 8 L.J.O.S.K.B. 77; 109 E.R. 335; 3 Digest (Repl.) 259, *728.*

(21) *R.* v. *Muirhead* (1908), 73 J.P. 31; 25 T.L.R. 88; 53 Sol. Jo. 164; 1 Cr. App. Rep. 189, C.C.A.; 14 Digest (Repl.) 659, *6689.*

(22) *Banks* v. *Gibson* (1865), 34 Beav. 566; 6 New Rep. 373; 34 L.J.Ch. 591; 29 J.P. 629; 11 Jur. N.S. 680; 13 W.R. 1012; 55 E.R. 753; 36 Digest (Repl.) 603, *1644.*

(23) *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A.C. 49; 72 L.J.C.P. 1; 87 L.T. 457; 51 W.R. 289; 19 T.L.R. 56, P.C.; 3 Digest (Repl.) 256, *720.*

Also referred to in argument:

Attwood v. *Munnings* (1827), 7 B. & C. 278; 1 Man. & Ry. K.B. 66; 6 L.J.O.S.K.B. 9; 108 E.R. 727; 1 Digest (Repl.) 345, *247.*

Smith v. *Prosser*, [1907] 2 K.B. 735; 77 L.J.K.B. 71; 97 L.T. 155; 23 T.L.R. 597; 51 Sol. Jo. 551, C.A.; 1 Digest (Repl.) 367, *394.*

Crumplin v. *London Joint Stock Bank, Ltd.* (1913), 109 L.T. 856; 30 T.L.R. 99; 19 Com. Cas. 69; 3 Digest (Repl.) 268, *772.*

Reid v. *Rigby & Co.*, [1894] 2 Q.B. 40; 63 L.J.Q.B. 451; 10 T.L.R. 418; 10 R. 280; 1 Digest (Repl.) 369, *409.*

Morison v. *Kemp* (1912), 29 T.L.R. 70; 1 Digest (Repl.) 362, *360.*

Freeman v. *Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 12 Digest (Repl.) 74, *414.*

Barber v. *Gingell* (1799), 3 Esp. 60; 1 Digest (Repl.) 363, *369.*

Bank of England v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 39 W.R. 657; 7 T.L.R. 333; sub nom. *Vagliano* v. *Bank of England*, 55 J.P. 676, H.L.; 3 Digest (Repl.) 250, *686.*

M'Kenzie v. *British Linen Co.* (1881), 6 App. Cas. 82; 44 L.T. 431; 29 W.R. 477, H.L.; 3 Digest (Repl.) 259, *734.*

Morris v. *Bethell* (1869), L.R. 5 C.P. 47; 21 L.T. 330; 18 W.R. 137; 1 Digest (Repl.) 363, *370.*

Lacave & Co. v. *Crédit Lyonnais*, [1897] 1 Q.B. 148; 66 L.J.Q.B. 226; 75 L.T. 514; 13 T.L.R. 60; 2 Com. Cas. 17; 3 Digest (Repl.) 263, *749*.

Arnold v. *Cheque Bank*, *Arnold* v. *City Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 3 Digest (Repl.) 260, *738*.

Re Land Credit Co. of Ireland, *Ex parte Overend Gurney & Co.* (1869), 4 Ch. App. 460; 39 L.J.Ch. 27; 20 L.T. 641; 17 W.R. 689, L.JJ.; 6 Digest (Repl.) 91, *712*.

Kepitigalla Rubber Estates, Ltd. v. *National Bank of India, Ltd.*, [1909] 2 K.B. 1010; 78 L.J.K.B. 964; 100 L.T. 516; 25 T.L.R. 402; 53 Sol. Jo. 377; 14 Com. Cas. 116; 16 Mans. 234; 3 Digest (Repl.) 253, *699*.

Walker v. *Manchester and Liverpool District Banking Co., Ltd.* (1913), 108 L.T. 728; 29 T.L.R. 492; 57 Sol. Jo. 478; 3 Digest (Repl.) 255, *710*.

Carlisle and Cumberland Banking Co. v. *Bragg*, [1911] 1 K.B. 489; 80 L.J.K.B. 472; 104 L.T. 121, C.A.; 36 Digest (Repl.) 42, *215*.

Patent Safety Gun Cotton Co. v. *Wilson* (1880), 49 L.J.Q.B. 713, C.A.; 6 Digest (Repl.) 98, *766*.

Lewes Sanitary Steam Laundry Co., Ltd. v. *Barclay & Co., Ltd.* (1906), 95 L.T. 444; 22 T.L.R. 737; 11 Com. Cas. 255; 3 Digest (Repl.) 254, *708*.

Swan v. *North British Australasian Co.* (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur. N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex.Ch.; 6 Digest (Repl.) 69, *607*.

Kelly v. *Solari* (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24; 35 Digest 151, *487*.

Russo-Chinese Bank v. *Li Yau Sam*, [1910] A.C. 174; 79 L.J.P.C. 60; 101 L.T. 689; 26 T.L.R. 203, P.C.; 1 Digest (Repl.) 418, *767*.

Howard v. *Duncan* (1870), 3 Lans. 174.

Union Bank v. *Middlebrook* (1865), 33 Conn. 95.

Brook v. *Hook* (1871), L.R. 6 Exch. 89; 40 L.J.Ex. 50; 24 L.T. 34; 19 W.R. 508; 1 Digest (Repl.) 454, *1056*.

Akrokerri (Atlantic) Mines, Ltd. v. *Economic Bank*, [1904] 2 K.B. 465; 73 L.J.K.B. 742; 91 L.T. 175; 52 W.R. 670; 20 T.L.R. 564; 48 Sol. Jo. 545; 9 Com. Cas. 281; 3 Digest (Repl.) 238, *621*.

Newall v. *Tomlinson* (1871), L.R. 6 C.P. 405; 25 L.T. 382; 1 Digest (Repl.) 774, *3049*.

Oliver v. *Bank of England*, [1902] 1 Ch. 610; 71 L.J.Ch. 388; 86 L.T. 248; 50 W.R. 340; 18 T.L.R. 341; 7 Com. Cas. 89, C.A.; 21 Digest 137, *7*.

Starkey v. *Bank of England*, [1903] A.C. 114; 72 L.J.Ch. 402; 88 L.T. 244; 51 W.R. 513; 19 T.L.R. 312; 8 Com. Cas. 142, H.L.; 1 Digest (Repl.) 763, *2988*.

Sheffield Corpn. v. *Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 10 Com. Cas. 287; 3 L.G.R. 992; 12 Mans. 248, H.L.; 1 Digest (Repl.) 763, *2989*.

Bank of England v. *Cutler*, [1908] 2 K.B. 208; 77 L.J.K.B. 889; 98 L.T. 336; 24 T.L.R. 518; 52 Sol. Jo. 442, C.A.; 3 Digest (Repl.) 133, *29*.

Appeal by the defendants against a decision of LORD COLERIDGE, J.

The following statement of the facts is taken from the judgment of LORD READING, C.J.:—The plaintiff brought his action to recover £1,885 3s. 9d. damages for the conversion of fifty cheques drawn upon and honoured by the National Provincial Bank for his account, or, alternatively, for the same amount as money had and received by the defendants to his use. At the trial of the action without a jury LORD COLERIDGE, J., gave judgment for the plaintiff against the defendants for the amount claimed, and the defendants appeal from that judgment. The plaintiff carried on business as an insurance broker in the city of London in the name of Bruce Morison & Co. In 1888 he gave authority to one Harry Abbott, who had been some years in his employment, to draw cheques for the purpose of the

plaintiff's business on the banking account of Bruce Morison & Co. at the National Provincial Bank, and to sign them "per pro. Bruce Morison & Co., H. Abbott," and the plaintiff gave written directions and authority to that bank to honour for his account all cheques so signed by Abbott. From 1888 until the end of 1911 Abbott signed cheques per procuration for the plaintiff which were duly honoured. In 1900 the plaintiff, who continued to have implicit confidence in Abbott, appointed him manager of his business, and thenceforward until the end of 1911 Abbott acted as manager of such business. About January, 1912, the plaintiff discovered that Abbott by means of the per pro. signature had drawn a number of cheques on the plaintiff's aforesaid banking account, and had fraudulently applied them to his own use. In June, 1905, Abbott had opened a banking account in his own name for his own private purposes and without the knowledge of the plaintiff at the Euston branch of the defendant bank. He was introduced to the defendants by one of their staff as the manager of a firm of insurance brokers. He continued to draw cheques upon and pay cheques into this account with the defendants until the beginning of 1912, when the defendants were first made aware that Abbott had grossly abused the plaintiff's confidence, and had by means of the per pro. signature drawn a number of cheques for his own purposes on the plaintiff's account at the National Provincial Bank, which had been duly honoured. It appeared that from May 29, 1907, until Nov. 23, 1911, fifty cheques so drawn, and when necessary so indorsed, for sums amounting, in the aggregate, to £1,885 3s. 9d. had been paid by Abbott into the defendants' bank at Euston for collection by the defendants on his behalf. All the cheques with the exception of two open or uncrossed cheques were crossed, forty-six were crossed generally, and two were crossed to the defendants. The sums were collected in the ordinary way by the defendants during the said period from the National Provincial Bank, and the plaintiff's account was duly debited with the same. The plaintiff makes no complaint against the National Provincial Bank. It is clear that they were bound in pursuance of the directions and authority given in 1888 to honour the said cheques on his account. The defendants placed the amount of such cheques to the credit of Abbott's account with their branch as and when they were paid in, and Abbott drew against them when the cheques had been cleared. During the currency of his banking account with the defendants Abbott paid in other moneys and cheques. It was, as the manager said, not a very active account, but a satisfactory account from the bank's point of view. Abbott drew cheques against his credit balance with the defendants, which were in the ordinary course duly honoured by them.

With reference to the earlier cheques, LORD COLERIDGE, J., thus stated the facts: The proceeds of six cheques were collected in 1907 and 1908 for Abbott by the defendants. The first was an open or uncrossed cheque, to which s. 82 of the Bills of Exchange Act, 1882 [repealed: see now Cheques Act, 1957, s. 4], does not apply. The next three were drawn to "selves or order," and indorsed by Abbott per procuration. The other two were made payable to "Abbott or order," and were indorsed by Abbott. As to the later cheques during the later years 1909, 1910, and 1911 the defendants collected for Abbott's account proceeds of forty-four cheques signed by him per procuration for the plaintiff, most of which were drawn to the defendants or bearer, as appears from the following list: One, dated Aug. 27, 1909, not crossed and therefore not within s. 82; five were drawn to "selves or order," four to "Abbott or order," one to defendants or order, one to "bearer," one to "selves or bearer," one to "Abbott or bearer," and thirty to defendants or bearer.

The original authority from the plaintiff to Harry Abbott, as shown by the plaintiff's letter of April 7, 1888, to the National Provincial Bank, was a general authority "to pay and honour all cheques drawn per procuration by Abbott on the plaintiff." The balance-sheet of Bruce Morison & Co. for 1907 showed loss of capital. Abbott's explanations did not satisfy the plaintiff, and the plaintiff had the accounts investigated by accountants. Part of the £5,929 deficiency was debited

to Abbott. The two cheques in question in that year formed part of the balance, and the balance-sheet contained an entry of what was on Dec. 31, 1907, the balance of an account in the firm's books called "exchanged cheques account." The balance-sheet for the year 1908 showed the debit balance against Abbott in an account in the firm's books called Abbott's "private account." On Oct. 1, 1909, a copy of Abbott's "private account" from Jan. 1, 1908, to May 22, 1909, was forwarded to the plaintiff. On Nov. 16, 1909, the plaintiff wrote to Abbott confirming his engagement as manager of his insurance broker's business on terms that Abbott should not incur liabilities, except in ordinary business transactions of the firm, without the plaintiff's previous sanction.

In their statement of defence the bank claimed that they became holders in due course of the cheques and credited them in good faith as cash to Harry Abbott and as to such of the cheques as were crossed in good faith and without negligence within s. 82 of the Bills of Exchange Act, 1882. They also relied upon the fact that the National Provincial Bank paid the cheques as bankers of the plaintiff without objection by the plaintiff, and on the fact that the plaintiff did not object during the period in which such payments had been made to Abbott's drawing and dealing with the cheques, and that if Abbott was acting without authority the plaintiff ratified Abbott's dealings by not objecting to the sums represented by the cheques being debited in his account with the National Provincial Bank. They, further, pleaded estoppel.

By the Bills of Exchange Act, 1882:

> "Section 25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority. . . . Section 82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Sir Robert Finlay, K.C., and *R. A. Wright* for the bank.
Greer, K.C., *Bartley Denniss* and *Harold Christie* for the plaintiff.

Cur. adv. vult.

April 8, 1914. The following judgments were read.

LORD READING, C.J., stated the facts, and continued: Upon these facts the plaintiff, in my judgment, is entitled primâ facie to recover the sum claimed either as damages for conversion or as money had and received. LORD ELLENBOROUGH in *M'Combie* v. *Davies* (1) said (6 East. at p. 540):

> "A man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?"

This principle has been frequently applied in actions to recover the proceeds of cheques or other negotiable instruments for the payment of money, collected by a bank without authority: see *Gordon* v. *London, City and Midland Bank* (2), [1902] 1 K.B. at pp. 264-5; and *Fine Art Society, Ltd.* v. *Union Bank of London, Ltd.* (3), and cases therein cited. In the present case the defendants were not mere intermediaries, but became the holders of the cheques when these were issued to them by Abbott. It is not disputed that the defendants received them in good faith, but it is contended that they received them from a person who had no authority to draw them or to issue them to the defendants, and could give no title, or only a defective title, to the defendants. The cheques were at all times, till issued, the property of the plaintiff. They never were the property of Abbott, who had no title to them. The defendants, having received the cheques for collection on behalf of Abbott, presented them, and obtained the proceeds from the

A plaintiff's bank, and applied the same to the credit of Abbott's account. Abbott had no account at the National Provincial Bank, and was only in possession of the cheque forms as manager for the plaintiff. When he had filled up the forms and signed them "per pro. Bruce Morison & Co.," the plaintiff was the true owner of the instruments and Abbott had no authority to dispose of the cheques for his own purposes, or to pay them into his own banking account. They came into existence B as cheques on the plaintiff's banking account by the fraud of Abbott and were issued by him to the defendants in fraud of the plaintiff. The defendants collected the proceeds, and their right to retain the money so collected must depend upon the validity of Abbott's title to the cheques, and if such title was invalid, upon the protection of s. 82 of the Bills of Exchange Act, 1882. In my judgment, the defendants' title to such cheques was defective, as Abbott issued them to the C defendants in fraud of the plaintiff. The defendants dealt with them in a manner inconsistent with the rights of the plaintiff, who was the true owner, and are liable to him for the conversion of his property. Damages for such conversion may be, and, in my opinion, are, in this case the face value of the instruments. The plaintiff is entitled to compensation for the loss he has suffered by reason of the conversion, and that loss is the equivalent of the amounts paid to the defendants D by the National Provincial Bank and debited to the plaintiff's banking account. The defendants have wrongfully obtained money on valuable instruments of the plaintiff, and his banking account at the National Provincial Bank has been depleted to the amounts paid on the cheques. The plaintiff has lost the sums which the defendants have wrongfully received, and the plaintiff is, therefore, entitled to recover such sums as damages for the conversion. That such damages E may be given for the conversion of a cheque or bill of exchange has been decided in many cases: see *Bobbett* v. *Pinkett* (4); *Fine Art Society, Ltd.* v. *Union Bank of London, Ltd.* (3); *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris* (5); *Bavins Junior and Sims* v. *London and South Western Bank, Ltd.* (6); *Capital and Counties Bank, Ltd.* v. *Gordon* (2); *Macbeth* v. *North and South Wales Bank* (7). The same result would be reached by the plaintiff upon the F alternative claim for money had and received. The plaintiff is entitled to waive the tort and sue for the same amount as money had and received to his use: *Hollins* v. *Fowler* (8).

The plaintiff further contended that the signatures per procuration by Abbott to the cheques were forgeries, and that, therefore, the instruments were nullities G and the defendants could not retain the proceeds obtained by means of forged instruments. In fact the signature was the genuine signature of Abbott in the form authorised by the plaintiff. The forgery was, as alleged by the plaintiff, in the misuse of his authority to sign cheques per procuration as this amounted to the making of a bill per procuration without lawful authority or excuse and with intent to defraud, and it was contended that all the necessary elements of a statutory H forgery under the Forgery Act, 1861 s. 24 [repealed: see now Forgery Act, 1913, s. 2 (2) (a)], were thus present. I cannot accept this contention. The National Provincial Bank, the plaintiff's bankers, were admittedly bound to honour the cheques so signed by Abbott under the direction or authority given to them by the plaintiff in 1888. The cheques bore genuine signatures by Abbott notwithstanding that these were made by Abbott with the intention of misapplying the I cheques and the proceeds. If, as is admitted, the National Provincial Bank were entitled, and, indeed, bound, to honour cheques so signed, these were valid instruments for that purpose, and, if so, they cannot be forgeries in the hands of the defendants. The signature to a cheque cannot be a valid signature in the hands of one person and a forgery in the hands of another; it cannot be valid today and a forgery tomorrow, although in some circumstances, by the application of the doctrine of estoppel, a person whose money has been wrongfully obtained by a forgery might be precluded from setting it up. In my judgment, the statute mentioned does not make it a forgery if a genuine signature is affixed by a person

who indicates on the face of the document that he signs per procuration on behalf of another, notwithstanding that the authority so to sign has been misused and fraudulently used. Section 24 of the Act of 1861 was passed to meet the difficulty created by the decision in *R.* v. *White* (9), where it was held that a person who signed the name of another per procuration could not be convicted under s. 39 of the Forgery Act, 1830 [repealed]. The recent case of *R.* v. *Holden* (10) does not assist the plaintiff. It decides that a partner who has no authority to sign the firm name to a bill and makes and issues a bill signed with his partner's name without authority and also with his own name is guilty of forgery. The question we are considering is whether Abbott in so drawing and issuing the cheques had committed the crime of forgery, and not whether he had committed a criminal offence.

To the claim thus primâ facie established by the plaintiff the defendants set up a defence based upon the protection afforded by s. 82 of the Bills of Exchange Act, 1882, to bankers who collect payment of cheques for their customers if the bankers have acted in good faith and without negligence. The defendants' good faith is not questioned, but it is contended that they did not act without negligence. LORD COLERIDGE, J., being of opinion that s. 25 of the Bills of Exchange Act, 1882, must be read with s. 82, came to the conclusion that the defendants were put upon inquiry by the mere fact that the cheques bore a signature per procuration, and that as the defendants failed to make inquiry they cannot be held to have acted without negligence. I do not agree with this view of the effect of s. 25. Section 82 only comes into operation when a banker receives payment of the proceeds for his customer, and, therefore, when the cheque has been honoured. The effect of s. 25 is that, notwithstanding the negotiable character of the instrument and the obligations upon the signatory to such an instrument to holders, and more particularly to a holder in due course and notwithstanding the authority given by the principal to the agent to sign negotiable instruments per procuration so as to bind the principal, the principal is not liable upon the instrument, even to a holder in due course, if the agent in so signing the cheque has exceeded the actual limits of his authority. The principal in such circumstances and before the instrument is honoured could refuse to pay the cheque or bill upon presentation, and would have a good defence to a claim, even when made by a holder in due course, upon the cheque or bill. I agree with LORD COLERIDGE, J., that this section is declaratory of the common law: see *Stagg* v. *Elliott* (11); but it does not, in my judgment, extend beyond it or alter it. When a bill so signed in excess of authority has been honoured, s. 25 does not confer a right to recover the proceeds. If such a right exists in the particular case it must be found elsewhere. Nevertheless, the fact that the signature to the cheques is made per procuration and is not the signature of the principal is not to be entirely disregarded. In my opinion, when considering whether the bank has acted without negligence, it is to be borne in mind with other facts and circumstances. It is also to be observed that LORD COLERIDGE, J., did not rely exclusively upon his view of s. 25 as bearing upon s. 82, for in a later part of his judgment he refers to the payment in of these cheques by the agent to his private account at another bank as another circumstance which should have caused the bank to make inquiries. Whether or not the evidence establishes that the bank did not act without negligence is a question of fact, and in strictness should be determined separately with regard to each of the fifty cheques signed by Abbott.

With reference to the earlier transactions, limited to the years 1907 and 1908, I agree with the decision of LORD COLERIDGE, J., that the defendants did not act without negligence. The defendants knew that Abbott was manager to a firm of insurance brokers, and the signature on the cheques was express notice to them that he was purporting to act in the signing and indorsing of these cheques as agent. The most cursory examination would have shown the defendants that they were collecting payment for their customer of cheques drawn by him as agent upon

A the account of his principal at another bank, and that the first three of these crossed cheques were made payable on the face of the instruments to the principal or order and issued to the bank by means of the indorsement of the agent purporting to act for the principal. For a firm to pay salary or commission or any debt to a manager by cheques made payable to the firm or order, and for a manager to pay cheques so drawn to his own private banking account after himself indorsing them B as agent for the payees, appear to me transactions so out of the ordinary course that they ought to have aroused doubts in the defendants' mind and caused them to make inquiry. Counsel for the bank argued that the courts had only deprived bankers of the immunity afforded to them by s. 82 when the cheques collected by the bank were signed by third persons in favour of the principal, and he sought thus to distinguish this case from *Bissell & Co.* v. *Fox Bros. & Co.* (12); *Hannan's* C *Lake View Central, Ltd.* v. *Armstrong & Co.* (13); *Gompertz* v. *Cook* (14); *Bevan* v. *National Bank, Ltd.* (15), and other such cases, but I can see no distinction in principle between these authorities and the present case. They are merely instances of the application of the principle of law to the facts and circumstances of particular cases.

Different considerations apply, however, to the collection of the later cheques D issued in 1909, 1910 and 1911. No question had been raised in reference to the cheques paid into Abbott's account in the preceding two years and any doubt or suspicion which the defendants ought to have had of these earlier transactions would have disappeared by this time. I cannot think that the defendants were guilty of negligence in not making inquiries in reference to these cheques after their experience of Abbott's transactions with them in the preceding two years. E It is true that the plaintiff owed no duty to the defendants to examine his pass books or check his accounts with them or with Abbott, but when we are asked to find as a fact that the defendants were negligent, it is necessary to consider all the circumstances, and, in my judgment, as these transactions were only repetitions of those of the previous years which had passed unchallenged, the defendants should not be deprived of the protection of the statute. It is argued by the plaintiff that as the amount so collected increased yearly this was an additional circumstance which established the negligence of the defendants. By reference to Abbott's banking account it will be seen that the cheques of the plaintiff paid in by Abbott to the credit of his account had increased in number and amount every year since 1907. The summary is as follows: 1907, two cheques, £82; 1908, four cheques, £188 17s. 6d.; 1909, nine cheques, £260; 1910, twelve cheques, £591 6s. 3d.; 1911, twenty-three cheques, £763; total, £1,885 3s. 9d. This yearly increase would not of itself arouse doubt or suspicion. Abbott's salary or commission or share of profits might easily have risen in amount, and as each year passed there would appear to be less and not more reason for inquiry. In my judgment, therefore, the defendants are entitled to the protection of s. 82 and are not liable to the plaintiff in this action in respect of the forty-three crossed cheques during the three later years.

[HIS LORDSHIP then considered the position of the parties in reference to the earlier crossed cheques and the two uncrossed cheques in respect of which the defendants contended that upon the facts proved, and even assuming that they had been negligent in not making inquiry, they were not liable in this action because the plaintiff had ratified the acts of Abbott. HIS LORDSHIP examined the evidence and said that on it he came to the conclusion that the plaintiff must be held to have ratified those transactions of Abbott, and, therefore, that the plaintiff's claim in respect to the cheques for 1907 and 1908 and the uncrossed cheque for 1909 failed. HIS LORDSHIP continued:] As I am clearly of opinion that the plaintiff is entitled to maintain his action for damages for conversion of the cheques and is not driven to rely upon the alternative count for money had and received to the plaintiff's use, it is unnecessary to deal in detail with the points raised by counsel for the bank in answer to the alternative claim. They would, in my judgment, in

themselves form an answer to the alternative claim. I content myself with expressing my view that the principle in *London and River Plate Bank* v. *Bank of Liverpool* (16) and not that in *Holland* v. *Russell* (17) governs this case. The addition of the words "not negotiable," and, in some cases, "not negotiable: account payee," to some of the crossed cheques under consideration has, in my opinion, no bearing upon the matters to be decided in this case. The protection of s. 82 is afforded to crossed cheques marked "not negotiable," as well as to cheques not so marked. The collection of cheques so crossed is not conclusive evidence of negligence: see *Gordon* v. *Capital and Counties Bank* (2) [1902] 1 K.B. at p. 275. Even if I assume that the taking of a crossed cheque bearing these words would be some evidence of negligence, it could not affect my decision upon the later cheques, as the other considerations, to which I have referred, would outweigh any value I could attribute to such evidence. The words "account payee" never appear upon any of the crossed cheques made payable to "selves or order" or to "selves or bearer." They are only to be found on the crossed cheques made payable to "Abbott or order," "Abbott or bearer," defendants "or bearer," and defendants "or order." The words "account payee" are a direction to the bankers collecting payment that the proceeds when collected are to be applied to the credit of the account of the payee designated on the face of the cheque. They do not, on the facts of this case, afford any evidence of negligence, for if, as the defendants thought, Abbott was entitled to issue the cheques to the defendants for collection, the directions to them by the addition of these words would be quite natural and correct. In one case (Jan. 27, 1911) a cheque so marked was made payable to the defendants "or order," and was indorsed by their manager per procuration for them, and the proceeds, when collected, were credited to Abbott's account. It was argued that this indorsement was a wrongful dealing by the defendants with the cheque outside the protection of s. 82, but, in my view, the indorsement by the defendants was made in the ordinary course and merely for the purpose of collecting the proceeds. It was unobjectionable if, as they thought, Abbott was entitled to issue the cheque to them, and the plaintiff's claim on this cheque stands or falls with the other cheques. I am of opinion, therefore, that this appeal should be allowed, and that judgment should be entered for the defendants.

BUCKLEY, L.J.—I am also of opinion that this appeal succeeds. As we are differing from the learned judge from whom this appeal is brought, I add a few words of my own upon some of the points which have been argued before us.

The authority which Morison gave to the National Provincial Bank on April 7, 1888, was in general terms. There is no question but that as between Morison and the National Provincial Bank the cheques signed per pro. by Abbott were effectual, and the bank were entitled and bound to pay them. Under these circumstances it is impossible to say that the instrument was not a cheque. As between Morison and the National Provincial Bank it was a cheque and not a forged instrument. A document cannot be a forged instrument as between certain persons and not as between others. The decision in *R.* v. *Holden* (10) does not, I think, apply. The instruments were Morison's cheques and none the less because they were cheques drawn in fraud of Morison.

The next question is whether Morison was the true owner of the cheques. If he was not, the defendants cannot be liable in conversion. If he was, then s. 82 of the Bills of Exchange Act, 1882, applies unless the words "true owner" in that section bear some meaning different from that which they bear when the subject under consideration is conversion. Having regard to what LORD HALSBURY said in *Great Western Rail. Co.* v. *London and County Banking Co., Ltd.* (18) ([1901] A.C. at p. 418), it seems to me that I ought not to draw a distinction between the title to the cheque itself and the title to the money obtained or represented by it. In the case referred to the cheque was one drawn by the appellants, the Great Western Railway Co. The bank were held liable to them for the amount of the

A cheque. In *Ogden* v. *Benas* (19) the plaintiff was again the drawer, and he recovered upon the footing that the money paid was money of the plaintiff which the defendant had no right to receive, and that consequently the plaintiff was entitled to recover it back.

Next, treating the plaintiff as true owner of the cheque within s. 82, does s. 25 apply to a case in which the instrument has served its purpose and the money has been paid under it? Can the principal then claim to recover the money on the ground, in the words of s. 25, that he is not bound by the signature because the agent was not acting within the limits of his authority? Counsel for the bank has argued, and I think his argument is sound, that s. 25 is not addressed to that case. In any action brought upon the instrument s. 25 applies. But to such a case as the present it has no application. The section is found as one of a group of sections dealing with the capacity and authority of the parties as persons concurring in the instrument. It goes, I think, to the validity of the instrument as an instrument. It does not deal with the case of rights arising in respect of the disposition of the proceeds when the instrument has served its purpose and the amount has been paid. In considering, therefore, s. 82 as a defence, I think s. 25 may be set out of consideration.

There remain those which are, to my mind, the important points of this case—namely, the questions, first, whether there was negligence; secondly, whether there was ratification; and, thirdly, whether Morison with the knowledge which he had can render the defendants liable for the loss which he sustained by continuing to employ a dishonest agent. For convenience I collect the main significant dates upon these points.

The first agreement of employment was on Nov. 2, 1900; Abbott's account with the defendants was opened in June, 1905; and the first relevant cheque was on May 29, 1907—£26. The second was on June 10, 1907—£56. The balance-sheet of Dec. 31, 1907, disclosed the £5,929, of which £2,929 was debited to Abbott and £3,000 to goodwill. On Aug. 12, 1908, Morison wrote a letter of that date to the accountants from which it is plain that he knew that Abbott had lost money (as he said) in speculation. By that letter Morison urged that the losses should be proved by cheques which must, he said, have been drawn, and added that he ought to know that the money lost was actually lost in speculation and not used for any other purposes. The two cheques of £26 and £56 must, of course, have formed items in arriving at that balance-sheet. The balance-sheet further contained under the head of "Sundries, £3 1s. 9d." that which was at Dec. 31, 1907, the balance of the "exchange cheques account." The balance-sheet to December, 1907, was prepared subsequently to the date of that letter—viz., in September, 1908. These two cheques as to which there must have existed in the possession of Morison at his office every means of knowledge, either were not traced, which was wrong, or were traced and the defendants were not informed of it, which was worse. On Sept. 28, 1909, Morison received the balance-sheet of the following year—viz., to Dec. 31, 1908. That brought forward as a debit to Abbott the £2,929 of the previous balance-sheet and further debited him with £306 0s. 4d. which was on Dec. 31, 1908, the debit of his private account in Morison's books. On Sept. 30, 1909, Morison wrote to the accountants about the deficit in Abbott's name and the balance on the wrong side. On Oct. 1, 1909, the accountants sent him a copy of Abbott's private account as appearing in the firm's books from Jan. 1 to Dec. 31, 1908, and from Jan. 1 to May 22, 1909. Under these circumstances Morison, with all this knowledge and means of knowledge, on Nov. 16, 1909, affirmed Abbott's engagement as his manager upon the terms stated in the letter of that date. The engagement was for the period of their joint lives and ten years after Morison's death during the remainder of Abbott's life, until determined by notice as in the letter mentioned, with a stipulation that Abbott should not incur any liabilities without his previous sanction except in the ordinary business transactions of the firm and should not bet, gamble, or speculate either in his own name or that of the

firm or otherwise. The balance-sheet of Dec. 31, 1908, was thereby agreed as a basis of the accounts between the parties. Down to the end of 1908 the total of the funds misappropriated which it is sought to recover in this action was £270 17s. 6d. After the end of 1908 Abbott misappropriated a further sum of £1,614 6s. 3d., and for all these the plaintiff seeks to make the defendants liable.

Quite shortly it seems to me that, assuming as I do that when the cheques, say, in 1907, two in number, were dealt with by the defendants, there was enough to put them upon inquiry, the position after (say) the end of 1907 was such that any suspicion which they ought to have had would have been lulled to sleep by the action of Morison himself. Such a sufficient time had then elapsed during which the customer had received back his pass book and his cheques and had raised no question as to the validity of the cheques as that the defendants were entitled to assume that there was no cause for suspicion or inquiry. As from that time no negligence is to be imputed to the defendants because they did not inquire whether the cheques were justified or not. As regards the earlier cheques at a date before such time had elapsed, it seems to me that the plaintiff's action was such as to adopt and ratify Abbott's acts in the matter. The fact is that after these proceedings Morison, whose fault or misfortune it is that he has employed a dishonest agent, is seeking to throw the consequences of his dishonesty upon the persons who are not in any way responsible for that dishonesty—persons who dealt with the cheques in the ordinary course of business and, as is admitted, in perfect good faith. The principle of *Cocks* v. *Masterman* (20) and of *London and River Plate Bank* v. *Bank of Liverpool* (16) is, I think, applicable. The principle is larger than that in *Holland* v. *Russell* (17). It is, I think, the case that the bank are not here to be treated simply as agents who paid money to Abbott as their principal before the bank received notice not to pay it. The money here has been received by the defendants in good faith and paid to their customer Abbott in good faith. Since its receipt they have altogether altered their position in that they have in good faith paid the money away to Abbott. Under these circumstances I think the principle of *Cocks* v. *Masterman* (20) applies, and that the defendants cannot be rendered liable for it to Morison. On these grounds I think this appeal succeeds.

PHILLIMORE, L.J.—The plaintiff, in my judgment, has made out a prima facie case for recovering in trover against the defendant bank for the conversion of his cheques, and to obtain as damages the face value of the cheques. I say his cheques, and I make out his right in the following manner. The cheques as originally drawn were instruments whereby the plaintiff, or a person to whom the plaintiff was bound or desired to pay money, could obtain out of the moneys standing to the plaintiff's credit with his bank the sum specified on the face of the cheque. The cheques were the plaintiff's instruments till he chose—or till Abbott on his behalf chose—to issue them to some outside person. As regards two of the cheques, which were open ones and drawn to "bearer," they need never have been further issued than by presenting them to the plaintiff's bank and getting them cashed. As regards the others, no doubt it was in contemplation that they should be issued, to the extent of passing through another bank, because they were crossed. And one cheque would require further negotiation because it was drawn to the order of somebody outside, to wit, the defendant bank. But all of them till issued remained the plaintiff's property. Till Abbott took them to the defendant bank they had not been issued. In Abbott's hands they were still his employer's property, and Abbott could not and did not give to the defendant bank any title in them. Therefore, they were the plaintiff's cheques at the time when they came into the possession of the defendant bank. The defendant bank, as the collecting bank, presented them to the plaintiff's bank and collected the proceeds, and did not do this as a bare messenger. The defendant bank was the holder of the cheques, which, with the exception of the one of which I have already spoken,

A were, by the time they reached it, bearer cheques, and it collected the proceeds in its own right, and probably settled for them in account with the paying bank, very likely through the clearing house, and gave its receipt. Therefore, the defendant bank converted the cheques.

That the damages for such conversion are (at any rate, where the drawer has sufficient funds to his credit and the drawee bank is solvent) the face value of the B cheques is established in a series of cases—such as *Bobbett* v. *Pinkett* (4), *Fine Art Society* v. *Union Bank* (3), *Bavins Junior & Sims* v. *London and South Western Bank, Ltd.* (6), and *Macbeth* v. *North and South Wales Bank* (7)—so well established that it is not necessary to inquire into the principle which may underlie the authority. But the principle probably is that, though the plaintiff might at any moment destroy the cheques while they remained in his possession, they are C potential instruments whereby the sums they represent may be drawn from his bankers, and if they get into any other hands than his he will be the loser to the extent of the sums which they represent. It may be also that anyone who has obtained its value by presenting a cheque is estopped from insisting that it has only a nominal value.

Having got so far as determining that the plaintiff has made out a primâ facie D case, I have now to consider the several defences raised by the defendant bank. But before I enter upon these, there is a preliminary point raised by the plaintiff which, if established, would destroy or seriously affect several of these defences. He contends that these cheques are forgeries—statutory forgeries, as one of his counsel put it. Apart from the statute, which I will consider in a minute, this contention cannot be supported. These cheques are real documents which, when E they reach their destination, will be honoured, and properly honoured, by the plaintiff's bank. They have been created for an improper purpose and in fraud of the plaintiff, but they have been created by a person whom the plaintiff had put in his place to create them. How, as was observed in the course of the case, they can be no forgeries when they reach their destination and yet be treated as forgeries while in the hands of other parties during the course of their journey, F I fail to see. But it is said that the Larceny Act, 1861, s. 24, makes it forgery to sign with intent to defraud any bill of exchange, by procuration or otherwise, for or in the name of or on the account of any other person without lawful authority or excuse, and that this enactment covers the case where a man having authority to sign uses his authority for an improper and fraudulent purpose, to the detriment of his principal. This, again, I think is an error. The reason why the words "by procuration or otherwise" were inserted in this statute is well known. It was always forgery to counterfeit a man's signature to certain important documents unless, indeed, you had the man's authority to write his name for him; but it was a different thing to append a man's signature with a statement showing that you were not claiming that it was his hand, but that you signed for him under a I supposed power. The point seems to have been mooted in one or two cases, and it was finally decided in *R.* v. *White* (9) not to be a forgery under the law, as it then stood, the argument which prevailed being thus summarised by counsel for the prisoner:

> "The prisoner has counterfeited nothing; the writing is not made as the writing of another, but avowedly as that of the prisoner himself; and though he may have committed fraud in saying that he was authorised to make the indorsement, that is not a forgery, but a mere false pretence."

In *R.* v. *White* (9) the prisoner, though at one time a clerk of the man in whose name he signed, had not and never had authority to sign for him. To meet this, the section I have quoted was passed, and it has no further application. It does not extend the law to cases where a man, having authority to sign the name of another per pro., misuses his authority, just as I think, under the old law, if

a man had authority to sign the name of another and misused that authority, he would not be indictable for forgery.

I have not, in stating these various propositions, added the phrase "with intent to defraud," which is always an ingredient in the charge of the crime. The words are used to meet the possible, though rare, case of innocent forgery; for example, for a wager, or for a joke, as suggested by WALTON, J., in *R.* v. *Muirhead* (21), where the analogous subject of false pretences was being discussed. I merely say this to guard my propositions. *R.* v. *Holden* (10) does not decide anything to the contrary of what I have said. There are partnerships which, from the nature of their business, imply an authority in each partner to sign the firm's name to bills, &c. There are others where no such authority is to be implied, and, unless it is given in express terms, the partner has not got it. AVORY, J., stated for the purposes of the point on which the opinion of the court was to be taken that the prisoner had no authority—meaning, I take it, no general authority as partner—and then to stop a possible hole took the opinion of the jury as to whether or not a particular authority had been given to him. That there was no suggestion that the prisoner had such general authority as partner, or under the partnership articles, appears from the argument of his counsel. They take no such point, but rely upon the general right of a partner to trade in the firm's name, and refer to *Banks* v. *Gibson* (22) and decisions in Chancery to that effect. The Lord Chief Justice has sent for all the papers in the case, and a perusal of them confirms this view of the case. The court, therefore, in *R.* v. *Holden* (10) only decided that the prisoner, having no authority to sign the name of his firm to bills, could not ride off on the fact that his firm's name was a partnership asset. It comes back to the same principle. Where there is power to sign per pro., a document so signed is not a forgery to the party to whom it is addressed, who can, or à fortiori must, act upon it, and, therefore, is not a forgery at all. The misuse by an agent of his power of writing his principal's name, either as a simple signature or by signing per pro., may, however, be indictable as some form of fraud.

I now come to the defences, and the first defence raised is under s. 82 of the Bills of Exchange Act, 1882, which protects the bank which collects a crossed cheque, and receives payment for its customer in good faith and without negligence, from incurring a liability to the true owner of the cheque. As the plaintiff sues as owner and as these cheques are not forgeries, the section applies. The good faith of the defendant bank is not questioned. The point left for decision is whether it has received payment for its customer Abbott without negligence. The learned judge has held that there was negligence. In the appropriate part of his judgment he seems to have rested that negligence on one ground only—namely, that the collecting bank, seeing that the signature was per pro., had thereby notice under s. 25 of the Act that the agent had but a limited authority to sign, and was, therefore, bound at its peril to make due inquiries as to the extent of the authority, and that it made none. A conclusion so sweeping would make cheques signed per pro. and crossed either useless or mere incentives to gambling. I think the true answer is that s. 25 is without relevancy to s. 82. Under s. 25, he who takes a negotiable instrument signed per pro. has notice that he may, when he comes to present it for payment, or when someone else to whom he has negotiated it presents it for payment, find that he or his transferee may fail to get payment because the limited authority of the agent may have been exceeded. It is a question of infirmity of title, but when once the instrument has been discharged by payment, neither the presenter nor his predecessors or successors in title are put under a liability to repay because he or they had originally notice that they might not get their money. If it were otherwise, there would be two objections to the point as a point in favour of the plaintiff: (i) That the only person who could avail himself of the right to recover would be the man who discharged the instrument—that is, the plaintiff's bank, not the plaintiff; (ii) that if the plaintiff's bank sought to do it, the special rule as to prompt recovery of money wrongly

A paid to discharge a negotiable instrument laid down in such cases as *London and River Plate Bank* v. *Bank of Liverpool* (16) and *Imperial Bank of Canada* v. *Bank of Hamilton* (23) would apply. I should here, perhaps, add that the cases cited in the judgment of the learned judge as authority for the duty of the collecting bank to inquire when it deals with cheques with per pro. signatures are cases of cheques not drawn for the principal by the dishonest agent signing per pro., but cases of B cheques in favour of the principal indorsed by the agent per pro. and then paid by him into his own account—a most suspicious proceeding.

But though, in the appropriate part of his judgment the learned judge has apparently relied upon the fact of the signature being per pro. as sufficient to make the collecting bank negligent for non-inquiry, he has in another part of his judgment taken another fact into consideration, a fact which, we are told by counsel, C he mentioned as impressing him during the course of the trial; and I think we must take this fact into consideration as it certainly arises upon evidence. Abbott was a customer of the collecting bank, well recommended, no doubt, but known to be an employé, and a manager; and, being a manager and having the power of signing per pro. for his employer, he was placing cheques which he drew for his employer to his private account. If this happened often enough and with regard to sufficiently D large sums, I think it ought to give rise to some suspicion in the breast of the bank manager or the cashier. If it were material, I do not think that I should be prepared to dissent from the conclusion to which I think the learned judge intended to arrive—that there was negligence in cashing some of the earlier cheques, cashing them and paying them to Abbott's account without at least some inquiry. But as regards all the middle and later cheques a suspicion which might have been E reasonably entertained would with at least equal reason be lulled to sleep. No business man need anticipate that a series of cheques ranging over more than a twelvemonth, for appreciable sums, occasionally large ones, would pass unnoticed, if they had been improperly drawn by an employé. The plaintiff may be under no duty to the defendant bank to examine his pass book, or to check his accounts, or to have them vouched or examined; but the defendant bank was entitled to act F as a reasonable man of business would, and to assume that—duty or not—the employer would in no very great length of time discover that he was being robbed in a mode so easily capable of detection. While inclining, therefore, against the collecting bank as to the few earlier cheques I decide, as far as I am concerned, that the collecting bank without negligence collected and recovered payment for Abbott of the bulk of the crossed cheques which are the subject-matter in this G action.

I am not impressed by the points made as to special cheques which were drawn to the London County and Westminster Bank or bearer, and crossed generally with the addition of the words "Not negotiable. Account payee," or as to the one cheque which was drawn to defendant bank or order, the cheque forms used being forms with the word "order" printed, and in the one case the word "bearer" H not having been substituted. On the assumption that Abbott was justified in paying these cheques to his account, there was nothing objectionable in his bank being the nominal payee, and in the order case the indorsement by the bank would be merely what is called "the necessary dealing with the instrument," in the language of COLLINS, M.R., in *Gordon* v. *London City and Midland Bank* (2) ([1902] 1 K.B. at p. 276).

I There are two cheques not crossed. As to these the defence of s. 82 does not apply, and the defendant bank is driven back upon its next line of defence which, if sound, covers them and the earlier crossed cheques, as to which there may have been negligence, and the later cheques to the end of 1908. It is the defence that the plaintiff ratified the drawing and cashing of these dishonest but genuine cheques. As to this defence, counsel for plaintiff make two answers. They deny that in fact there was ratification, and they say—and truly say—as the learned judge in the court below has said, that there can be no ratification without knowledge

of what you are ratifying, and they contend that the plaintiff had no knowledge [His Lordship referred to the evidence]. In my view, there was ratification of those acts of Abbott which depleted the plaintiff's banking account by the use of the cheques in question, as well as of other acts of Abbott which must have swelled the depletion. The plaintiff's remedy against Abbott for his misappropriation was abandoned; as to part without any quid pro quo except the continuance of Abbott's services; as to the rest, by converting him into an ordinary debtor with certain terms as to repayment, and this, I think, makes ratification. As to knowledge, it is unnecessary to decide what inference should be drawn when a principal knows so much that it is the policy of an ostrich to know no more. I am not sure that in that case we can altogether rely upon the doctrine that for this purpose means of knowledge are not the same as knowledge. It is unnecessary to decide this, for here the plaintiff put the accountants in his place, and we really cannot believe that the accountants did not know that Abbott had been passing per pro. cheques to his private account. Each cheque so passed would bear the stamp of the collecting bank, and would either, according to modern practice, be returned by the paying bank to the customer, or would be available at any moment if the customer or his accountant demanded it. Ratification, therefore, covers a gap in the defences quoad the uncrossed cheques and any of the early cheques, as to which there may have been negligence. It is not wanted for the later crossed cheques, and on the whole the defendant bank succeeds.

I have not thought it necessary to determine upon the defence of estoppel by negligence, which involves considerations of some difficulty. I have only to add that two further defences raised for the defendant bank by counsel in reply before us do not seem to me to help it. The doctrine with regard to prompt notice and demand where a negotiable instrument has been discharged in error only applies, as I have already incidentally said, where it is the payer of the instrument who seeks to recover back. And the doctrine that an agent who has in good faith paid to his principal money to which it is subsequently discovered the principal had no right cannot be required to return money which he has so paid over only applies where the action is for money had and received to the plaintiff's use—an action which assumes that there was no wrongful act in receiving the money. In such a case the plaintiff's licence to receive the money is presumed, and, therefore, the plaintiff cannot complain if it is properly paid over before the licence is revoked. In the present case the plaintiff, though he has in the alternative shaped his case as for money had and received, has a right to sue in trover for the conversion of his cheques, and, accordingly, would not be defeated by the fact that the defendant whom he sues for the misuse of his temporary dominion of the property claims to be an agent for someone else. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Donald McMillan & Mott; Fraser & Christian.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

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TAYLOR *v.* NATIONAL AMALGAMATED APPROVED SOCIETY

[KING'S BENCH DIVISION (Ridley and Bankes, JJ.), January 20, 21, 1914]

B [Reported [1914] 2 K.B. 352; 83 L.J.K.B. 1020; 110 L.T. 696; 78 J.P. 254; 12 L.G.R. 525]

County Court—Appeal to Divisional Court—Right of appellant to raise points not taken by him in county court.

On an appeal from the county court to the Divisional Court an appellant can only appeal with regard to a point of law which has been raised by him C at the trial even though the point he wishes to raise is one touching the jurisdiction of the county court.

Smith v. *Baker & Sons* (1), [1891] A.C. 325, applied.

Notes. The National Insurance Act, 1911, s. 67, and the National Insurance Act, 1913, s. 27, were repealed by the National Health Insurance Act, 1924, s. 133 and Sched. 7.

D Since the Administration of Justice (Appeals) Act, 1934, s. 2 (18 HALSBURY'S STATUTES (2nd Edn.) 524), appeals from the county court lie to the Court of Appeal and not as formerly to the Divisional Court of the High Court except that in certain cases appeals still lie to the High Courts, i.e., in bankruptcy matters; appeals from orders made by a county court under the Settled Land Act, 1925 (ibid., vol. 23, p. 12) and the Land Registration Act, 1925 (ibid., vol. 20, p. 940); certain enact- E ments which provide for appeal from the county court to the High Court saved by s. 2 (2) of the Administration of Justice (Appeals) Act, 1934, which subsection has been replaced by s. 205 (5) of the County Courts Act, 1959 (ibid., vol. 39, pp. 238, 239).

Distinguished: *Simpson* v. *Crowle*, [1921] All E.R. Rep. 715.

F As to appeals from the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 320 *et* seq., and for cases see 13 DIGEST (Repl.) 467 et seq.

Cases referred to:

(1) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 13 Digest (Repl.) 467, *918*.

(2) *Prentice* v. *London* (1875), L.R. 10 C.P. 679; 44 L.J.C.P. 353; 33 L.T. 251; G 39 J.P. 711; 7 Digest (Repl.) 525, *297*.

(3) *Willis* v. *Wells*, [1892] 2 Q.B. 225; 61 L.J.Q.B. 606; 67 L.T. 316; 56 J.P. 775; 41 W.R. 64; 36 Sol. Jo. 594; sub nom. *Willis* v. *New Union Society*, 8 T.L.R. 653, D.C.; 25 Digest 323, *250*.

(4) *Palliser* v. *Dale*, [1897] 1 Q.B. 257; 66 L.J.Q.B. 236; 76 L.T. 14; 45 W.R. 291; 13 T.L.R. 147, C.A.; 25 Digest 323, *251*.

H (5) *Blue* v. *West Kilbride Free Gardeners' Society* (1866), 4 Macph. (Ct. of Sess.) 1042.

(6) *Norwich Corpn.* v. *Norwich Electric Tramways Co., Ltd.*, [1906] 2 K.B. 119; 75 L.J.K.B. 636; 95 L.T. 12; 70 J.P. 401; 54 W.R. 572; 22 T.L.R. 553; 50 Sol. Jo. 499; 4 L.G.R. 1114, C.A.; 38 Digest (Repl.) 52, *270*.

(7) *Clarkson* v. *Musgrave* (1882), 9 Q.B.D. 386; 51 L.J.Q.B. 525; 31 W.R. 47, I D.C.; 13 Digest (Repl.) 467, *917*.

Also referred to in argument:

Misa v. *Currie* (1876), 1 App. Cas. 554; 45 L.J.Q.B. 852; 35 L.T. 414; 24 W.R. 1049, H.L.; Digest (Practice) 779, *3435*.

Connecticut Fire Insurance Co. v. *Kavanagh*, [1892] A.C. 473; 61 L.J.P.C. 50; 67 L.T. 508; 57 J.P. 21; 8 T.L.R. 752, P.C.; 16 Digest 155, *551*.

Re Cowburn, Ex parte Firth (1882), 19 Ch.D. 419; 46 L.T. 120; 30 W.R. 529, C.A.; Digest (Practice) 779, *3437*.

Tasmania (Ship Owners and Freight Owners) v. *Smith, etc., City of Corinth (Owners), The Tasmania* (1890), 15 App. Cas. 223; 63 L.T. 1; 6 Asp. M.L.C. 517, H.L.; Digest (Practice) 780, *3441*.

Renton v. *King* (1905), 93 L.T. 10; 21 T.L.R. 577; 49 Sol. Jo. 552, D.C.; 13 Digest (Repl.) 430, *555*.

Gregory v. *Torquay Corpn.*, [1912] 1 K.B. 442; 81 L.J.K.B. 385; 105 L.T. 886; 76 J.P. 73; 10 L.G.R. 179, C.A.; 13 Digest (Repl.) 428, *538*.

Appeal from the decision of His Honour JUDGE WIGHTMAN WOOD, sitting at the Coventry County Court.

An action was brought by the plaintiff against the defendants, who were an approved society under the National Insurance Act, 1911 [repealed], to recover the sum of £9 10s. to which he claimed to be entitled in respect of sickness benefit as a member of the society. The defendants filed the following notice of defence: "That, in accordance with s. 67 of the National Insurance Act, 1911, this court has no jurisdiction to try the dispute the subject of this action." The section in question provides (inter alia) that any dispute between an approved society and an insured person who is a member of such society relating to anything done or omitted by such person or society shall be decided in accordance with the rules of the society. Rule 43 of the defendant society's rules provided that if any dispute should arise between an insured person and the society it should be decided by arbitration. It was not admitted by the defendants that the plaintiff was a member of the society, and the learned judge entertained the action on the ground that s. 67 of the National Insurance Act only applied in the case of a person who was admittedly a member of the society with whom the dispute arose. After hearing evidence he gave judgment for the plaintiff for the amount claimed, and also made a declaration that the plaintiff was a member of the society. The National Insurance Act, 1913 [repealed], s. 27, provides that any dispute between an approved society and person as to whether that person is or was at any date a member of that society shall be decided in like manner as a dispute between an approved society and an insured person who is a member thereof. This section was not called to the attention of the learned judge, and no point was taken by the defendants at the trial that it ousted his jurisdiction. The defendants appealed upon the grounds that the learned judge was wrong: (i) In holding that he had jurisdiction to try the action having regard to the National Insurance Act, 1911, and the rules of the defendant society. (ii) In allowing the plaintiff after judgment to amend his particulars of claim by claiming a declaration that he was a member of the defendant society. (iii) In holding that he had under his equitable jurisdiction power to try the action in the amended form. (iv) In holding that he had power to assess the amount payable to the plaintiff and deciding that the same should not be assessed by arbitration in accordance with the rules of the defendants.

A. S. Comyns Carr for the appellants.

R. A. Willes for the respondent.

RIDLEY, J.—In this case, in my opinion, the appeal fails, and the judgment of the learned judge must be affirmed. The action was brought by the plaintiff against the defendant society claiming to recover the benefits which would be due to him as the result of an illness if he were a member of the society. The defendants denied that he was a member of the society, and when the matter came before the court they gave notice that they were going to take the point that under s. 67 of the National Insurance Act, 1911, the court had no jurisdiction to try the dispute between the parties. The learned judge heard the evidence given by the plaintiff, and said that in his opinion the plaintiff was a member of the society, and made a declaration to that effect. He also gave judgment for the plaintiff for £9 10s. damages. He further stated that in his opinion s. 67 of the National Insurance Act, 1911, did not affect his right to hear the action because that section only applied in cases where the dispute was between a person who was admittedly a

member of a society such as the defendants and the society, and consequently he held that he had jurisdiction to entertain the action. It appears to me that the learned judge was right in so holding. The decisions which have been quoted to us show that in cases arising under the Friendly Societies Acts it was held that when a question such as that now before us arose, and it was contended that the dispute fell within the arbitration clause of the rules of the society, in order for the rules to apply it must be shown that the dispute was one which arose between the trustees of the society and a person who was a member, and that if it was denied that the person suing was a member of the society, then the case was not governed by the rules, and the court was at liberty to entertain the matter. The first case dealing with this question was *Prentice* v. *London* (2). There the trustees of the friendly society denied that the plaintiff was a member of the society, and it was held that they were estopped from saying that the dispute was a dispute between the society and one of its members within a rule providing for the settlement of such disputes. It appears to me that that case applies to the present, and that the defendants here, having denied that the plaintiff was a member of the society, are estopped from saying that the dispute was one between the society and one of its members. That case was followed by two others, *Willis* v. *Wells* (3) and *Palliser* v. *Dale* (4), which were quoted to us by counsel for the respondent. He also referred to the Scottish case of *Blue* v. *West Kilbride Free Gardeners' Society* (5) which appears to me to show that when once the court has established its right to hear a case it has the right to hear it out, and that, if in such a case as the present, it decides in favour of the plaintiff, it may also determine the damages to which he is entitled. Therefore the statutory defence under s. 67 of the National Insurance Act, 1911, failed.

But it was urged by counsel for the appellant that on Sept. 1, 1913, there came into operation the National Insurance Act, 1913, s. 27 of which provided that any dispute as to whether a person was a member of the society in question should be decided under the rules of the society in like manner as a dispute between the society and an insured person who is a member thereof. If that section had been before the learned judge it would, as it appears to me, have dealt with the point raised because it would have taken out of his jurisdiction the very matter left within it by the former Act. No point, however, was taken upon the section. It was not apparently known to the parties nor present to the mind of the learned judge. Counsel for the appellant now contends that because the point is one which goes to the jurisdiction of the court it can be taken at any time without the attention of the learned judge having been called to it in the first instance. Probably in the case of the High Court this contention might be sound in view of the decision in *Norwich Corpn.* v. *Norwich Electric Tramways Co.* (6) where VAUGHAN WILLIAMS, L.J., said ([1906] 2 K.B. at p. 125):

> "The first point made for the plaintiffs in answer to that contention [i.e., that the dispute should be determined by some person appointed by the Board of Trade] is that it is too late at the present stage of the proceedings to raise this objection to the jurisdiction, and that it ought to have been raised at the trial. I can only say with regard to that point that I have always supposed it to be well established law that the objection that the tribunal has no jurisdiction to entertain the case is one which, at all events in reference to proceedings in the High Court, may be taken at any time. If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself."

I think that statement leaves open the question whether the principle there referred to applies to proceedings in the county court. In my view, the same rule does not apply. In *Smith* v. *Baker* (1) LORD HALSBURY, L.C., speaking of appeals from county courts, said ([1891] A.C. at p. 325):

"A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the judge."

Looking at those words, I am of opinion that the principle which VAUGHAN WILLIAMS, L.J., lays down as applicable to the High Court does not properly apply to the county court, and that if an objection to the jurisdiction is sought to be raised in the Divisional Court, it must first be taken in the court below. For the reasons I have given I think that this appeal must be dismissed.

BANKES, J.—I agree. I think the case has been very well and fully argued on both sides, and I somewhat regret that so much learning has been expended upon a point which is really more one of form than of substance. There can be no question, it seems to me, having regard to s. 27 of the National Insurance Act, 1913, that the learned judge as a matter of fact had no jurisdiction to try the question involved in the action, and that being so the proper course to adopt in challenging his jurisdiction to try the case would have been by prohibition. If an application for prohibition had been made, I do not think there would have been any answer to it. Instead of doing that the defendants appealed, and the only question we have to decide is whether, having adopted that course they are entitled to succeed.

Many points were taken during the argument, and I will deal shortly with them. The plaintiff in his particulars of claim alleged that he was entitled to a sum of £9 10s. under a contract of insurance made between himself and the defendants. The claim so formulated raised the issue whether or not he was a member of the defendant society, because if the defendants challenged the existence of the contract they challenged the fact that he was a member of the society, and we know that that was the real dispute between the parties. Therefore, it seems to me that the particulars of claim were framed in a way which enabled that question to be raised before the learned judge. The next step was that the defendants put in a form of statutory defence. They limited themselves in their notice to a defence resting upon s. 67 of the National Insurance Act, 1911. I agree with counsel for the appellant that where a person challenges the jurisdiction of the court it is not necessary for him to put in a notice of defence, and that the document in question was not within the meaning of the County Court Rules and the County Courts Act, 1888, a statutory defence at all, and that consequently the defendants were not limited in setting up that the court had no jurisdiction to what appeared in the notice given by them. Then the matter came before the learned judge, and the only point taken by the defendants was that his jurisdiction was ousted by reason of s. 67 of the National Insurance Act, 1911. It seems to me that the point of law which the learned judge was asked to decide was whether or not the terms of that section were such as to oust his jurisdiction. That question of law the learned judge decided by saying that the dispute between the parties being whether or not the plaintiff was a member of the defendant society he was entitled to exercise jurisdiction in the matter because of the authorities to which he was, I suppose, either referred or which he had in his mind. I think it is plain that *Prentice* v. *London* (2) and the other cases of that class do decide that where a statute or a rule is framed in language to the effect that all disputes between a member and the society to which he belongs shall be referred to arbitration that does not include the case of whether or not a person is a member of the society, and therefore I think the learned judge was right in holding that so far as s. 67 was concerned it did not oust his jurisdiction. It was then contended that the learned judge amended the particulars of claim by inserting a claim for a declaration that the plaintiff was a member of the society, and thus gave himself jurisdiction. In the view I take of the particulars of claim, that contention is not well founded in fact, because I think the particulars were sufficiently wide in the circumstances to raise the points in dispute, and that the learned judge by his amendment only made it plain what he intended to do or had done. I go further,

because I think the cases cited to us, and particularly *Blue* v. *West Kilbride Free Gardeners' Society* (5), establish the proposition that when once the court has jurisdiction to decide the question whether or not a person is a member of a society, it also has the right to give the consequential relief the person is claiming in the same action, and it is not right to say that the learned judge is confined to deciding whether the man was or was not a member of the society, and that when he has decided that he must go on to say that he has no jurisdiction to award compensation because the plaintiff must proceed to recover the same by arbitration if it is so provided in the rules.

The only material question in this case, to my mind, is whether or not it is open to the defendants to challenge the jurisdiction of the learned judge by way of an appeal when they did not raise before him the particular point of law which, if it had been raised, would have entitled them to judgment. There is no statute which says in terms that there shall be no right of appeal except with regard to points of law which have been raised before the judge; but I think the decision in *Smith* v. *Baker* (1), which followed on *Clarkson* v. *Musgrave* (7), does decide that a party can only appeal in regard to a particular point of law which has been raised before the county court judge, and that the question does not depend on whether the point is of such a nature that evidence might have been called in the county court with regard to it. I think if the decision of *Clarkson* v. *Musgrave* (7) is looked at, the real ground of the rule will be found. FIELD, J., in giving judgment, after referring to s. 6 of the County Court Act, 1875, which for this purpose is in the same language as s. 120, which gives the right of appeal under the County Courts Act, 1888, continued (9 Q.B.D. at p. 391):

> "Then the section provides further that at the trial or hearing the judge shall at the request of either party 'make a note of any question of law raised at such trial or hearing and of the facts in evidence in relation thereto, and of his decision thereon,' and he shall furnish a copy of the note so taken by the person requiring the same for the purpose of appeal. I am clearly of opinion that every question of law upon which it is desired to appeal must be raised at the trial. Unless it is, there is no 'ruling order, direction, or decision of the judge within s. 6 upon which to appeal'."

I think that the scheme of the legislation as defined by these authorities is that there shall be no appeal on a question of fact from a county court judge, nor upon a question of law unless such question has been definitely brought to his attention, and in regard to which he has been asked to decide.

In the present case, in my opinion, the learned judge was not asked to decide the particular question of law upon which the defendants appeal here, and that being so, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Kingsley, Wood & Co.; Sharpe, Pritchard & Co.*, for *Rowland Hollick*, Coventry.

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

IBRAHIM *v.* REGEM

[PRIVY COUNCIL (Viscount Haldane, L.C., Lord Atkinson, Lord Shaw, Lord Moulton and Lord Sumner), February 9, March 6, 1914]

[Reported [1914] A.C. 599; 83 L.J.P.C. 185; 111 L.T. 20; 30 T.L.R. 383; 24 Cox, C.C. 174]

B

Criminal Law—Evidence—Admissibility of admission made by accused to person with authority over him—Answer to question put by that person.

The appellant, a private in the Indian Army, was convicted of the murder of a native officer. Shortly after the murder the commanding officer went to see the appellant, who was in custody, and said to him: "Why have you done such a senseless act?" The appellant replied: "Some three or four days he has been abusing me; without a doubt I killed him." No threat or inducement was offered to the appellant before he made this statement. At the trial evidence of this conversation was admitted.

C

Held: without deciding whether or not the answer made by a person in custody to a question put to him by a person with authority over him was admissible in evidence, the general circumstances of the case were such, and the preponderance of unquestioned evidence so great, that it was unlikely that the jury were substantially influenced by the disputed evidence, and there was, therefore, no substantial miscarriage of justice as would justify interference by the Board.

D

The authorities as to the admission in evidence of statements made by prisoners to persons in whose custody they are, considered.

E

Notes. Applied: *R.* v. *Colpus and Boorman*, *R.* v. *White*, [1917] 1 K.B. 574; *R.* v. *Voisin*, [1918–19] All E.R. Rep. 491. Considered: *R.* v. *Cook* (1918), 34 T.L.R. 515; *R.* v. *Bass*, [1953] 1 All E.R. 1064. Referred to: *R.* v. *Crowe and Myerscough* (1917), 81 J.P. 288; *Nadan* v. *R.*, [1926] A.C. 482; *Attygalle* v. *R.*, [1936] 2 All E.R. 116; *Teper* v. *R.*, [1952] 2 All E.R. 447; *A.-G. of Ceylon* v. *Perera*, [1953] A.C. 200; *Tameshwar* v. *R.*, [1957] 2 All E.R. 683.

F

As to confessions and statements by accused, see 10 HALSBURY'S LAWS (3rd Edn.) 469 et seq., and for cases see 14 DIGEST (Repl.) 467 et seq.

Cases referred to:

G

(1) *R.* v. *Thompson*, [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 41 W.R. 525; 9 T.L.R. 435; 37 Sol. Jo. 457; 17 Cox, C.C. 641; 5 R. 392, C.C.R.; 14 Digest (Repl.) 468, *4521*.

(2) *R.* v. *Warickshall* (1783), 1 Leach, 263; 14 Digest (Repl.) 468, *4518*.

(3) *R.* v. *Baldry* (1852), 2 Den. 430; 21 L.J.M.C. 130; 19 L.T.O.S. 146; 16 J.P. 276; 16 Jur. 599; 5 Cox, C.C. 523, C.C.R.; 14 Digest (Repl.) 480, *4589*.

H

(4) *R.* v. *Thornton* (1824), 1 Mood. C.C. 27, C.C.R.; 14 Digest (Repl.) 485, *4628*.

(5) *R.* v. *Wild* (1835), 1 Mood. C.C. 452, C.C.R.; 14 Digest (Repl.) 484, *4624*.

(6) *R.* v. *Kerr* (1837), 8 C. & P. 176; 14 Digest (Repl.) 475, *4547*.

(7) *R.* v. *Cheverton* (1862), 2 F. & F. 833; 14 Digest (Repl.) 475, *4550*.

(8) *R.* v. *Reason* (1872), 12 Cox, C.C. 228; 14 Digest (Repl.) 475, *4553*.

(9) *R.* v. *Fennell* (1881), 7 Q.B.D. 147; 50 L.J.M.C. 126; 44 L.T. 687; 45 J.P. 666; 29 W.R. 742; 14 Cox, C.C. 607, C.C.R.; 14 Digest (Repl.) 482, *4615*.

I

(10) *R.* v. *Brackenbury* (1893), 17 Cox, C.C. 628; 14 Digest (Repl.) 474, *4529*.

(11) *R.* v. *Pettit* (1850), 4 Cox, C.C. 164; 14 Digest (Repl.) 462, *4462*.

(12) *R.* v. *Berriman* (1854), 6 Cox, C.C. 388; 14 Digest (Repl.) 462, *4463*.

(13) *R.* v. *Gavin* (1885), 15 Cox, C.C. 656; 14 Digest (Repl.) 475, *4554*.

(14) *R.* v. *Male and Cooper* (1893), 17 Cox, C.C. 689; 14 Digest (Repl.) 475, *4555*.

(15) *R.* v. *Hirst* (1896), 18 Cox, C.C. 374; sub nom. *R.* v. *Goddard and Hurst*, 60 J.P. 491; 14 Digest (Repl.) 446, *4331*.

(16) *R.* v. *Miller* (1895), 18 Cox, C.C. 54; 14 Digest (Repl.) 474, *4530.*

(17) *R.* v. *Histed* (1898), 19 Cox, C.C. 16; 14 Digest (Repl.) 474, *4543.*

(18) *Rogers* v. *Hawken* (1898), 67 L.J.Q.B. 526; 78 L.T. 655; 62 J.P. 279; 42 Sol. Jo. 381; 19 Cox, C.C. 122, D.C.; 14 Digest (Repl.) 468, *4515.*

(19) *R.* v. *Best*, [1909] 1 K.B. 692; 78 L.J.K.B. 658; 100 L.T. 622; 25 T.L.R. 280; 22 Cox, C.C. 97; 2 Cr. App. Rep. 30; 73 J.P. Jo. 77, C.C.A.; 14 Digest (Repl.) 475, *4558.*

(20) *R.* v. *Knight and Thayre* (1905), 69 J.P. 108; 21 T.L.R. 310; 20 Cox, C.C. 711; 14 Digest (Repl.) 474, *4542.*

(21) *R.* v. *Booth and Jones* (1910), 74 J.P. 475; 5 Cr. App. Rep. 177, C.C.A.; 14 Digest (Repl.) 474, *4532.*

(22) *R.* v. *Wong Chin Kwai* (1908), 3 Hong Kong L.R. 89; 14 Digest (Repl.) 472, **3055.*

(23) *Clifford* v. *King-Emperor* (1913), L.R. 40 Ind. App. 241; 83 L.J.P.C. 152, P.C.; 8 Digest (Repl.) 821, *731.*

(24) *Riel* v. *R.* (1885), 10 App. Cas. 675; 55 L.J.P.C. 28; sub nom. *R.* v. *Riel*, 54 L.T. 339; 16 Cox, C.C. 48, P.C.; 8 Digest (Repl.) 822, *748.*

(25) *Re Dillet* (1887), 12 App. Cas. 459; 56 L.T. 615; 36 W.R. 81; 3 T.L.R. 492; 16 Cox, C.C. 241, P.C.; 8 Digest (Repl.) 823, *749.*

(26) *Ex parte Deeming*, [1892] A.C. 422; sub nom. *Re Deeming*, 8 T.L.R. 577, P.C.; 8 Digest (Repl.) 823, *752.*

(27) *Ex parte Macrea*, [1893] A.C. 346; 69 L.T. 734; 17 Cox, C.C. 702; sub nom. *MacCrea* v. *Queen-Empress*, 9 T.L.R. 463, P.C.; 8 Digest (Repl.) 823, *761.*

(28) *R.* v. *Bertrand* (1867), L.R. 1 P.C. 520; 16 L.T. 752; 31 J.P. 531; 10 Cox, C.C. 618; sub nom. *A.-G. of New South Wales* v. *Bertrand*, 4 Moo. P.C.C.N.S. 460; 36 L.J.P.C. 51; 16 W.R. 9; 16 E.R. 391, P.C.; 14 Digest (Repl.) 348, *3387.*

(29) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094.*

(30) *R.* v. *Dyson*, [1908] 2 K.B. 454; 77 L.J.K.B. 813; 99 L.T. 201; 72 J.P. 303; 24 T.L.R. 653; 52 Sol. Jo. 535; 21 Cox, C.C. 669; 1 Cr. App. Rep. 13, C.C.A.; 14 Digest (Repl.) 650, *6614.*

(31) *R.* v. *Lucas* (1908), 1 Cr. App. Rep. 234, C.C.A.; 14 Digest (Repl.) 639, *6478.*

(32) *R.* v. *Stoddart* (1909), 73 J.P. 348; 25 T.L.R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C.C.A.; 14 Digest (Repl.) 650, *6616.*

(33) *R.* v. *Norton*, [1910] 2 K.B. 496; 79 L.J.K.B. 756; 102 L.T. 926; 74 J.P. 375; 26 T.L.R. 550; 54 Sol. Jo. 602; 5 Cr. App. Rep. 65, C.C.A.; 14 Digest (Repl.) 638, *6470.*

(34) *R.* v. *Loates* (1910), 5 Cr. App. Rep. 193, C.C.A.; 14 Digest (Repl.) 640, *6499.*

(35) *R.* v. *Wilson* (1911), 6 Cr. App. Rep. 207, C.C.A.; 14 Digest (Repl.) 639, *6482.*

(36) *R.* v. *Westacott* (1908), 25 T.L.R. 192; 1 Cr. App. Rep. 246, C.C.A.; 14 Digest (Repl.) 640, *6500.*

(37) *R.* v. *Mullins* (1910), 5 Cr. App. Rep. 13, C.C.A.; 14 Digest (Repl.) 637, *6465.*

(38) *R.* v. *Solomon* (1909), 2 Cr. App. Rep. 80, C.C.A.; 14 Digest (Repl.) 514, *4979.*

(39) *R.* v. *Fisher*, [1910] 1 K.B. 149; 79 L.J.K.B. 187; 102 L.T. 111; 74 J.P. 104; 26 T.L.R. 122; 22 Cox, C.C. 270; 3 Cr. App. Rep. 176, C.C.A.; 14 Digest (Repl.) 636, *6447.*

Appeal by special leave from a decision of the Supreme Court of Hong Kong, dated Dec. 16, 1912, affirming a conviction of the appellant for the wilful murder

at Canton, in China, of a native officer one Subadar Ali Shafa, and a sentence of death pronounced by the Chief Justice.

The appellant was a native of Afghanistan and was enrolled as a private in the 126th Baluchistan Infantry Regiment of His Majesty's Indian Forces in June, 1911, and at the time of the commission of the offence was stationed at Shameen Island, Canton, in China. After his enrolment the appellant duly made a solemn affirmation that he would be faithful and bear true allegiance to His Majesty and honestly and faithfully serve in His Majesty's Indian Forces, and go wherever he might be ordered by land or sea, and would observe and obey all commands of any officer set over him. The murder of which he was convicted was that of Ali Shafa, a subadar or company commander in his regiment who was shot with a rifle. The appellant was immediately arrested and charged with the murder. In accordance with the provisions contained in s. 6 of the Foreign Jurisdiction Act, 1890, and art. III, V. & L., of the China and Corea Order in Council, 1904, the appellant was sent to Hong Kong for trial by the Supreme Court. An indictment was preferred by the Attorney-General of Hong Kong against the appellant charging him with the murder, and he was tried before the Chief Justice of the Supreme Court of Hong Kong and a jury on Oct. 21, 22, 23 and 24, 1912, but the jury failed to agree and were discharged. The appellant was tried a second time before the Chief Justice and a jury on Nov. 18, 19, 20, 21 and 22, 1912, and the jury returned a verdict of guilty. Sentence was postponed pending the hearing by the full court of Hong Kong of certain points raised on behalf of the appellant during the trial. These points were shortly: (i) That the court had no jurisdiction to try the prisoner, who was not a British subject, and (ii) that the judge at the trial had improperly admitted as evidence a statement of the prisoner, amounting to a confession, made in answer to a question put to him by the commanding officer after he was in custody, who asked: "Why have you done such a senseless Act?" The full court confirmed the conviction, and the Chief Justice sentenced the appellant to death, but special leave to appeal in formâ pauperis was granted by the Board.

A. Romer Macklin for the appellant.

Sir R. Finlay, K.C., and *E. W. Hansell*, for the respondent, were not called on to argue.

Mar. 6, 1914. **LORD SUMNER.**—The appellant, Ibrahim, is a natural-born subject of the Ameer of Afghanistan, who was duly enlisted and enrolled on Jan. 12, 1911, in the 126th Regiment of Baluchistan Infantry at Quetta. He took the oath of allegiance to His Majesty and made a solemn declaration undertaking among other things to go wherever ordered by land or sea. On Sept. 4, 1912, he was a private serving with the detachment of that regiment which was encamped on Sha-mien or Shameen Island at Canton as guard of the concession. On Shameen are situated the various European settlements including the British. About 10.30 p.m. Subadar Ali Shafa, a native officer in the same regiment, was murdered. Ibrahim was charged with the crime, tried before the Supreme Court of Hong Kong, and convicted. He was sentenced to death, but sentence was respited pending the hearing of this appeal, which is brought by special leave in formâ pauperis. His grounds are two: first, that the jurisdiction of the court was not established, and, second, that there was a grave miscarriage of justice by reason of the misreception of evidence. [The first ground of appeal no longer calls for report.]

The second ground for this appeal is as follows: Some ten or fifteen minutes after Subadar Ali Shafa was shot Major Barrett, the officer commanding the detachment, who had been summoned from a little distance, arrived at the camp. He found Ibrahim in custody and in bonds, sitting on the step of the guard-room. "When I got up to Ibrahim," says the Major, "I said, 'Why have you done such a senseless act?' I said nothing else. Did not threaten him in any way. I offered no inducement of any kind, nor did anybody else to my knowledge or in my presence . . . when I spoke to accused I was sorry for him because he had killed the Subadar."

This last observation their Lordships treat only as evidence of the way in which the question was put, tending to show that it did not convey a command or inducement to Ibrahim of any kind. In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service. To this Ibrahim replied in Hindustani, "Some three or four days he has been abusing me; without a doubt I killed him."

It is argued that Ibrahim's statement was inadmissible, (a) as not being a voluntary statement but obtained by pressure of authority and fear of consequences; and (b) in any case as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinates who had made him prisoner. On this it becomes incumbent on their Lordships to consider the rule of English criminal law applicable to such circumstances. This somewhat exceptional duty arises because, by art. XXXV (2) of the China and Corea Order in Council, it is provided that "subject to the provisions of this order criminal jurisdiction under this order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being." There are no provisions in the order material on this point as modifying or excluding the principles and practice of English law, and their Lordships think that the matter may be justly treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong Kong. At the same time they are not to be understood to decide, that such law and practice are in all respects and particulars binding on that court, nor do they overlook in any way the necessary distinction that must sometimes be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a British possession in the far East, where a mixed and fluctuating population is subject to the administration of the law by European judges, whose duty it is to have regard alike to the principles of British justice and to the necessities of local order. Nor do their Lordships fail to observe that the words, "so far as circumstances admit" may well be applicable to such circumstances in the present case as the facts, that the facilities for formal proof of statutes passed and administrative orders made in various parts of His Majesty's dominions cannot be as copious in Hong Kong as they are in this country, and further that when, as in the present case, a force detailed for the protection of Europeans resident beyond His Majesty's dominions in the midst of a population, often turbulent and at the particular time disturbed, is itself disturbed by such a crime as the murder of a subadar by a native private in the ranks, such words may well cover and be designed to cover some necessary departure from the formalities only as distinguished from the essentials of English justice.

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE. The burden of proof in the matter has been decided by high authority in recent times in *R.* v. *Thompson* (1), a case which, it is important to observe, was considered by the trial judge before he admitted the evidence. There was, in the present case, Major Barrett's affirmative evidence that the prisoner was not subjected to the pressure of either fear or hope in the sense mentioned. There was no evidence to the contrary. With *R.* v. *Thompson* (1) before him, the learned judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests

with the trial judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule.

The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority. It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest, or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tort-feasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out or fear inspired by a person in authority, is a rule of policy.

> "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it" (*R.* v. *Warickshall* (2)).

It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *R.* v. *Baldry* (3). Accordingly, when hope or fear were not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warning as to their weight.

In the earlier part of the nineteenth century there was strong judicial authority for admitting a prisoner's statements, even though obtained by constables, who had him in custody, by considerable insistence in the way of interrogation (*R.* v. *Thornton* (4); *R.* v. *Wild* (5); *R.* v. *Kerr* (6); and even so late as *R.* v. *Baldry* (3), a case decided on the rules as to hope and fear, PARKE, B., observed (2 Den. at p. 445):

> "by the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary, and there is no doubt that any inducement in the nature of a promise or a threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way: whether it would not have been better to have allowed the whole to go to the jury it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence . . . justice and common sense have too frequently been sacrificed at the shrine of mercy."

The law, however, was considered to be fairly settled: see *R.* v. *Cheverton* (7); *R.* v. *Reason* (8); *R.* v. *Fennell* (9); 7 Q.B.D. at p. 150, and the references collected in the note to *R.* v. *Brackenbury* (10). When judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law: e.g., *R.* v. *Pettit* (11); *R.* v. *Berriman* (12), a case when the accused was not yet in custody.

In 1885 *R.* v. *Gavin* (13) re-opened these questions. Then A. L. SMITH, J., excluded a statement made to a constable, who questioned his prisoner in a way that amounted to cross-examination. He laid it down that a constable has no right to ask questions without expressly saying that the answers cannot be relevant evidence. In 1893 DAY, J., in *R.* v. *Brackenbury* (10), declined to follow

this decision, in a case when the question and answer preceded the arrest, and CAVE, J., in *R.* v. *Male and Cooper* (14), rejected a statement made by a prisoner in custody to a constable who had cross-examined him, saying merely that the police have no right to manufacture evidence, though in 1896, in *R.* v. *Goddard and Hurst* (15), he appears to have concurred in the admissibility of very similar matter. Two years later HAWKINS, J., in *R.* v. *Miller* (16), allowed the accused's answers to be proved against him, when he had been cross-examined before arrest, saying that he did not expressly dissent from *R.* v. *Gavin* (13), but that "every case must be decided according to the whole of its circumstances," but in 1898 (*R.* v. *Histed* (17)) he excluded the answers of a prisoner in custody, on the authority of *R.* v. *Gavin* (13), saying that the constable was entrapping the prisoner and trying by a trick to set a broken-down case on its legs again. Since then the current of authority has run the other way. In *Rogers* v. *Hawken* (18), a case of questions before arrest, a Divisional Court, consisting of LORD RUSSELL, C.J., and MATHEW, J., judges not prone to lean against a prisoner, held that the statement was admissible, and observed that

> "*R.* v. *Male and Cooper* (14) must not be taken as laying down that a statement of the accused to a police constable without threat or inducement is not admissible. There is no rule of law excluding statements made in such circumstances;"

and in *R.* v. *Best* (19) the Court of Criminal Appeal (including CHANNELL, J.) held that

> "it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial,"

adding that *R.* v. *Gavin* (13) is not a good decision. Here, however, it is to be observed that the actual decision was that under the proviso of s. 4 of the Criminal Appeal Act, 1907, the court would not interfere in that case. It did not expressly declare that statements of an accused, when in custody, in reply to a policeman's questions, are always admissible evidence against him unless they are rendered involuntary by reason of hope or fear induced by a person in authority. The point has been before the Court of Criminal Appeal more recently. In 1905 (*R.* v. *Knight and Thayre* (20)) statements were rejected, because obtained from the accused before arrest by means of a long interrogation by a person in authority over him. CHANNELL, J., adverted thus to the case of questions put by a constable after arresting:

> "When he has taken anyone into custody . . . he ought not to question the prisoner . . . I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence."

The same learned judge in *R.* v. *Booth and Jones* (21) in 1910 observes (5 Cr. App. Rep. at p. 179),

> "the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question it is inadmissible; what happens is that the judge says it is not advisable to press the matter;"

and of this DARLING, J., delivering the judgment of the Court of Criminal Appeal, observes: "The principle was put very clearly by CHANNELL, J."

The learned trial judge in the present case, in addition to the argument of counsel for the defence had before him a case decided in 1908 by the full court at Hong Kong, *R.* v. *Wong Chin Kwai* (22), in which the English authorities up

to that time were very fully examined. Before admitting the evidence of the appellant's statement he consulted GOMPERTZ, J., who had been a party to that decision, and accordingly it is clear that he admitted the statement only after the fullest consideration. The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial judge did not follow, the matter is one for the judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shown to have been exercised improperly.

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a court which exercises, as their Lordships do not, the revising functions of a general court of criminal appeal: (*Clifford* v. *King-Emperor* (23)). Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists: (*Riel* v. *R.* (24), 10 App. Cas. at p. 675); nor unless "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done" (*Dillet's Case* (25)). It is true that these are cases of applications for special leave to appeal, but the board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing (*Riel's Case* (24); *Ex parte Deemin* (26)). The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice (*Ex parte Macrea* (27)). There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future (*R.* v. *Bertrand* (28)).

Their Lordships were strongly pressed in argument with the case of *Makin* v. *A.-G. for New South Wales* (29), in which LORD HERSCHELL, L.C., delivered an elaborate exposition of the principles on which a Court of Criminal Appeal should act. Although in that case these observations are technically obiter dicta, since the board held that the evidence complained of at the trial had been rightly admitted, they are most weighty in themselves, and they have since been adopted by the Court of Criminal Appeal in *R.* v. *Dyson* (30), though with some later qualification. In *Makin's Case* (29), however, their Lordships had to determine the true construction of s. 423 of the New South Wales Act 46 Victoria, No. 17, which in defining a strictly appellate jurisdiction in criminal matters, provided

A "that no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated, unless for some substantial wrong or other miscarriage of justice."

It was held there that to transfer the decision of the guilt of the accused from a jury, acting on oral testimony, to an appellate tribunal, possessing that testimony only in writing, cannot be said to involve no miscarriage of justice, and hence that B a court of criminal appeal is not entitled to dismiss the appeal by re-trying the case on shorthand notes, or by holding that, if the trial judge had excluded the evidence, which he wrongly received, the verdict would probably have been the same. In other words such a proviso is not to be construed as investing a statutory court of criminal review with the functions of the original trial judge and jury. This is a very different matter from the duty of this Board in advising His Majesty C as to the exercise of his prerogative in relation to facts as they are made to appear to this Board by admissible material. Even in *Makin's Case* (29), however, reservation was made of cases

"where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury,"

D and this reservation is not to be taken as exhaustive. In England, where the trial judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, s. 4, may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict—(*R.* v. *Lucas* (31); *R.* v. *Stoddart* (32); *R.* v. *Norton* (33); *R.* v. *Loates* (34); *R.* v. *Wilson* (35))—or where evidence has been E admitted inadvertently or erroneously, which is inadmissible but of small importance—(*R.* v. *Westacott* (36); *R.* v. *Mullins* (37))—or most unlikely to have affected the verdict (*R.* v. *Solomon* (38)). Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to F warrant a conviction (*R.* v. *Fisher* (39)). The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute "highly improbable" for "impossible" in LORD HERSCHELL'S reservation above quoted.

Their Lordships think that the jurisdiction, which they exercise in appeals in criminal matters, involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substan- G tiated, in their proper relation to the whole matter. The facts of the present case must, therefore, be stated. They are briefly as follows. During the hot weather of 1912 the Sepoys of the 126th Beluchistan Regiment at Shameen lived and slept a great deal in the open air. The camp was near the Central Avenue, shaded by trees and lit by the electric light standards in the Avenue. On the night in question H the native officers, including Subadar Ali Shafa, were sitting in chairs near the road. Ibrahim and three other Sepoys were not far off in a group playing cards. The time was about 10.30 p.m. The subadar went up to them, accused them of gambling, searched them, took away 3·80 dollars of Ibrahim's money and ordered them to be confined to the lines. He abused Ibrahim with offensive language, against which Ibrahim protested, and then returned to his chair. A little time I afterwards the sentry saw a man going into the camp itself to the place where the men's rifles were kept, and gave an alarm. A shot was fired, and the subadar, after calling to the guard to turn out, and walking a few steps, fell dead, a bullet having passed through his body. Almost at once a man was seen a few paces from the sentry, standing behind a tree and pointing his rifle in the direction of the place where the native officers were sitting. This last significant fact was elicited by the jury themselves. He was immediately seized and proved to be Ibrahim. He had his own service rifle in his hand, identified by its number. Five rounds, enough to fill one clip, were missing from his bandolier. Four cartridges were in

the magazine of his rifle, the bolt of which was open; one, empty and still hot, was found on the ground. The rifle was fouled from recent discharge. No one else with a rifle was seen outside the camp when Ibrahim was seized. This story, which did not depend at any point on the evidence of one witness only, was amply corroborated in various ways. Beyond an indefinite suggestion that Ibrahim had been instigated to commit this crime, which came to nothing, the only attack on the witnesses was founded on discrepancies between them in matters of detail, or on the suggestion that they had amplified their evidence between the first trial, when the jury disagreed, and the second. It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave or otherwise. They will humbly advise His Majesty that the appeal should be dismissed.

Solicitors: *Langlois, Harding, Warren & Tate*, for *G. K. Hall Brutton*, Hong Kong; *Sutton, Ommanney & Rendall.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* CLAY. INLAND REVENUE COMMISSIONERS *v.* BUCHANAN

[Court of Appeal (Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.JJ.), May 26, 28, 1914]

[Reported [1914] 3 K.B. 466; 83 L.J.K.B. 1425; 111 L.T. 484; 30 T.L.R. 573; 58 Sol. Jo. 610]

Land Tax—Valuation of property—"Open market"—"Willing seller"—Special circumstances—Property required for particular purpose—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 2, 25 (1).

The term "open market" in s. 25 (1), of the Finance (1909–10) Act, 1910 [repealed], included, but was not confined to, a sale by auction or a sale through publication in the lists of house agents; it did not necessarily involve a sale without reserve. The term "willing seller" in the same subsection meant a free agent who could not be required by virtue of compulsory powers to sell.

The value of the fee simple of a certain dwelling-house and garden, if purchased by an ordinary individual and used as a private dwelling-house, was £750 and no more. Owing to the fact that the property was situate near a certain institution, the trustees of which were desirous of extending their premises, and that the property was well adapted for the special purposes for which the institution required it, the trustees were willing to pay £1,000 for it, and it was purchased by them at that figure. On appeal against valuations of the property, under the Act, at £1,000,

Held: the valuations should be affirmed because the value of a property if sold in the "open market" by a "willing seller," might be ascertained with reference to the fact that a price in excess of what the property might otherwise have realised had been paid by one particular purchaser owing to special circumstances.

Decision of Scrutton, J., [1914] 1 K.B. 339, affirmed.

Notes. Land values duties have now been abolished, and the sections of Finance (1909–10) Act, 1910, considered in this case have been repealed. The case

A is reported, however, because it may be of assistance in construing the provisions of the Finance Act, 1894, s. 1 and s. 7 (5), that estate duty is payable, where property passes on death, on the price which, in the opinion of the commissioners, it would fetch if sold in the open market at the time of the death. The case must be read subject to the decisions of the House of Lords in *I.R. Comrs.* v. *Crossman*, [1936] 1 All E.R. 762, that the open market price is not necessarily as high as B the price which a particular purchaser may, for special reasons, be prepared to pay; and of the Scottish Court that it is not necessarily the price at which the property is in fact sold after the death (*I.R.C.* v. *Marr's Trustees* (1906), 44 Sc.L.R. 647).

The principle laid down in this case does not apply to valuations for the purpose of assessing compensation on compulsory purchase: see Acquisition of Land C (Assessment of Compensation) Act, 1919, s. 2 (3).

Considered: *I.R. Comrs.* v. *Driver Holloway* (1917), 87 L.J.K.B. 406.

As to value in the open market for estate duty purposes and for compulsory purchase purposes, see 15 HALSBURY'S LAWS (3rd Edn.) 72, and ibid. vol. 10, pp. 112–114, and cases there cited. For the Finance Act, 1894, and the Acquisition of Land (Assessment of Compensation) Act, 1919, see 9 HALSBURY'S STATUTES (2nd D Edn.) 347, and ibid. vol. 3, p. 975 respectively.

Case referred to:

(1) *Glass* v. *I.R. Comrs.*, March 20, 1914, unreported, Valuation Appeal Court, Scotland.

E Also referred to in argument:

Lumsden v. *Inland Revenue Comrs.*, [1913] 3 K.B. 809; 82 L.J.K.B. 1275; 109 L.T. 351; 29 T.L.R. 759, C.A.; affirmed [1914] A.C. 877; 84 L.J.K.B. 45; 111 L.T. 993; 30 T.L.R. 673; 58 Sol. Jo. 738, H.L.; 42 Digest 623, *238*.

Re Lucas and Chesterfield Gas and Water Board, [1909] 1 K.B. 16; 77 L.J.K.B. 1009; 99 L.T. 767; 72 J.P. 437; 24 T.L.R. 858; 52 Sol. Jo. 173; 6 L.G.R. 1106, C.A.; 11 Digest (Repl.) 133, *182*.

F *R.* v. *Brown* (1867), L.R. 2 Q.B. 630; 36 L.J.Q.B. 322; 16 L.T. 327; 32 J.P. 54; 15 W.R. 988; sub nom. *R.* v. *Midland Rail Co.*, *Ex parte Brown*, 8 B. & S. 456; 11 Digest (Repl.) 131, *171*.

Ripley v. *Great Northern Rail. Co.* (1875), 10 Ch. App. 435; 23 W.R. 685, L.JJ.; 11 Digest (Repl.) 132, *173*.

G *Re Gough and Aspatria, Silloth and District Joint Water Board*, [1904] 1 K.B. 417; 73 L.J.K.B. 228; 90 L.T. 43; 68 J.P. 229; 52 W.R. 552; 20 T.L.R. 179; 48 Sol. Jo. 207, C.A.; 11 Digest (Repl.) 133, *181*.

Re Countess Ossalinsky and Manchester Corpn. (1883), Browne & Allan's Law of Compensation (2nd Edn.) 659, D.C.; 11 Digest (Repl.) 133, *179*.

Inland Revenue Comrs. v. *Herbert*, [1913] A.C. 326; 82 L.J.P.C. 119; 108 L.T. H 850; 29 T.L.R. 502; 57 Sol. Jo. 516; 11 L.G.R. 865, H.L.; 42 Digest 622, *235*.

Orchard v. *Simpson* (1857), 2 C.B.N.S. 299; 140 E.R. 431; 39 Digest 408, *428*.

Appeals against two decisions of SCRUTTON, J., on petitions against decisions of a referee on the value of a certain property for the purposes of Land Values Duty.

I

INLAND REVENUE COMMISSIONERS v. CLAY

The petitioners R. H. Clay and others were persons aggrieved by a decision of a referee within the meaning of s. 33 (4) of the Finance (1909–10) Act, 1910, in respect of a dwelling-house and garden, being No. 83, Durnford Street, East Stonehouse, Plymouth.

In January, 1911, there was duly served by a district valuer appointed by the petitioners, a provisional valuation made under and by virtue of the Act. The provisional valuation showed original gross value £750; original total value £750;

difference between the gross value and the value of the fee simple divested of buildings, trees, etc., £560; original full site value, £190; original assessable site value £190. By a notice of appeal dated Oct. 12, 1911, the petitioners intimated their intention to appeal to the referee against the total and site value fixed in the provisional valuation on the ground that those values were insufficient. At the hearing of the appeal at Plymouth, on Mar. 8 and 9, 1912, before the referee, the evidence called by the petitioners showed that the gross value on April 30, 1909, as defined by s. 25 (1) of the Finance (1909-10) Act, 1910, did not exceed the figure fixed in the provisional valuation. The witnesses called on behalf of the petitioners did not dispute that apart from one special circumstance the gross value was fairly fixed at £750. The special circumstance referred to was that the proprietors of a nurses' home, who at all material times occupied the house next door to the house now in question, and were desirous of extending their premises, did, at a later time, give the sum of £1,000 for the house now in question, and were as it appeared on the evidence willing at April 30, 1909, to have given that sum if the house now in question could have been obtained for it. It was contended that the above circumstance constituted a special adaptability of the house now in question, enhancing its value and rendering £1,000 a proper value to be fixed.

On April 26, 1912, the referee gave his decision in relation to the appeal as follows:

"The decision on the appeal in respect of which the annexed notice of appeal has been given is that items numbered 1, 2, and 12 in the provisional valuation are insufficient, and that the amounts of these should be as follows:

1. Gross value		£1,000
Deductions from gross value.		
2. Difference between gross value and value of fee simple of land divested of buildings, trees, &c.	£800	
Full site value	£200	—£1,000
Deductions from total value.		
12. Deductions from gross value to arrive at full site value (as above)		£800
Assessable site value		£200

I further decide that the expenses of the appellants in connection with the appeal shall be paid by the commissioners."

This was the decision by which the petitioners were aggrieved, and against which the present petition was brought.

The petitioners submitted that the decision of the referee was erroneous and should be reversed upon the following grounds: (i) That the values fixed in the provisional valuation were correct; (ii) that there was ample evidence that the fee simple sold on April 30, 1909, in the "open market" by a "willing seller" would not have fetched more than £750; (iii) that there was no evidence of any special adaptability in the house now in question; (iv) that the price that one particular purchaser might, owing to special circumstances, be prepared to give was not the measure of the market value of the house; (v) that the witnesses on behalf of the petitioners, in arriving at their valuation, allowed for the fact that the proprietors of the nurses' home were anxious to buy; (vi) that the decision of the referee proceeded upon an erroneous view of the law; and that the referee misconstrued s. 25 (1) of the Finance (1909-10) Act, 1910. The petitioners, therefore, prayed (a) that it might be declared that the provisional valuation of Jan. 24, 1911, was correct and ought to be restored; (b) such further or other order as the court might think fit.

Inland Revenue Commissioners v. Buchanan

The petitioners, Mrs. E. J. Buchanan and others, were persons aggrieved by the decision of the referee relating to the same dwelling-house and garden. As in the

preceding case, the provisional valuation with reference to which house was as set forth above. The appeal to the referee in respect of that valuation was heard together with the appeal which is the subject of the petition in the preceding case.

By an indenture of conveyance dated Sept. 29, 1910, the dwelling-house and garden now in question were conveyed in fee simple by Mrs. E. J. Buchanan to the before-mentioned R. H. Clay and others, in consideration of £1,000. Particulars of the conveyance were duly delivered to the petitioners, and the conveyance being an "occasion" under and by virtue of s. 2 (2) of the Finance (1909–10) Act, 1910, particulars as provisionally determined of the values on the occasion aforesaid were duly made under the hand of the petitioners' valuer, dated Feb. 21, 1911, and were served on the said Mrs. E. J. Buchanan, R. H. Clay and others. The particulars showed: Value of land on the occasion £1,000; difference between gross value and value of the fee simple divested of buildings, trees, &c., £560; site value on the occasion £440. The original site value, as stated in the provisional valuation, was £190, and as found by the referee was £200. Notice of appeal was duly given on behalf of Mrs. E. J. Buchanan, R. H. Clay and others, against the provisional determination of the site value on the "occasion," the ground of appeal being that such site value on the occasion was not correct. At the hearing of the appeal by the referee at Plymouth, on Mar. 8 and 9, 1912, together with the appeal in the preceding case, the evidence called by the petitioners showed that the gross value of the land on the "occasion" did not exceed £750.

The witnesses called on behalf of the petitioners did not dispute that, apart from the special circumstances of the sale to the proprietors of the nurses' home, the gross value was fairly fixed at £750. The proprietors of the nurses' home, who at all material times occupied the house next door to the house now in question, and were desirous of extending their premises, were prepared to give and did give the sum of £1,000 for the house now in question. It was contended that the above circumstance constituted a special adaptability of the house now in question, enhancing its value, and rendering £1,000 a proper value to be fixed. On April 26, 1912, the referee gave his decision in relation to the appeal as follows:

> "The decision of the appeal, in respect of which the annexed notice of appeal has been given is that the site value on the occasion of the sale to and the purchase by the appellants is not correct, and that the amount should be as follows:
>
> | | |
> |---|---|
> | Value of land on the 'occasion' ... ... | £1,000 |
> | Deduction to arrive at site value on the 'occasion': | |
> | Difference between gross value and value of the fee simple divested of buildings, trees, &c. ... ... | £800 |
> | Site value on the 'occasion' ... ... | £200 |
>
> And I further decide that the expenses in connection with the appeal shall be paid by the commissioners."

This was the decision by which the petitioners were aggrieved and against which the present petition was brought.

The petitioners submitted that the decision of the referee was erroneous and should be reversed on the following grounds: (i) that the gross value of the land on the occasion was £750; (ii) that there was ample evidence that the fee simple of the land sold on Sept. 29, 1910, in the "open market" by a "willing seller" could not have fetched more than £750; (iii) that there was no evidence of any special adaptability in the house now in question; (iv) that the price that one particular purchaser might, owing to special circumstances, be prepared to give, and had in fact given, was not the measure of the market value of the house; (v) that the site value on the occasion was correctly deduced in the particulars of value as provisionally determined on the occasion; (vi) that the decision of the referee proceeded upon an incorrect construction of ss. 2 and 25 of the Finance (1909–10)

Act, 1910. The petitioners, therefore prayed, (a) that it might be declared that the particulars of value as provisionally determined were correct and that the conclusion arrived at by the referee was erroneous; (b) such further or other order as the court might think fit.

Section 25 (1) of the Finance (1909–10) Act, 1910, provided:

> "For the purposes of this part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction, (other than rates or taxes) might be expected to realise."

In December, 1913, the petition came on to be heard before SCRUTTON, J., when judgment was reserved. On Dec. 13, 1913, SCRUTTON, J., held that the gross value of the property for the purpose of the subsection was £1,000, as fixed by the referee; and that in considering the value of the fee simple, if sold in the "open market" by a "willing seller," the referee was perfectly entitled to take into account the price actually offered and paid for the property, although the same was in excess of what it might otherwise have realised, owing to the fact that the particular purchaser required it for a particular purpose. From that decision the Commissioners appealed to the Court of Appeal.

The Solicitor-General (*Sir Stanley Buckmaster, K.C.*) and *William Finlay* for the appellants, the Inland Revenue Commissioners.

Freeman, K.C., and *William Allen* for the respondent taxpayers.

Cur. adv. vult.

May 28. The following judgments were read.

COZENS-HARDY, M.R.—This appeal—for I think that the two cases really form one appeal—raises an important question under s. 25 of the Finance (1909–10) Act, 1910. That section provides that

> "the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition [subject to certain deductions] might be expected to realise."

The facts are not in dispute. The respondent Mrs. Buchanan was owner and occupier of No. 83, Durnford Street, East Stonehouse, having purchased it in 1902 for £700. In September, 1910, she sold it to the respondents Clay and others for £1,000. The purchasers were the trustees of a nurses' home, No. 84, who wanted the house for the purpose of extending their home. In 1908 they had offered Mrs. Buchanan £850 which she declined. Negotiations were resumed in 1910 and after some bargaining she agreed to sell for £1,000. The trustees would have been prepared to give £1,100. Regarding No. 83 solely as a residence for private occupation, its value was not more than £750. The referee found the gross value as on April 30, 1909, to be £1,000, and SCRUTTON, J., has upheld that view. The contention of the appellants is that the gross value is £750 only. The contest before us has turned mainly on the words "open market" and "willing seller." I think the view ultimately taken by counsel for the appellants, and also for the respondents, as to the meaning of "open market" is correct. "Open market" includes a sale by auction, but it is not confined to that. It would include property publicly announced in the usual way by insertion in the lists of house agents, but it does not necessarily involve the idea of a sale without reserve. I can see no ground for excluding from consideration the fact that the property is so situate that to one or more persons it presents greater attractions than to anybody else. The house or the land may immediately adjoin one or more landowners likely to offer more than the property would be worth to anyone else. This is a fact which cannot be disregarded. Counsel for the appellants ultimately admitted that some regard must be had to that fact, but he urged that you ought to consider, first, what an outside purchaser would give, say, £750, and then allow the adjoining

owner one more bid. In other words, something very small beyond the £750. We had our attention called to the valuable judgments of LORDS JOHNSTON and SALVESEN in the recent Scottish case, *Glass* v. *Inland Revenue Comrs.* (1), and I accept their view of the meaning of the words "open market." The price at which the property was sold in 1910 is not the test of the gross value in April, 1909, but it cannot be disregarded. I adopt the language of SCRUTTON, J. ([1914] 1 K.B. at p. 350):

> "He [the referee] was right in this, not because of the sale for £1,000, but because of the reasonable expectation that a willing seller could get £1,000 or more from the nurses' home."

An "open market" sale of property "in its then condition" presupposes a knowledge of its situation with all surrounding circumstances. To say that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd. If the landowner does not at the moment buy, land brokers or speculators will give more than its pure agricultural value with a view to re-selling it at a profit to the landowner. It is for the referee, whose competence is not challenged, to arrive at a figure. The court ought not, as a rule, to review his decision on what is in truth a question of fact. I see no ground for supposing that there has been any misdirection in point of law.

The other point is as to the meaning of "willing seller." It is urged that Mrs. Buchanan never was a willing seller; that she never wished to vacate the house in which she was living; and that it was only after pressure from the trustees that she agreed to sell for £1,000. I am disposed to think that a "willing seller" is a person who is a free agent and cannot be required by virtue of compulsory powers to sell, and that Mrs. Buchanan was a "willing seller" when, in 1910, she voluntarily agreed to accept £1,000. If, however, contrary to my view, she was not a "willing seller," the problem still remains, for the existence of a willing seller, whether Mrs. Buchanan or not, must be assumed for the purpose of the section.

In my opinion, the judgment of SCRUTTON, J., affirming the decision of the referee was correct, and this appeal must be dismissed with costs.

SWINFEN EADY, L.J.—The Solicitor-General has contended that in arriving at "the gross value of land" pursuant to the provisions of s. 25 (1) of the Finance (1909–10) Act, 1910, and in ascertaining the amount "which the fee simple of the land, if sold at the time in the open market by a willing seller . . . might be expected to realise" you must disregard the fact that the property has a special value to one particular person who would be willing to give substantially more than any other person and also disregard the influence upon the market which the knowledge of this fact would create. He further urged that at most there could only be allowed some slight increase, on what he contended would otherwise be the market value of the land, so as to represent the amount of one bid at an auction which the particular person would probably make over all other persons to secure the property—say £50 extra or the like.

The house in question—No. 83, Durnford Street, East Stonehouse, Plymouth—has been valued in the Provisional Valuation as of April 30, 1909, as altered and settled by the referee at £1,000 and deducting £800, the assessable site value fixed at £200. On the occasion of a sale the amounts as altered and settled by the referee are the same, so that no increment duty is payable. The appellants claim that the original amount in the provisional valuation—namely, £750, should be restored as that figure represented the market value of the house—irrespective of the wants of the nurses' home next door. On Sept. 18, 1908, Mrs. Buchanan refused an offer of £850 made by the nurses' home for the house. On Mar. 2, 1910, it was reported to the nurses' home that Mrs. Buchanan would not take

less for the house than £1,100, and in August, 1910, the nurses' home determined to offer £1,100 if it could not be obtained for less, but on Sept. 29, 1910, it was agreed to be sold by Mrs. Buchanan to Dr. Clay and others on behalf of the nurses' home for £1,000. The referee found the value both on April 30, 1909, and on Sept. 29, 1910, was £1,000—this was less than the nurses' home had determined to give and was prepared to offer, if they could not obtain the property cheaper. The house could not be rebuilt so as to give the same accommodation as at present for less than £1,200. The learned judge in the court below found as a fact that as a private residence, and having regard to the other houses offering, No. 83 was not worth more than £750, which was the utmost such people could be expected to give, but that to the nurses' home which owned the neighbouring house, and needed further accommodation near, No. 83 was so adjacent and offered such suitable accommodation that it would be advantageous to them to pay at least £1,000 and probably more for it, and that the £1,000 actually paid was a profitable business transaction to the nursing home and not a fancy price. It was not worth anyone else's while to pay a sum substantially larger than £750 except in the hope of re-selling to the nurses' home to which the house was obviously of considerable value and a likely subject of purchase.

The Solicitor-General contended that as the section said "if sold at the time in the open market" the price which only one particular buyer was prepared to pay must be excluded from all consideration. It might possibly be a fancy price which had no relation to market price; that a reference to open market showed that the statute referred to a current market price of land a price which one or more valuers might determine to be the market value of the land.

In my opinion, this contention is unsound. A value, ascertained by reference to the amount obtainable in an "open market," shows an intention to include every possible purchaser. The market is to be the open market as distinguished from an offer to a limited class only such as the members of the family. The market is not necessarily an auction sale. The section means such amount as the land might be expected to realise if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale. It scarcely needed Mr. Body's evidence to inform us—it is common knowledge—that when the fact becomes known that one probable buyer desires to obtain any property, that raises the general price or value of the thing in the market. Not only is the probable buyer a competitor in the market but other persons—such as property brokers—compete in the market for what they know another person wants with a view to a re-sale to him at an enhanced price so as to realise a profit. A vendor desiring to realise any land would ordinarily give full publicity to all facts within his knowledge likely to enhance the price. The local conditions and requirements, the advantages of the situation of the property for any particular purpose, and the names of the persons who are probable buyers would ordinarily be matters of local knowledge to the property brokers, agents, and speculators. In order to arrive at the amount which land might be "expected to realise" all these matters ought to be taken into consideration. "Expected" refers to the expectation of properly qualified persons who have taken pains to inform themselves of all the particulars ascertainable about the property and its capabilities, the demand for it and the likely buyers. The price actually realised by a sale is not necessarily the price which it might have been expected to realise. But if the valuer be competent and has taken proper pains in the matter there ought to be little difference between the two figures. The fact that No. 83 had a potential value by reason of its proximity to the nurses' home and to the very rapid increase of the work of that institution, pointing to a necessary extension at an early date ought properly to be taken into consideration in arriving at the value it might be expected to realise. The Solicitor-General urged that after the addition of the new wing to the old building, which followed upon the refusal by

Mrs. Buchanan of the offer of £850 on Sept. 18, 1908, this element of value disappeared. This is not the case in fact. The report of the institution for 1908–9 shows the leaps and bounds by which the work was increasing, and points to a further extension of premises being necessary in the near future, and this extension indeed became extremely urgent in the following year.

It was then urged by the Solicitor-General that if the probability of this special buyer purchasing above the price which but for his needs would have been the market price could be taken into consideration at all, then only one further point or bid could be allowed, and it must be assumed that this special buyer would have become the purchaser upon making this one extra bid. Such an assumption would ordinarily be quite erroneous. The knowledge of the special need would affect the market price, and others would join in competing for the property with a view to obtaining it at a price less than that at which the opinion would be formed that it would be worth the while of the special buyer to purchase.

It was then urged that the vendor in the present case was not a "willing seller," as she had to be persuaded to sell at the sum of £1,000. It was, however, true that her son-in-law was consumptive, and that his wife did not think Durnford Street quite the right place for him to live in, and that was one motive for her yielding to the solicitations of Dr. Clay on behalf of the home. She was, however, a "willing seller" at £1,000. A sale by a "willing seller" is distinguished from a sale which is made by reason of compulsory powers where the vendor frequently obtains an addition to the price, because of being under compulsion to sell. It does not mean a sale by a person willing to sell his property without reserve for any price he can obtain. Mrs. Buchanan was a "willing seller" when she accepted £1,000. The fact that she was persuaded or induced to agree voluntarily to sell at that price, did not make her any the less a willing seller. There was no evidence of any compulsion; there was friendly bargaining, some discussion, some higgling about price, and then an agreement come to. This is the normal course of most private contract sales. She was none the less a willing seller because she had not previously put the property into the hands of an agent for sale. She was willing to sell at a price; she was offered a price less than the maximum which the intending purchasers were willing to give, and she took it. There was a considerable body of evidence re-heard before SCRUTTON, J., and the sum of £1,000 was arrived at because that was the sum which the land, if sold at the time in the open market in its then condition, might be expected to realise. It happens, also, to be the price actually realised, but the figure was not arrived at on the latter ground.

I agree with the judgment of SCRUTTON, J., and also with the reasons given in the judgments of LORD JOHNSTON and LORD SALVESEN in the Court of Session in the unreported case of *Glass* v. *Inland Revenue Comrs.* (1) of which shorthand notes have been furnished to us. This appeal should be dismissed.

PICKFORD, L.J.—This is an appeal from SCRUTTON, J., relating to the gross value of premises in Stonehouse under the Finance (1909–10) Act, 1910. [HIS LORDSHIP summarised the facts and continued:] Upon this state of facts the referee and SCRUTTON, J., fixed the gross value at £1,000. The appellants contended that the gross value should be £750 and a small sum which I will mention later. The case turns on the application to the facts of s. 25 (2) of the Finance (1909–10) Act, 1910, by which the gross value is defined as the amount which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realised.

It was argued for the appellants that the respondent was not a "willing seller" as she was only tempted by an exceptionally high offer and that the market value to a "willing seller" was not to be measured by the price given by the trustees of the nurses' home in consequence of their special wants.

I think that sold in the "open market" means sold in such a way that anyone wishing to purchase was able to do so, e.g., by auction or by putting the house

into the hands of an agent to sell, and I think a "willing seller" means one who is prepared to sell provided a fair price is obtained under all the circumstances of the case. I do not think it means only a seller who is prepared to sell at any price and on any terms or who is actually at the time wishing to sell. In other words, I do not think it means an anxious seller.

In this case the house was only worth £750 if it was sold as a dwelling-house, and unless there were some other elements to be considered that would be its value; but there was another element here, i.e., the fact that the trustees of the nurses' home wished to buy the house and were willing to give more than its value as a dwelling-house for it, although it was not known to what price they would go and the exact amount of knowledge of their intentions amongst those persons who were likely to buy houses was not clearly shown. It is, however, impossible to suppose that the wish of the trustees to buy the house was entirely unknown to those interested in property sales, and if the sale took place either by auction or through an agent the willing seller would be careful to see that that fact were made known. I assume that the gross value is not to be measured necessarily by the price given by a buyer who is peculiarly in need of the particular piece of property. But it seems to me clear that the fact of there being such a person in the market must have an influence on the value in the "open market."

The position is well expressed by LORD JOHNSTON in the Scottish case, *Glass* v. *Inland Revenue Comrs.* (1), to which we were referred. Substituting trustees of the nurses' home for commissioners this applies to this case. It is not denied by the appellants that the wish of the trustees to buy the house is a fact to be considered, but it is said that the only effect to be given to it is that a small sum is to be added to the value of £750 to represent a final bid made by the trustees in order to acquire the property. This seems to me to be a fallacy, and to ignore common experience. It assumes that the dwelling-house value £750 having been reached, everybody except the trustees will decline to make any further offer and allow the trustees to become the purchasers by a single offer which exceeds that amount in however small a degree. It is not uncommon that where a person or public body is known to be very anxious to purchase a piece of property speculators will run the price up on the chance of buying it at a price to which the person or body is not prepared at that moment to go, and hoping that their needs will eventually oblige them to buy from the speculator at a profit. I do not think that the effect of the needs of a probable purchaser can be confined to the amount of the one bid which will take the offer above the bare dwelling-house value. The effect on the market of such a probable purchaser is a matter to be estimated by the referee. I agree with SCRUTTON, J., that he is not bound to take the actual figure given, and should not do so arbitrarily, but should consider all the circumstances and estimate what he considers the value in the "open market." Here he has done so, and has come to the conclusion that under all the circumstances the amount this house might be expected to realise in the "open market" would be £1,000—an amount, it is to be noticed, less than the trustees were in fact willing to give if compelled. I do not see that he has applied any wrong principle, and I do not see my way to say that he and SCRUTTON, J., who also had evidence before him and came to the same conclusion, were wrong. I think he would have applied a wrong principle if he had said that he was limited to the dwelling-house price plus one bid of a small sum by the trustees. I think the appeal should be dismissed.

Solicitors: *Solicitor of Inland Revenue: Lewin, Gregory & Anderson*, for *S. J. Lawry*, Plymouth.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

MATHERS *v.* PENFOLD

[KING'S BENCH DIVISION (Darling, Bankes, Avory, Lush and Atkin, JJ.), December 8, 9, 1914]

B [Reported [1915] 1 K.B. 514; 84 L.J.K.B. 627; 112 L.T. 726; 79 J.P. 225; 31 T.L.R. 108; 59 Sol. Jo. 235; 13 L.G.R. 359; 24 Cox, C.C. 642]

Criminal Law—Vagrancy—Begging—Collection for charitable object—Money for men out of work—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

The respondent, who was a member of a branch of a trade union, was in a public place soliciting contributions for members of his branch, including him-
C self, who were out of work in consequence of a dispute in the trade. He was authorised by his branch to collect subscriptions, and he had to return to the committee of the branch all the money he collected, which was divided equally among all the unemployed men, including himself. The respondent having been summoned, under s. 3 of the Vagrancy Act, 1824, for wandering abroad in a public place to beg, and the summons having been dismissed,

D **Held:** a person who was found in a street making a bonâ fide collection for some charitable object was not within the mischief or the language of the Act, and so the respondent, although he might himself receive some benefit from the money collected, was not "begging" within the meaning of s. 3 of the statute, and, therefore, the information against him was properly dismissed.

Pointon v. *Hill* (1), 12 Q.B.D. 306, considered.

E **Notes.** Explained and distinguished: *Prothero* v. *Watson* (1931), 47 T.L.R. 627.

As to vagrancy, see 10 HALSBURY'S LAWS (3rd Edn.) 697–703, and for cases see 15 DIGEST 921 et seq. For Vagrancy Act, 1824, see 18 HALSBURY'S STATUTES (2nd Edn.) 202.

Case referred to:

F (1) *Pointon* v. *Hill* (1884), 12 Q.B.D. 306; 53 L.J.M.C. 62; 50 L.T. 268; 48 J.P. 341; 32 W.R. 478; 15 Cox, C.C. 461, D.C.; 15 Digest (Repl.) 922, *8846*.

Also referred to in argument:

Logsdon v. *Booth*, [1900] 1 Q.B. 401; 69 L.J.Q.B. 131; 81 L.T. 602; 64 J.P. 165; 48 W.R. 266; 16 T.L.R. 129; 44 Sol. Jo. 158, D.C.; 38 Digest (Repl.) 261, *692*.

G *Booth* v. *Ferrett* (1890), 25 Q.B.D. 87; 59 L.J.M.C. 136; 63 L.T. 346; 55 J.P. 7; 38 W.R. 718; 6 T.L.R. 337, D.C.; 38 Digest (Repl.) 261, *691*.

Case Stated by the metropolitan magistrate sitting at the Marlborough Street Police Court.

On May 9, 1914, the respondent was brought by the appellant, a police constable, H before the magistrate on the charge that he, on May 8, 1914, in the city of Westminster, did unlawfully wander abroad in a public place there to beg. Evidence was given that at 11.25 p.m., on May 8, in St. James' Square, Westminster, and the immediate neighbourhood, the respondent went to two gentlemen and asked them to buy some tickets which he had in his possession and produced them to the gentlemen, who refused to purchase them. He then went to another gentle-
I man and offered the same tickets for sale, at the same time asking the gentleman to assist him, as he was out of work through a strike. The respondent, in the same way, solicited a lady and gentleman who were together, and subsequently a gentleman who was walking alone. In no case did any of the persons solicited buy any of the tickets or give the respondent any money. The appellant, who was then and there on duty, apprehended the appellant under the powers of s. 6 of the Vagrancy Act, 1824, and made the charge before the magistrate as already stated. When apprehended, the respondent had in his possession one book of tickets containing twenty-four tickets, and another complete book containing sixty tickets.

At the time of the alleged offence there was a dispute in the building trade, in consequence of which the respondent was out of work. The respondent was a member of the Shamrock branch of the United Order of General Labourers, this being an affiliated union under the Federation of Building Trade Unions. The Shamrock branch had organised a collection of funds to relieve their members who were out of work and their families. In order to have a check upon the collectors this system of tickets was instituted, the expectation being that when a donation was received the donor would accept a ticket or tickets corresponding in value to the amount given. The respondent had possession of the tickets in pursuance of this scheme, and was fully authorised by the branch to collect subscriptions.

The Shamrock branch had at the time of the alleged offence 517 members, of whom 140 were then out of work in consequence of the dispute. The money collected was divided equally among these 140 men, including the respondent, quite irrespective of the fact that some collected and some did not. The amount which each man had received during the week next preceding the week in which the alleged offence was committed was 7s.

It was contended on behalf of the respondent that upon the authority of *Pointon* v. *Hill* (1), the respondent was not guilty of the offence charged, upon the following grounds: (i) That the respondent was not of the class of persons against whom the Act was directed—namely, those who made it their mode and habit of life to wander about and put themselves in streets and highways, and there beg or ask for alms: (ii) that the respondent was going about in an orderly way when soliciting alms and for an object which was not unlawful; (iii) that the respondent's action was in the same category as the Hospital Saturday street collections, mentioned in the *Pointon Case* (1) and, therefore, not unlawful. The contention on the part of the appellant was: (i) That it is not necessary to constitute the offence that there should be any questionable mode and habit of life extraneous to the specific acts charged; (ii) that the degrees of "idle and disorderly person, rogue and vagabond" and "incorrigible rogue" conferred by the Act upon certain convictions were mere expressions of art used in order that when new offences were created the procedure of the Vagrancy Act, 1824, might be made applicable; (iii) that otherwise it would be necessary to prove in such cases as exposure of the person with intent to insult a female, being found on enclosed premises for an unlawful purpose, male person importuning for an immoral purpose, or keeping a lottery, that the person charged, irrespective of the offence charged, bore a bad character as a rogue and vagabond, and that this has never been required; (iv) that where an independent status was necessary under the Vagrancy Act, 1824, it was always stated in the Act, for example, a prostitute behaving in a riotous or indecent manner in the street, or "a suspected person or reputed thief" frequenting a place with intent to commit a felony; (v) that the facts in this case were not within the same category as a Hospital Saturday collection, or the cow case, which was given as an illustration in the judgment in *Pointon* v. *Hill* (1), as, in the former case, none of the collectors received personal benefit from the collection, and in the latter case, the application for assistance was made to private friends and not in a public place to the public generally; (vi) that the offence of begging might be committed notwithstanding it might be part of an organised and co-operative scheme.

The magistrate held that, whatever his opinion might have been, had the affair been res integra, the facts of this case fell within the principle of *Pointon* v. *Hill* (1), so that he felt bound to discharge the respondent, but thought it right to grant the appellant's application for a Case in order that it might be considered whether the above case should not be reviewed.

By s. 3 of the Vagrancy Act, 1824:

". . . every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage to beg or gather alms . . . shall

A be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him . . .) to the house of correction, there to be kept . . . for any time not exceeding one calendar month."

Travers Humphreys for the appellant.—The question raised is as to the meaning B of the words in s. 3 of the Vagrancy Act, 1824, a person wandering about or placing himself in any public place to beg or gather alms. The statute describes three classes of persons—those who come within s. 3 are to be deemed to be idle and disorderly persons, those who come within s. 4 are rogues and vagabonds, and those who come within s. 5 are to be deemed to be incorrigible rogues. The magistrate decided the case on the authority of *Pointon* v. *Hill* (1), considering that he C was bound by that decision to dismiss the information. That case is distinguishable on the facts, but it cannot be contended that it is distinguishable on the grounds that were given for the judgment. The decision in *Pointon* v. *Hill* (1) proceeded on a wrong basis, that to bring a case within this section the act must be done habitually, and that unless it can be proved that the person has been doing this thing habitually, as his habit and mode of life, there would be no offence within D s. 3. Persons are to be deemed idle and disorderly persons within the meaning of this Act if they do the thing prohibited by s. 3—namely, to place themselves in the streets to beg. The difficulty felt by CAVE, J., as to those persons who placed themselves in the streets to gather alms for the hospitals of London has been got over by subsequent legislation. Section 1 of the Metropolitan Streets Act, 1903, gave power to make regulations as to street collections in the metropolis,

E "with respect to the places where and the conditions under which persons may collect money in any street for charitable or other purposes."

Regulations have been made under that section, and that would meet the difficulty put by CAVE, J., as to the Hospital Saturday collections in the streets. It cannot assist the respondent in this case that he was collecting for himself and others as F well. In s. 1 of the Act of 1903 the words "other purposes" must read as ejusdem generis with charitable purposes, and collecting funds for persons out on strike would not be collecting money for charitable purposes or any purposes of a similar kind. The decision in *Pointon* v. *Hill* (1) proceeds on a wrong assumption that no person can be guilty of this offence under s. 3 unless he is in the habit of begging as his mode of life, or is a bad character. If it were necessary to prove that in G each case, it would be practically impossible to administer this Act. The question whether the Divisional Court ought to overrule a previous decision of the same court if they disagree with it was considered in *Logsdon* v. *Booth*, and the court there, in a considered judgment delivered by LORD RUSSELL, C.J., thought that they ought to overrule, and did overrule, the previous decision in *Booth* v. *Ferrett*, as they disagreed with it. In this case the magistrate based his decision on *Pointon* H v. *Hill* (1), and as this is a criminal case and there is no appeal the court can and ought to overrule that case.

Langdon, *K.C.* (*Slesser* with him), for the respondent.—*Pointon* v. *Hill* (1) was rightly decided and ought to be followed. In MURRAY'S DICTIONARY "begging" is defined as the action or habit of asking earnestly, specially of asking alms. A person cannot be convicted under this section unless he is a beggar, that is, unless I he is doing it habitually. There must be the implication that that is his habit of life and that he is living by it; and he must be of that class of life that is in ordinary language described as a beggar and must be asking for alms as his means of living. The test is whether a man is trying to make his living by begging instead of by working; but if he merely asks for contributions in the way the respondent did, it would be an abuse of language to say that he is "an idle and disorderly person." It would be sufficient to say that the broad principle laid down in *Pointon* v. *Hill* (1) would cover most of the cases that arise, and the test is there put that to bring a case within the section the act must be done as a habit or mode of life,

and that the persons who are idle and disorderly persons within s. 3 are those who place themselves in the streets to beg as their habit and mode of getting their living. The title and preamble of the Act and the construction of this section all show that a charitable collection for special objects does not come within the Act. The various Acts dealing with vagrancy from the earliest times are summarised in STEPHEN'S HISTORY OF THE CRIMINAL LAW OF ENGLAND, vol. 3, pp. 266 et seq., and that shows that the history of begging has given to the word the meaning of the habitual asking of alms, and that the word has no application to collections which are for charitable or largely beneficial objects. The facts of the present case fall well within *Pointon* v. *Hill* (1), and even if that case seems doubtful the court ought not to overrule it. It was decided thirty years ago; it is an old case and it has been accepted as good law and has never been challenged, but on the contrary, collections of this kind have been going on all the time and proceedings have not been taken. There was an implied recognition of the principle of *Pointon* v. *Hill* (1) in the Metropolitan Streets Act, 1903, as to collections for "charitable or other purposes." That brings the case within the dictum of LORD RUSSELL, C.J., in *Logsdon* v. *Booth* ([1900] 1 Q.B. at pp. 413–4), that if it could be shown that the legislature had subsequently legislated in a way which demonstrated that it was accepting and adopting the law as so laid down in a previous case, then the court ought not to disturb the decision in question. That is applicable here, as the legislature in 1903 has recognised the law as to these street collections laid down in *Pointon* v. *Hill* (1), and the court, therefore, ought not to overrule that case. The collection in this case was a street collection for a charitable purpose within the Act of 1903. The magistrate was therefore right in following *Pointon* v. *Hill* (1) and dismissing the information.

DARLING, J.—In this case the respondent, who belonged to some association of persons who were out of work, solicited alms in the street, and he was charged under the Vagrancy Act, 1824, with being an idle and disorderly person. The magistrate declined to convict him, but stated this Case. The question comes to be determined upon the words in s. 3 of that Act, because it is said that the respondent was an idle and disorderly person within the meaning of that section. The respondent did undoubtedly place himself in a street, and he did solicit contributions to a fund for the relief of people who were out of work belonging to the society to which he himself belonged, and he would, or at all events might, himself benefit to some extent by any contributions that might be received.

I think the magistrate was right in refusing to convict him. In my opinion, this statute, which says that a person is to be deemed to be an idle and disorderly person, really is not aimed at people collecting for an object of a charitable nature in which possibly they themselves have an interest, but that it is aimed merely at people of a different type. It is not a statute which stands by itself. It is the result of a number of statutes which were passed to deal with people who were a danger to society—people wandering about the country without work. I am not in the least saying that when these statutes began to be passed they were aimed at people who were without work by their own fault, but they were without work, and being without work and being without means, no doubt they were dangerous people, and it was necessary to deal with them. How they came to be in such a state is a matter of history, and we need not go into it, but there they were, and there being these masses of people for many years, this statute was passed to deal with them, as other statutes have been passed.

The preamble of the statute is important. It says:

> "Whereas . . . it is expedient to make further provision for the suppression of vagrancy, and for the punishment of idle and disorderly persons, rogues and vagabonds, and incorrigible rogues . . ."

Then comes s. 3, which begins in this way:

A "Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place . . ."

B [Those words have been repealed by the National Assistance Act, 1948: see Sched. 7, Part 1.] That is the sort of person, I think, among others, who is aimed at. I think that what the respondent was doing was not "begging" in the sense in which the statute uses the word. The word "beg" may be used in many senses, as, for instance, one may say: "I beg your pardon." This is a use which has very little similarity with the begging which is done by what the statutes call a C sturdy vagrant. It is, in fact, rather a humiliating thing to do, as most people would think, done by people of quite a different turn of mind—namely, by those sturdy and troublesome beggars. Then the Act says "or gather alms." The respondent can hardly say he was not gathering alms; I think he was gathering alms, but it is to be noticed that he was not doing it for the sort of purpose for which those people who were denominated by the statute idle and disorderly D persons would do it. To my mind, it is a misuse of language to say that the respondent, simply because he stood in the street and asked for contributions to a fund from which he and others were to profit because they were temporarily out of work, had become an idle and disorderly person. If we read the words of the statute I think they are obviously aimed at a different sort of person altogether, persons who are wandering abroad, who are placing themselves at the corners of E streets and begging or soliciting alms, or who are like the persons taken by the judges who decided *Pointon* v. *Hill* (1), to be persons who have given up work and have adopted begging as a habit or mode of life. Those persons are clearly, I think, within the statute.

I do not differ from *Pointon* v. *Hill* (1), and I must not for the moment be understood to do so; but I do not think that the definition which is given by CAVE, J., F in that case is an exhaustive one, because it puts the magistrate in the difficulty of having to ascertain whether a person has begged as a habit and mode of life, and obviously magistrates have felt a difficulty in this, that, if they find a person begging for the first time, they may say that he is not a beggar by habit or by mode of life. I do not agree that that is the right test. I think it can be said what a person's habit or mode of life is if he has just adopted it. If a person has been G in work, and if it were proved that he had definitely come to the conclusion that he did not wish to work for reasons satisfactory to himself, and that he meant to lead the life of a gypsy, to live on alms which he might gather, I should say a magistrate, being convinced by the evidence that that was so, might convict him under this statute, and hold that the fact that he was demanding alms made him an idle and disorderly person within the statute, although there was no proof that he H had ever done so before, because, to my mind the proof that he has done it before is only one way of proving what is his habit and mode of life, as CAVE, J., expressed it. It might be proved otherwise than that he had done it before, that that was his habit and mode of life, because a man might have a habit or mode of life although he has only just taken to it—for example, a barrister, who has been called to the Bar, on the first day that he was called to the Bar, although I he has not yet had a brief, could say that he has adopted the habit or mode of life of a barrister, and that he intends to get his living in that way although nobody has yet given him a brief. In the case of a beggar it might perfectly well be proved, if the evidence was satisfactory to the magistrate, that he was a beggar by mode of life although he had not yet received a contribution, and although this was the first time he asked for one, and although on that occasion in fact he did not get it. It might be difficult to prove it, but it gets rid of the notion that, like a vicious dog, he cannot be proved to be vicious until he has bitten somebody. It is not

necessary to go so far as that in the case of a beggar. If one is satisfied that he has taken to this mode of collecting alms as a habit and mode of life, for his own benefit, he could be convicted although it was the first occasion on which he had done it. I think, however, that all that kind of evidence is rebutted when it is proved that although he may have solicited alms a hundred times, he was soliciting them for a charitable purpose for the sake of those who, like himself, were in misfortune, and that there was nothing disorderly about it, that it was a well arranged charitable collection, just as much as are the collections for many recognised charities. In that case, I think it would be an absolute misuse of language to say that he must be deemed to be an idle and disorderly person when he is not idle, and when he is not disorderly, simply because he has done that which other people who really are idle and really are disorderly are in the habit of doing. Upon these grounds, and not entirely because *Pointon* v. *Hill* (1) was so decided, I think the magistrate was right in dismissing this summons.

BANKES, J.—I agree. So far as the decision in this case is concerned, it will be sufficient to say that, in my opinion, a person who is found in the street making or assisting to make a bonâ fide collection for some charitable object is not within either the mischief or the language of the statute. But we are told that the object of bringing this case is to obtain the view of the court upon the decision of CAVE, J., in *Pointon* v. *Hill* (1). I do not know that the decision itself is complained of, but what is said is that CAVE, J., applied a test which, if it be the correct test, renders it extremely difficult to enforce the statute. The test that CAVE, J., laid down was this. He said it was necessary to establish that the act complained of was part of the habit and mode of life of the person charged, and if CAVE, J., meant by that anything in the nature of a permanent habit or mode of life, or if he meant that it was necessary that evidence of a man's past life must be produced before one could ascertain what his habit and mode of life was, I should not agree with him, but I do not think that that is what CAVE, J., intended. So far as I am concerned, while I think that a person's past life may be a very good test of what his habit and mode of life is, it is certainly not the only test as to whether a person has on any particular occasion brought himself within the statute. A person, in my opinion, may by his conduct on the particular occasion complained of so behave himself that either from the nature of his request, the persistence or importunity of his manner, the whining tone adopted, or the deceptive devices employed, afford evidence upon which a magistrate may be satisfied that the act is not a merely isolated act, but is such an act of begging within the meaning of the statute that the person's particular habit and mode of life at that time is one of begging.

AVORY, J.—I am of the same opinion, and I only add anything to the judgments already delivered in order, if I may, to assist those who have to administer this Act of Parliament. I quite appreciate the difficulty which the learned magistrate has felt in this case in consequence of the expressions which appear in the judgment of *Pointon* v. *Hill* (1). So far as that decision is concerned, I think it was right, and I think it covers this particular case, because I think that in this case the magistrate was right in dismissing the charge on the ground that the respondent was in fact collecting for a specific charitable purpose, and was not a person who was begging within the meaning of this statute. I agree also with what my brother BANKES, J., has said, that the expressions which were used by CAVE, J., if they are not calculated to mislead, are certainly calculated to create a difficulty in the administration of the Act. I agree that it is not necessary to prove that a man has before the particular occasion been in the habit of begging, nor is it necessary to prove that he intends in the future to follow the habit of begging. I think that counsel for the appellant was right when he said that a person who places himself in the street to beg, that is to say, to gather alms as a means of livelihood, is primâ facie guilty of the offence under this statute, but it is for

the magistrate, when such a primâ facie case is made, to satisfy himself that the accused has in fact adopted the calling of a beggar. He may adopt that calling for one day only, and it is not necessary to prove that he has followed that calling previously or that he intends to follow it in future. With these additions to the judgment, I agree with everything that has been said.

LUSH, J. It is, I think, impossible to read the preamble of this Act or to observe the context in which this passage with regard to begging occurs without seeing fairly clearly what the class of persons is against whom this legislation was directed. It seems to me clear that it was directed against that idle class of persons who, instead of endeavouring to earn their livelihood by work, prefer to wander idly about or wander abroad, as the section says, or place themselves in a public street and to beg and gather alms. That is the class of persons against whom this part of the section was directed, who are not improperly called "idle and disorderly persons." It seems to me quite impossible to say that a man who, like the respondent in this case, was engaged in collecting funds on behalf of the trade union to which he belonged, is within this class of idle and disorderly persons against whom this part of the section is directed. Counsel for the appellant has criticised the test which CAVE, J., and SMITH, J., laid down in *Pointon* v. *Hill* (1). For myself, it seems to me that that test was a perfectly accurate and proper one, if I may say so. CAVE, J., used this language which has been criticised —namely, that the act was not done as a habit or mode of life, in order thereby to distinguish the case then before the court from a mere isolated case of begging, and also to distinguish a case of habitual begging by an idle person from a case in which, although the person convicted was no doubt gathering alms, he was doing so, not because he either had in the past lived or was intending in the future to live an idle and disorderly life, making his livelihood by begging, but because he wished to aid persons in the collection of funds for a charitable purpose, or quasi-charitable purpose, in which he was interested. It seems to me that that is all that CAVE, J., meant. The habit may be in the past; it may be an indication of a habit intended to be formed in the future; but, unless the habit is one of begging as a mode of obtaining a livelihood, CAVE, J., said, and I entirely agree, that the case would not come within the Vagrancy Act. I agree, therefore, that the appeal ought to be dismissed.

ATKIN, J.—The offence created by the statute is created for every person wandering abroad or placing himself or herself in any public place to beg or gather alms. I think no offence is committed if, in fact, the person is collecting money bonâ fide for a specific charitable purpose. I think, in that case, he cannot be said to be begging or gathering alms within the meaning of the statute; the offence is wandering abroad or placing himself in a public place to beg, and I think that, inasmuch as that purpose has got to be shown, the case would be excluded of a person who is merely found casually begging. It would exclude any casual or desultory act of begging. But if a person has, in fact, placed himself in a public street for the purpose of collecting alms in order to obtain wholly or in part his daily subsistence, I think that he has committed an offence within the meaning of the Act, and I see nothing at all in the Act which uses the words or contains the words or implies the words "mode or habit of life." To my mind, the offence is committed under the circumstances which I have stated. In this case it appears to me plain that the person who was charged was not, in fact, in any sense begging, and, therefore, that the acquittal of the person accused was perfectly correct.

Appeal dismissed.

Solicitors: *Wontner & Sons; Kenneth Brown, Baker, Baker & Co.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

Re CONSOLIDATED DIESEL ENGINE MANUFACTURERS, LTD.

[CHANCERY DIVISION (Neville, J.), December 1, 1914]

[Reported [1915] 1 Ch. 192; 84 L.J.Ch. 325; 112 L.T. 535; 31 T.L.R. 91: 59 Sol. Jo. 234; [1915] H.B.R. 55]

Company—Winding-up—Liquidator—Appointment of solicitor—Appointment against wishes of committee of inspection.

In a winding-up by the court, the liquidator, knowing that the committee of inspection disapproved of the appointment of a certain firm of solicitors, nevertheless applied to the court ex parte and obtained an order from the registrar sanctioning their appointment in particular matters connected with the winding-up. The committee applied to the court to discharge this order.

Held: in appointing a solicitor the liquidator is bound to have regard to the express wishes of the committee of inspection, and, if he thinks they are acting unwisely, his course is to take the opinion of the contributories and creditors; in the present case, as the liquidator did not have regard to the wishes of the committee, the order must be discharged.

Notes. The Companies (Consolidation) Act, 1908, has been replaced by the Companies Act, 1948.

Considered: *Re Salmon, Ex parte Official Receiver*, [1916] 2 K.B. 510.

As to the employment of a solicitor by a liquidator, see 6 HALSBURY'S LAWS (3rd Edn.) 589–590; and for cases, see 10 DIGEST (Repl.) 921–922. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Motion to discharge an order of the registrar sanctioning the employment by the liquidator of Messrs. Goldberg, Barrett, Newall and Braune as solicitors to the liquidator in certain matters arising in the liquidation. The company had been promoted by another company known as the Diesel Engine Co., Ltd. (in liquidation), and was, in fact, in some respects a reconstruction company. On June 25, 1914, a meeting of shareholders was held, when a special resolution for voluntary liquidation was proposed, but was not carried. A resolution was then passed to the effect that, if the company went into liquidation, the liquidator should be requested to employ a firm of solicitors not previously connected with the company. On July 7 an order was made that the company be wound-up by the court, and, at the statutory meetings of creditors and contributories held on Oct. 8, 1914, Sir W. B. Peat was appointed liquidator with a committee of inspection. On Nov. 18 the liquidator made an application to the court ex parte for an order sanctioning his appointment of Messrs. Goldberg, Barrett, Newall, and Braune as solicitors to the company in connection with the disposal of the company's works at Ipswich, and in the matter of an action which was pending against the company; this sanction was granted, and on the same day the order was drawn up and completed. Later in the day, at a meeting of the committee, the liquidator informed them of the order, and the committee requested him to reconsider the matter; he refused to do so, and they then passed a resolution disapproving of the appointment of Messrs. Goldberg, Barrett, Newall and Braune as solicitors to the company. The objections to this appointment, as stated in an affidavit sworn by members of the committee, were that the firm in question had previously acted as solicitors for the company and its directors, and also for the Diesel Engine Co., and that there were questions in dispute between the two companies. Sir W. B. Peat was also liquidator of the Diesel Engine Co., and the committee were of opinion that independent solicitors should be appointed in order to secure a complete and impartial investigation of the company's affairs. No application had been made by the liquidator to the committee of inspection under s. 151 of the Companies (Consolidation) Act,

1908 [now s. 245 (1) of the Companies Act, 1948], for the sanction of the committee to the employment of solicitors, and the application to the court on Nov. 18 was made without affording them an opportunity of appearing. The committee by notice of motion dated Nov. 26, 1914, moved to discharge the order of the registrar.

R. H. Hodge for the committee of inspection.

Gore-Brown, K.C., and *E. W. Hansell* for the liquidator.

NEVILLE, J.—I think in the present case the order of the registrar must be discharged. The liquidator, with the knowledge that the committee of inspection, which had been properly appointed, disapproved of the appointment of the present solicitors, without notice to them, and, as I understand, without even having formally asked their sanction (although this would make no difference), proceeded to the court, and upon an ex parte application obtained a direction that these solicitors should be employed in particular matters. It seems to me that under s. 158 of the Companies (Consolidation) Act, 1908 [now s. 246 of the Companies Act, 1948], the liquidator is bound to have regard to the express wishes of the committee of inspection in this matter, and if in his discretion he thinks they are acting unwisely, his course is to do what he was entitled to do, to take the opinion of the contributories and creditors, which s. 158 [now s. 246 of the Companies Act, 1948], gives him the power to do, and, if there is any conflict between them, the directions given by the creditors and contributories shall be deemed to override any directions given by the committee of inspection. I do not think the liquidator was acting properly when he proceeded behind the backs of the committee of inspection to obtain an order ex parte. I am bound to say he was quite candid with regard to the matter, and in the affidavit that he filed he advised the registrar of the fact that the committee of inspection differed from him. I think that order must be discharged. I say nothing about whether or not there is any serious objection to the employment of those solicitors in question in the matters specified. The applicants must have their costs, and the liquidator must pay them.

Solicitors: *Godwin & Sons; Goldberg, Barrett, Newall & Braune.*

[*Reported by* LEOFRIC AMBROSE, ESQ., *Barrister-at-Law.*]

A

HICKMAN *v.* KENT OR ROMNEY MARSH SHEEP BREEDERS' ASSOCIATION AND ANOTHER

[CHANCERY DIVISION (Astbury, J.), March 4, 25, 31, 1915]

[Reported [1915] 1 Ch. 881; 84 L.J.Ch. 688; 113 L.T. 159; 59 Sol. Jo. 478] B

Arbitration—Submission—Article of company—Application for membership of company and acceptance—Rule for all disputes between company and members to be referred.

Company—Articles—Effect—Contract between members and company and between members inter se.

In 1905 the plaintiff was elected a member of the defendant association, and he then agreed to conform to its rules and regulations. By art. 49 of the articles of association differences between the association and any of its members relating to any of the affairs of the association must be referred to the decision of an arbitrator. In 1914 the plaintiff issued a writ against the association and its secretary claiming injunctions and declarations in respect of matters which related to the affairs of the association and for certain other relief, which in substance was to enforce his rights under the articles. On an application by the defendants for a stay of the action pursuant to s. 4 of the Arbitration Act, 1889, and to refer the matters in dispute to arbitration in accordance with the terms of art. 49, C D

Held: (i) art. 49 must be treated as a statutory agreement between the members and the association as well as between themselves inter se, and it constituted a submission to arbitration within the Arbitration Act, 1889; (ii) the application for membership by the plaintiff and its acceptance by the association constituted a contract between the plaintiff and the association by which the plaintiff agreed in writing to conform to the regulations of the association, one of which regulations was that all differences between the association and a member should be submitted to arbitration, and that contract also constituted a submission to arbitration; therefore, on both those grounds a stay of the action would be granted. E F

Notes. Applied: *Anglo-Newfoundland Development Co.* v. *R.*, [1920] 2 K.B. 214. Considered: *Agricultural Wholesale Society* v. *Biddulph and District Agricultural Society*, [1925] Ch. 769; *Beattie* v. *Beattie, Ltd.*, [1938] 3 All E.R. 214. G Applied: *Kanssen* v. *Rialto (West End), Ltd.*, [1944] Ch. 154. Considered: *Rayfield* v. *Hands*, [1958] 2 All E.R. 194. Referred to: *London Sack and Bag Co.* v. *Dixon and Lugton, Ltd.*, [1943] 2 All E.R. 763.

As to the effect of memoranda and articles of association, see 6 HALSBURY'S LAWS (3rd Edn.) 127–130, and for cases see 9 DIGEST (Repl.) 85–88. As to submissions to arbitration and stay of proceedings, see 2 HALSBURY'S LAWS (3rd H Edn.) 3 et seq., and for cases see 2 DIGEST (Repl.) 421 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452, and for Arbitration Act, 1950, see ibid., vol. 29, p. 89.

Cases referred to:

(1) *Willesford* v. *Watson* (1873), 8 Ch. App. 473; 42 L.J.Ch. 447; 28 L.T. 428; 37 J.P. 548; 21 W.R. 350, L.C. & L.JJ.; 2 Digest (Repl.) 452, *190a*. I

(2) *Re Tavarone Mining Co., Pritchard's Case* (1873), 8 Ch. App. 956; 42 L.J.Ch. 768; 29 L.T. 368; 21 W.R. 829, L.JJ.; 9 Digest (Repl.) 85, *362*.

(3) *Melhado* v. *Porto Alegre Rail. Co.* (1874), L.R. 9 C.P. 503; 43 L.J.C.P. 253; 31 L.T. 57; 23 W.R. 57; 9 Digest (Repl.) 53, *152*.

(4) *Eley* v. *Positive Government Security Life Assurance Co.* (1875), 1 Ex.D 20; 45 L.J.Q.B. 50; 33 L.T. 743; 24 W.R. 252; affirmed (1876), 1 Ex.D 88, 45 L.J.Q.B. 451; 34 L.T. 190; 24 W.R 338, C.A.; 9 Digest (Repl.) 87, 374

(5) *Browne* v. *La Trinidad* (1887), 37 Ch.D. 1; 57 L.J.Ch. 292; 58 L.T. 137; 36 W.R. 289; 4 T.L.R. 14, C.A.; 9 Digest (Repl.) 87, *374*.

(6) *Kelner* v. *Baxter* (1866), L.R. 2 C.P. 174; 36 L.J.C.P. 94; 15 L.T. 213; 15 W.R. 278; sub nom. *Kelmer* v. *Baxter*, 12 Jur. N.S. 1016; 9 Digest (Repl.) 682, *4498*.

(7) *Re Famatina Development Corpn., Ltd.*, [1914] 2 Ch. 271; 84 L.J.Ch. 48; 30 T.L.R. 696, C.A.; 10 Digest (Repl.) 978, *6731*.

(8) *MacDougall* v. *Gardiner* (1875), 1 Ch.D. 13; 45 L.J.Ch. 27; 33 L.T. 521; 24 W.R. 118, C.A.; 9 Digest (Repl.) 619, *4130*.

(9) *Pender* v. *Lushington* (1877), 6 Ch.D. 70; 46 L.J.Ch. 317; 9 Digest (Repl.) 609, *4039*.

(10) *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (1882), 23 Ch.D. 1; 49 L.T. 150; 31 W.R. 330, C.A.; 9 Digest (Repl.) 553, *3655*.

(11) *Johnson* v. *Lyttle's Iron Agency* (1877), 5 Ch.D. 687; 46 L.J.Ch. 786; 36 L.T. 528; 25 W.R. 548, C.A.; 9 Digest (Repl.) 350, *2243*.

(12) *Bradford Banking Co., Ltd.* v. *Briggs & Co., Ltd.* (1886), 12 App. Cas. 29; 56 L.J.Ch. 364; 56 L.T. 62; 35 W.R. 521; 3 T.L.R. 170, H.L.; 9 Digest (Repl.) 85, *363*.

(13) *Wood* v. *Odessa Waterworks Co.* (1889), 42 Ch.D. 636; 58 L.J.Ch. 628; 37 W.R. 733; 5 T.L.R. 596; 1 Meg. 265; 9 Digest (Repl.) 86, *364*.

(14) *Salmon* v. *Quin and Axtens, Ltd.*, [1909] 1 Ch. 311; 78 L.J.Ch. 367; 100 L.T. 161; 25 T.L.R. 164; 53 Sol. Jo. 150, C.A.; affirmed sub nom. *Quin and Axtens, Ltd.* v. *Salmon*, [1909] A.C. 442; 78 L.J.Ch. 506; 100 L.T. 820; 25 T.L.R. 590; 53 Sol. Jo. 575; 16 Mans. 230, H.L.; 9 Digest (Repl.) 498, *3283*.

(15) *Welton* v. *Saffery*, [1897] A.C. 299; 66 L.J.Ch. 362; 76 L.T. 505; 45 W.R. 508; 13 T.L.R. 340; 41 Sol. Jo. 437; 4 Mans. 269, H.L.; 9 Digest (Repl.) 203, *1293*.

(16) *Bisgood* v. *Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743; 77 L.J.Ch. 486; 98 L.T. 809; 24 T.L.R. 510; 52 Sol. Jo. 412; 15 Mans. 163, C.A.; 9 Digest (Repl.) 201, *1288*.

(17) *Re Lewis, Ex parte Munro* (1876), 1 Q.B.D. 724; 45 L.J.Q.B. 816; 35 L.T. 857; sub nom. *R.* v. *Munro, Re Lewis*, 24 W.R. 1017, D.C.; 42 Digest 126, *1211*.

(18) *Caerleon Tinplate Co.* v. *Hughes* (1891), 60 L.J.Q.B. 640; 65 L.T. 118; 7 T.L.R. 619; 2 Digest (Repl.) 423, *27*.

(19) *Baker* v. *Yorkshire Fire and Life Assurance Co.*, [1892] 1 Q.B. 144; 61 L.J.Q.B. 838; 66 L.T. 161; 2 Digest (Repl.) 423, *28*.

Also referred to in argument:

Morgan v. *W. Harrison, Ltd.*, [1907] 2 Ch. 137; 76 L.J. Ch. 548; 97 L.T. 445, C.A.; 2 Digest (Repl.) 445, *170*.

Borland's Trustee v. *Steel Bros. & Co., Ltd.*, [1901] 1 Ch. 279; 70 L.J.Ch. 51; 47 W.R. 120; 17 T.L.R. 45; 9 Digest (Repl.) 99, *446*.

Re Wheal Buller Consols (1888), 38 Ch.D. 42; sub nom. *Re Wheal Buller Consols, Ltd., Ex parte Jobling*, 57 L.J.Ch. 333; 58 L.T. 823; 36 W.R. 723; 4 T.L.R. 282, C.A.; 9 Digest (Repl.) 469, *3071*.

Adjourned Summons by which the defendants applied for a stay of the action under s. 4 of the Arbitration Act, 1889 [see now s. 4 of the Arbitration Act, 1950].

The defendants, the Kent or Romney Marsh Sheep Breeders' Association and their secretary, W. W. Chapman, applied for an order staying all proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889, and referring the matters in dispute in the action to arbitration under art. 49 of the articles of association of the association.

The Kent or Romney Marsh Sheep Breeders' Association was incorporated under the Companies Acts in the year 1895 as an association not for profit, the defendant

W. W. Chapman having been the secretary since the incorporation of the association. On Nov. 8, 1905, the plaintiff, Alfred John Hickman, wrote to Chapman as such secretary stating he wished to become a member of the association, and in reply on Nov. 10, 1905, Chapman wrote to the plaintiff inclosing a form of application for membership. This form, completed and signed by the plaintiff, was received by Chapman on or about Nov. 12, 1905, and was as follows:

"Kent or Romney Marsh Sheep Breeders' Association (Incorporated).—Application form for membership.- I, Alfred J. Hickman, of Court Lodge, Egerton, in the county of Kent, am desirous of becoming a member of the Kent or Romney Marsh Sheep Breeders' Association (Incorporated) as a flock owner, and I engage when elected to pay the entrance fees, annual subscriptions, and such fees for entry of ewe flocks and individual sheep as may then be in force or subsequently adopted, together with all such costs for inspection and tattooing as may be sanctioned by the council for the time being, and to conform to the rules and regulations of the association until I by notice in writing to the secretary cease to be a member of the association.—Signature ALFRED J. HICKMAN.—Dated Nov. 11, 1905."

The plaintiff was elected a member of the association on Dec. 12, 1905, and he was informed of such election by letter on Dec. 14, 1905. By art. 49 of the articles of association of the defendant company:

"Whenever any difference arises between the association and any of the members touching the true intent or construction or the incidents or consequences of these presents or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these presents or of the statutes, or touching any breach or alleged breach of these presents, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises or to these presents, or to any statute affecting the association, or to any of the affairs of the association, every such difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference or if they cannot agree upon a single arbitrator, to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference, or an umpire to be appointed by the two arbitrators."

On Dec. 18, 1914, the plaintiff issued the writ in the present action claiming, inter alia, an injunction to restrain the defendants from taking any steps to expel him from the association or doing any act or acts in derogation of his rights as a member of the association, and damages for refusing to register his sheep, and a declaration that he was entitled to have his sheep registered. A summons for directions was issued, but before it was heard or any further step taken in the action, the defendant association and Chapman issued this summons for the hearing of an application by them that all further proceedings be stayed, pursuant to s. 4 of the Arbitration Act, 1889, and that the matters in question in the action should be referred to arbitration in accordance with art. 49 of the articles of the association.

By s. 4 of the Arbitration Act, 1889 [see now Arbitration Act, 1950, s. 4]:

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced,

and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

By s. 27 [see s. 32 of Act of 1950] :

"'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

By s. 14 (1) of the Companies (Consolidation) Act, 1908 [see now s. 20 of Companies Act, 1948] :

"The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act."

Micklem, K.C., and *F. Hinde* for the defendants.

Frank Russell, K.C., and *H. S. Simmons* for the plaintiff in the action.

Cur. adv. vult.

Mar. 31, 1915. **ASTBURY, J.,** read the following judgment.—This is a summons by the defendants to stay proceedings in the action under s. 4 of the Arbitration Act, 1889 [see now s. 4 of Arbitration Act, 1950]. The plaintiff, by his writ in the action, which is brought against the defendant association and their secretary, claims injunctions, a declaration, and certain other relief in respect of matters which arise out of and relate solely to the affairs of the association, which relief is, in substance, to enforce the plaintiff's rights under the articles of association of the defendant company. It is admitted by the plaintiff that the action is against the association and the second defendant as its officer, and no point is made by the plaintiff of there being two defendants.

The association is a limited company registered under the Companies' Acts, and by its memorandum of association it is provided (inter alia) that the objects of the association are

"the encouragement of the breeding of Kent or Romney Marsh sheep at home and abroad and the maintenance of the purity of the breed."

Further :

"The establishment and publication of a flock book of recognised and pure-bred sires which have been used, or ewes which have been bred from, and of such other flock books (if any) which the council may think fit and the annual registration of the pedigrees of such sheep as are proved to the satisfaction of the council to be eligible for entry. . . . The undertaking of the arbitration upon and settlement of disputes and questions relating to or connected with Kent or Romney Marsh sheep and the breeding thereof, and for other subsidiary purposes."

By art. 49 disputes between the association and any of its members are to be referred to arbitration. This is a common form of article in private companies, and, the objects of the association being what they are, it and its members might be seriously prejudiced by a public trial of their disputes. If this summons fails, as the plaintiff contends that it should, these arbitration clauses in articles are of very little, if any, value.

The plaintiff became a member of the association in 1905. It is clear on the authorities that if there is a submission to arbitration within the meaning of the Arbitration Act there is a primâ facie duty cast upon the court to act upon such an agreement : per LORD SELBORNE in *Willesford* v. *Watson* (1), 8 Ch. App. at p. 480. In the present case the defendants contend, first, that art. 49, dealing as it does with the members of the company in their capacity of members only, constitutes a submission within the meaning of the Arbitration Act, or, alternatively, that the contract contained in the plaintiff's application for membership and the company's

acceptance of it amounts to such a submission. The plaintiff contests both these propositions. Independently of the particular dispute in this case, the arguments, especially upon the first of these contentions, have raised questions of far-reaching importance and of great difficulty.

I will deal with the question as to the effect of art. 49 first. Section 14 (1) of the Companies (Consolidation) Act, 1908 [see now s. 20 (1) of Companies Act, 1948], says:

> "The memorandum and articles shall, when registered, bind the company and members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act."

It is laid down in text-books of the highest authority that the articles are not a contract between the members and the company, but a contract with the other members. The articles are a contract only as between the members inter se in respect of their rights as shareholders. The exact nature of this covenant—that is, the covenant referred to in s. 14—has given rise to considerable discussion and is even now very difficult to define; but it is now settled that it is not equivalent to a contract between the company, on the one part, and the members, on the other, on which either a member can sue the company or the company can sue a member.

The principal authorities in support of these propositions are *Re Tavarone Mining Co., Pritchard's Case* (2); *Melhado* v. *Porto Alegre Rail. Co.* (3); *Eley* v. *Positive Government Security Life Assurance Co.* (4); and *Browne* v. *La Trinidad* (5). In *Pritchard's Case* (2), by the articles of association of a mining company it was provided that the company should immediately after incorporation enter into an agreement with the vendor of the mine for the purchase of the mine, and the price was fixed. The articles were signed by the vendor and six other persons, and the directors allotted shares to the vendor, but no further agreement was made with him. It was held, affirming the decision of WICKENS, V.-C., that the articles of association did not constitute a contract in writing between the vendor and the company within s. 27 of the Companies Act, 1867, and that certain shares should not, therefore, be considered as fully paid up. MELLISH, L.J., in giving judgment, said (8 Ch. App. at p. 960):

> "But I am of opinion that the articles of association cannot be considered as a contract in writing between De Thierry and the company for the sale of the mine to them. It may no doubt be the case if no other contract was entered into, and if De Thierry signed these articles and they were acted upon, that a court of equity would hold that as between him and the company—from their acting upon it—there was a binding contract; but in themselves the articles of association are simply a contract as between the shareholders inter se in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree inter se."

In *Melhado* v. *Porto Alegre Rail. Co.* (3) the articles of association of a joint stock company provided that the company should defray such expenses incurred in its establishment as the directors should consider might be deemed and treated as preliminary expenses to an amount not exceeding a sum named. The plaintiffs, who were promoters of the company, had incurred preliminary expenses in its establishment, and it was held that no action would lie at the suit of the plaintiffs against the company under the articles. LORD COLERIDGE, C.J., said (L.R. 9 C.P. at p. 505):

> "The action is brought on a clause in the articles of association, by which the directors are authorised to pay certain expenses if they should consider them

to be properly deemed preliminary expenses. The declaration avers that all conditions were performed necessary to entitle the plaintiffs to be paid their expenses; and therefore I think we must take it that they were expenses which, if the directors had thought proper to pay them, the articles would have justified them in paying. The question therefore is whether an action will lie for the payment of these expenses, in pursuance of the articles of association, to which the plaintiffs were not parties. I have come to the conclusion that no such action will lie—I must say somewhat reluctantly, because though I wish to express no opinion on the merits of this particular case, having no materials for forming such an opinion, it does seem just, in general, if a company takes the benefit of the work and expenditure by which its existence has been rendered possible, and voluntarily comes into existence on the terms that it shall be liable to pay for such work and expenditure, that a cause of action should be given. I can find, however, no legal principle upon which such an action can be maintained. It appears to me that there is no contract between the plaintiffs and the defendants. The doctrine of ratification is inapplicable, for the reasons given in the judgments in *Kelner* v. *Baxter* (6)."

MELLOR, J., said (ibid. at p. 506):

"The plaintiffs were not in any way parties to the articles of association, and there was not, therefore, any express contract to pay them."

BRETT, J., said (ibid. at p. 507):

"There is no contract, in my judgment, of any sort upon which they can sue, and unless there be a contract of some sort between them and the company I do not see that they can have any cause of action. No contract made with them before the existence of the company can be ratified by the company for the reasons pointed out in the case of *Kelner* v. *Baxter* (6), with which I fully agree."

In *Eley* v. *Positive Government Security Life Assurance Co.* (4) the articles of association contained a clause in which it was stated that the plaintiff, a solicitor, should be the solicitor to the company and transact its legal business. The articles were registered and the company incorporated. The plaintiff was not appointed solicitor by any resolution of the directors, nor by any instrument bearing the seal of the company, but he acted as such for a time. Subsequently the company ceased to employ him, and he brought an action for breach of contract against the company for not employing him as its solicitor. The first count of the declaration stated that it was agreed by and between the plaintiff and the defendants that the plaintiff should be employed by the defendants as, and appointed by them to the office of, solicitor of the company. During the argument it was contended that the contract declared for was not the contract purported to be contained in the articles. AMPHLETT, B., in his judgment, said (1 Ex.D. at pp. 26, 28):

"The articles, taken by themselves, are simply a contract between the shareholders inter se, and cannot, in my opinion, give a right of action to a person like the plaintiff, not a party to the articles, although named therein. If authority were wanted for this proposition, the cases cited in the argument, *Pritchard's Case* (2), and *Melhado* v. *Porto Alegre Rail. Co.* (3) are, in my opinion, quite conclusive on the subject. . . . For these reasons, I think that there was no contract at all between the plaintiff and the company to the effect stated in the declaration."

CLEASBY, B., confined his judgment to the last points raised in the case and said (ibid. at p. 30):

"I am of opinion that cl. 118 of the articles cannot by itself be taken to operate as a contract between the solicitor and the company."

KELLY, C.B., said (ibid. at pp. 31, 32): A

"I forbear to pronounce any opinion as to whether these articles, with the fact of the subsequent employment, constitute a contract on the terms contained in them, because, were I to so hold, there would be a difficult question behind, whether it was not ultra vires for the directors to attempt to bind the company to employ a solicitor to transact, for all his life, all the legal business of the company. Passing by this, I come to consider the objection raised under s. 4 of the Statute of Frauds. I do not see how anyone can doubt that this agreement was not to be performed within a year. It was for the life of the plaintiff, subject to a defeasance on the possibility of his being guilty of some misconduct. But, assuming, as I think we must, that this was not to be performed in a year, the question arises whether there is any memorandum or note in writing of it signed by the defendants. The signatures affixed to the articles were alio intuitu and it can hardly be suggested that the directors had any idea that in signing the articles they were signing a note of this contract." B C

This case went to the Court of Appeal, and LORD CAIRNS, L.C., said (1 Ex.D. at pp. 89, 90): D

"I wish to say, in the first place, that in my opinion a contract of the kind suggested to exist in this case ought not to receive any particular favour from the court. The statement is that Baylis was endeavouring to form a joint stock insurance company upon a new principle, and applied to the plaintiff to make advances to meet the expenses of getting up the company, and it was arranged between them that in the event of the company being formed the plaintiff should be appointed permanent solicitor to the company. That is to say, a bargain is made between a professional man and Baylis, which, so far as the case is concerned, does not appear to have been communicated to those who were invited to join the company, that if the former will advance money for the formation of the company he shall be appointed permanent solicitor, and the company shall be obliged to employ him as their professional adviser. When the articles are prepared, they are so by the plaintiff, and in them he inserts a clause which no doubt informs those who signed the articles of the arrangement, but does not appear to have been brought to the notice of those who joined from receiving circulars. This, I repeat, is not a proceeding which the court would encourage in any way. I also wish to reserve my judgment as to whether a clause of this kind is obnoxious to the principles by which the courts are governed in deciding on questions of public policy. . . . This case was first rested on the 118th article. Articles of association, as is well known, follow the memorandum, which states the object of the company, while the articles state the arrangement between the members. They are an agreement inter socios, and in that view, if the introductory words are applied to art. 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as that is concerned, it is res inter alios acta, the plaintiff is no party to it. No doubt he thought that by inserting it he was making his employment safe as against the company, but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff." E F G H I

In *Browne* v. *La Trinidad* (5), before the formation of the company an agreement was entered into between B. and a person as trustee for the intended company by which it was stipulated (inter alia) that B. should be a director and should not be removable till after 1888. The sixth clause of the articles provided that the directors should adopt and carry into effect the agreement with or without modification, and that subject to such modification (if any) the provisions of the agreement

A should be construed as part of the articles. The agreement was acted upon, but no contract adopting it was entered into between the plaintiff and the company. Held, that treating the agreement as embodied in the articles, still there was no contract between B. and the company that he should not be removed from being a director, the articles being only a contract between the members inter se, and not between the company and B. COTTON, L.J., towards the end of his judgment, B said (37 Ch.D. at pp. 13, 14):

"Assuming that an unlimited power is given to the meeting by art. 91, ought we, having regard to the contract entered into by the memorandum of Nov. 24, 1884, and art. 6, to interfere by injunction to restrain the company in general meeting from acting under that power? I do not give any opinion upon the C question how far the court would have interfered by injunction in order specifically to enforce an agreement between the company and the plaintiff that he should be an irremovable director. That point raises questions upon which I should not like to give any opinion without having them fully discussed. In my opinion we ought not to interfere in the present case, because there is no such contract between the plaintiff and the company. The memorandum of D agreement of Nov. 24, 1884, is in no way a contract between the plaintiff and the company. It is said that it was adopted and incorporated into the articles, but I cannot accede to that. The company by its directors acted upon the agreement, but that does not make it binding on the company. Then is it incorporated into the articles in such a way as to entitle the plaintiff to say, 'I have such a contract between me and the company as can be enforced by E a court of law, and as I might enforce in equity by way of specific performance'? That point is clearly settled, I think, by *Eley* v. *Positive Government Security Life Assurance Co.* (4). There two of the members of the court of first instance held, and the other member did not express dissent, that the articles are merely a contract between the shareholders inter se, and that though a person in whose favour a stipulation is made in the articles may afterwards F have shares allotted to him, he does not by that means become in the same position as if he had entered into a contract with the company."

LINDLEY, L.J., said:

"Having regard to the construction put upon s. 16 of the Companies Act of 1862 in the case of *Eley* v. *Positive Government Security Life Assurance Co.* G (4) and subsequent cases, it must be taken as settled that the contract upon which he relies is not a contract upon which he can maintain any action, either on the common law side or the equity side. There might have been some difficulty in arriving at that conclusion if it had not been for the authorities, because it happens that this gentleman has had shares allotted to him, and is therefore a member of the company. Having regard to the terms H of s. 16, there would be some force, or, at all events, some plausibility, in the argument that, being a member, the contract which is referred to in the articles has become binding between the company and him. Of course, that argument is open to this difficulty, that there could be no contract between him and the company until the shares were allotted to him, and it would be remarkable that upon the shares being allotted to him a contract between him I and the company, as to a matter not connected with the holding of shares, should arise."

In these four cases the article relied upon purported to give specific contractual rights to persons in some capacity other than that of shareholder, and in none of them were members seeking to enforce or protect rights given to them as members in common with the other corporators. The actual decisions amount to this, that an outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he subsequently becomes a member or not,

cannot sue on such articles treating them as contracts between himself and the company to enforce such rights. Such rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such non-member and the company, and the subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article to enforce rights which are res inter alios acta and not part of the general rights of the corporators as such. The language of some of the judgments appears, however, to go further, as recognised, for instance, by SARGANT, J., in *Re Famatina Development Corpn.* (7) ([1914] 2 Ch. at p. 279).

The wording of s. 14 (1) of the Companies (Consolidation) Act, 1908, which is in the same terms as s. 16 of the Act of 1862 [see now s. 20 (1) of Companies Act, 1948], is difficult to construe or understand. The company cannot in the ordinary course be bound otherwise than by statute or contract, and it is in this section that its obligation must be found, so far as the members are concerned. The section does not say with whom they are to be deemed to have covenanted, but the section cannot mean that the company is not to be bound when it says it is to be bound, as if, &c., nor can the section mean that the members are to be under no obligation to the company under the articles in which their rights and duties as corporators are to be found. Much of the difficulty is removed if the company be regarded, as the framers of the section may very well have so regarded it, as being treated in law as a party to its own articles. It seems clear from other authorities that a company is entitled as against its members to enforce and restrain breaches of its regulations: see, for example, *MacDougall* v. *Gardiner* (8), *Pender* v. *Lushington* (9), and *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (10). In the last case BOWEN, L.J., said (23 Ch.D. at p. 13):

> "The articles by s. 16 are to bind the company and all the shareholders as much as if they had all put their seals to them."

It is also clear from many authorities that shareholders as against their company can enforce and restrain breaches of its regulations, and in many of these cases judicial expressions of opinion appear which, in my judgment, it is impossible to disregard.

In *Johnson* v. *Lyttle's Iron Agency* (11), in an action by a shareholder against the company, JAMES, L.J., said (5 Ch.D. at p. 693):

> "The notice did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulation of Table A."

In *Bradford Banking Co., Ltd.* v. *Briggs & Co., Ltd.* (12) the articles gave the company a lien on its members' shares, and, in an action by the company to enforce such lien, LORD BLACKBURN said (12 App. Cas. at p. 33):

> "The only one of the articles of association which I think it material to notice is the 103rd article, which is as follows:
>
> 'The company shall have a first and permanent lien and charge, available at law and in equity, upon every share of every person who is the holder or one of several joint owners thereof for all debts due from him, either alone or jointly with any other person, whether a shareholder or not in the company.'
>
> John Faint Easby, a coal merchant, became a proprietor of a number of shares in the respondent company, and obtained certificates for them. This property in the shares was, by virtue of s. 16 of the Companies Act, 1862, already quoted, I think, bound to the company as much as if he had (at the time he became holder of these shares) executed a covenant to the company in the same terms as art. 103, but I do not think it was bound any further."

In *Wood* v. *Odessa Waterworks Co.* (13), which was an action by the plaintiff on behalf of himself and all other shareholders against the company, STIRLING, J., said (42 Ch.D. at p. 642):

"The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other."

In *Salmon* v. *Quin and Axtens, Ltd.* (14), FARWELL, L.J., referring to this last statement, said ([1909] 1 Ch. at p. 318):

"I think that that is accurate subject to this observation, that it may well be that the court would not enforce the covenant as between individual shareholders in most cases."

In *Welton* v. *Saffery* (15) LORD HERSCHELL, who dissented on the main question from the rest of the House, made the following general observation ([1897] A.C. at p. 315):

"Section 16 of the Act of 1862 provides that the articles of association, when registered, shall bind the company and the members thereof to the same extent as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act. The articles thus become in effect a contract under seal by each member of the company, and regulate his rights. They cannot, of course, diminish or affect any liability created by the express terms of the statute; but, as I have said, the statute does not purport to settle the rights of the members inter se; it leaves these to be determined by the articles (or the articles and memorandum together), which are the social contract regulating those rights. I think it was intended to permit perfect freedom in this respect. It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and another member, any right beyond that which the contract with the company gives."

In all these last-mentioned cases the respective articles sought to be enforced related to the rights and obligations of the members generally as such, and not to rights of the character dealt with in the four authorities first above referred to. It is difficult to reconcile these two classes of decisions and the judicial opinions therein expressed, but I think this much is clear—first, that no article can constitute a contract between the company and a third person; secondly, that no right merely purported to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, or director, can be enforced against the company; and, thirdly, articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

In *Bisgood* v. *Henderson's Transvaal Estates, Ltd.* (16), BUCKLEY, L.J., said ([1908] 1 Ch. at p. 759):

"The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as individual."

By s. 27 of the Arbitration Act, 1889 [see now s. 32 of Arbitration Act, 1950]:

"'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

The defendant's first contention is that art. 19 is, on the authorities, a written agreement within the meaning of this section. A

In *Re Lewis, Ex parte Munro* (17), which was an action on the Attorneys and Solicitors Act, 1870, it was held that:

"A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, assented to by the client, but signed by the solicitor only, is not 'an agreement in writing' within the Attorneys and Solicitors Act, 1870." B

LORD COLERIDGE, C.J., said:

"It is quite clear that there was no agreement in writing within s. 4 of the Act. . . . An 'agreement in writing' within s. 4 must be an agreement by both parties, and both parties must sign their names upon the agreement." C

In *Caerleon Tinplate Co.* v. *Hughes* (18), in an action for the price of goods sold, the bought note signed by the defendants contained a provision for arbitration in case of dispute, while the sold note signed by the plaintiff contained no such provision. It was held that there was no submission within the meaning of the Act, for an agreement to submit to arbitration must be in writing and signed by both parties. *Re Lewis* (17) was referred to, and DENMAN, J., referring to s. 27 of the Arbitration Act, 1889, said (60 L.J.Q.B. at p. 641): D

"In my judgment, there can be no written agreement unless in writing signed by the parties as their agreement, and that 'written agreement' means one in which the terms on both sides are reduced into writing. It is useless to discuss the doctrines here, for the bought and sold notes differ in the essential particular that the former contains a provision which is wholly absent in the latter." E

WILLS, J., said (ibid.):

"Supposing there were a contract and the parties were ad idem [which in fact they were not in this case] yet there was no submission under the Act unless there was an agreement in writing by both parties. *Re Lewis, Ex parte Munro* (17) is conclusive on this point. In the present case the agreement is to be in writing under s. 27, and we must hold that both parties must sign their names to it; otherwise there might be a conflict of evidence, and a discussion as to what was understood by either party." F

In *Baker* v. *Yorkshire Fire and Life Assurance Co.* (19) an action was brought on a fire policy which was executed in the usual way by the company, but not by the assured, and it was held that the policy, though not signed by the plaintiff, amounted to a submission to arbitration within the meaning of the Act. LORD COLERIDGE, C.J., who had been a party to *Re Lewis* (17), said ([1892] 1 Q.B. at pp. 145, 146): G

"The plaintiff sues on the policy, and by so suing affirms it to be his contract; he cannot disaffirm a part of the very contract on which he is suing. He contends that in order to bring into operation the arbitration clause contained in the policy, the policy must be signed by both parties; but the Act of Parliament says nothing of the kind, and the only apparent justification for the contention is to be found in *Caerleon Tinplate Co.* v. *Hughes* (18). That decision must be interpreted, however, with regard to the particular facts of that case. There was there no complete contract; the two documents constituting the contract differed materially in their terms, and the court said it was plain that the parties were never ad idem." H I

A. L. SMITH, L.J., said (ibid. at pp. 146, 147):

"It is said, however, that by the interpretation clause a submission must be a written agreement to refer disputes to arbitration. This, however, is not a

higher interpretation than was necessarily put on the language of the old Act, under which it was the universal practice to refer these cases, and does not mean that in all cases the written agreement to refer must be signed by both parties. It is quite unnecessary to say more as to the decision in *Caerleon Tinplate Co.* v. *Hughes* (18) than that it turned entirely upon the peculiar facts of the case."

The result of these decisions is, I think, that if the submission is in writing and is binding on both parties as their agreement, or as the equivalent in law to an agreement between them, the statute is satisfied. In the present case the plaintiff's action is, in substance, to enforce rights as a member under the articles against the company. The 49th article is a general article applying to all the members as such, and, apart from technicalities, it would seem reasonable that the plaintiff ought not to be allowed, in the absence of any evidence filed by him, to proceed with an action to enforce his rights under the articles which in itself is a breach of his obligation contained therein to submit his disputes with the company to arbitration, and, if the case falls within the Act, I see no reason for exercising my discretion under s. 4 in his favour. In my judgment, art. 49, for the reasons above referred to, creates rights and obligations enforceable as between the plaintiff and the company respectively, and such rights and obligations are contained in a written document, but whether such document is a contract or agreement between the plaintiff and the defendants within s. 27 of the Arbitration Act, 1889, depends upon whether the decision in *Eley* v. *Positive Government Security Life Assurance Co.* (4) and the other cases of a similar character above referred to ought to be regarded as only dealing with and applying to articles purporting, first, to contain an agreement with the company and a third person, or, secondly, to define the rights of a shareholder in some capacity other than that of a member of the company. To reconcile the decisions and expressions of judicial opinion above mentioned, some such view should, I think, be adopted, and general articles dealing with the rights of members "as such" treated as a statutory agreement between them and the company as well as between themselves inter se, and in my judgment, art. 49 in the present case does constitute a submission to arbitration within the true meaning and intent of the Arbitration Act.

Having regard, however, to the conclusion to which I have come on the second contention raised by the defendants, it is not necessary for me to base my decision upon this ground alone and upon the opinion I have so expressed. The defendants' second contention is that the contract contained in the plaintiff's application for membership, and the defendants' acceptance of it, amounts to a submission within the Act. On Nov. 8, 1905, the plaintiff wrote to the company, through its secretary:

"I wish to become a member of the Kent Sheep Breeders' Association. Will you kindly take the necessary steps?"

That was answered by a letter from the secretary, in which he said:

"If you will fill in the inclosed form . . . I shall have great pleasure in submitting it to the next council meeting."

The form inclosed was signed by the plaintiff. It stated that the plaintiff wished to become a member of the association and agreed to pay an entrance fee, subscriptions, and fees for entry of sheep, and to conform to the rules and regulations of the association. At a meeting of the council of the association held on Dec. 12 the plaintiff's offer was accepted and he was elected a member of the defendant company. Notice of such acceptance was given to the plaintiff in a letter of Dec. 14 by the secretary, which informed him he was elected a member of the association at the council meeting held on the 12th. In consideration of being elected a member and of his offer to join the association being accepted, the plaintiff contracted in writing with the association to conform to its rules and regulations. One of such regulations was a general submission to arbitration of all differences between the

association and any of its members as such, amply wide enough to cover the matter in dispute in this action. The association at the date of the contract was already bound to each and all its corporators to act in conformity with such regulations, and was at the date of the writ in this action, and has been since, ready, and willing to so act. It is submitted on behalf of the plaintiff that at the date of this contract he may have known nothing about art. 49, and that as the council of the association have power under its articles to make further by-laws and regulations as to certain matters therein referred to, the plaintiff's offer may have referred to these. The plaintiff has, however, filed no evidence in support of this, and the articles not only constitute the rules and regulations of the company, but refer to the rules and regulations of the association as contained in them, and I am unable to accept this contention. In my judgment, the contract so made between the plaintiff and the association is also a submission in writing within the true meaning and intent of the Arbitration Act, and I make an order to stay under s. 4 and direct that the matters in dispute in this action be referred to arbitration accordingly.

Solicitors: *Walters & Co.; Ernest Simmons & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

PALACE SHIPPING CO., LTD. *v.* GANS STEAMSHIP LINE

[King's Bench Division (Sankey, J.), December 13, 15, 1915]

[Reported [1916] 1 K.B. 138; 85 L.J.K.B. 415; 115 L.T. 414; 32 T.L.R. 207; 13 Asp. M.L.C. 494; 21 Com. Cas. 270]

Shipping — Charterparty — "Safe port."

By a charterparty dated April 18, 1913, the plaintiffs hired a steamship to the defendants for five years for service between safe ports. On Feb. 11, 1915, during the war of 1914-18 between Great Britain and Germany, the German government threatened the destruction of all merchant ships in the waters round Great Britain and Ireland. On Feb. 13, 1915, the defendants ordered the vessel, then at Cardiff, to the Tyne. The plaintiffs contended that Newcastle was no longer a safe port.

Held: the term "safe port" in a charterparty implied that the port was both physically and politically safe: it was a question of fact whether nature or war had rendered a port unsafe; and, on the facts, Newcastle was a safe port.

Notes. Considered: *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (1932), 38 Com. Cas. 79. Applied: *G. W. Grace & Co.* v. *General Steam Navigation Co.*, [1950] 1 All E.R. 201.

As to safe ports, see 30 Halsbury's Laws (2nd Edn.) 516-519, and for cases see 41 Digest 521-523.

Cases referred to:

(1) *Ogden* v. *Graham* (1861), 1 B. & S. 773; 31 L.J.Q.B. 26; 5 L.T. 396; 8 Jur. N.S. 613; 10 W.R. 77; 121 E.R. 901; 41 Digest 522, *3509*.

(2) *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp. M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, *3501*.

Action tried by Sankey, J., for a declaration that Newcastle-upon-Tyne was not in February, 1915, a safe port within the meaning of a charterparty dated April 18, 1913.

Roche, K.C., and *A. Hyslop Maxwell* for the plaintiffs.

Leek, K.C., and *Raeburn* for the defendants.

SANKEY, J.—In this case the plaintiffs claim a declaration that Newcastle-upon-Tyne was not in February, 1915, a safe port within the meaning of cl. 3 of a charterparty dated April 18, 1913, and made between them and the defendants; and, further, that the defendants by ordering the plaintiff's steamship *Frankby* to proceed to Newcastle during that month to load a cargo for Barcelona committed a breach of the charterparty which entitled them to withdraw the ship from the defendants' service.

By a charterparty of the above date the plaintiffs agreed to let and the defendants agreed to hire the British steamship *Frankby* for a term of five years at the rate of £1,440 per calendar month for employment between a safe port or safe ports between 50 degrees N. and 50 degrees S., subject to certain exceptions which are not material to the present case. The northern limit was afterwards extended to 60 degrees N. There was a stipulation in the charterparty that upon any breach thereof the plaintiffs should be at liberty to withdraw the vessel from the service of the defendants. In the first week of February, 1915, the vessel was at Havre, and had been provisionally ordered to proceed to Cardiff to load. The owners thereupon arranged to fit her up with stores and a new donkey boiler at that port. On Feb. 11 the German government promulgated the following announcement:

> "The waters round Great Britain and Ireland, including the entire English Channel, are hereby declared a military area. From Feb. 18 every hostile merchant ship within these waters will be destroyed even if it is not always possible to avoid dangers which thereby threaten the crews and passengers."

On Feb. 13 the defendants, by their agents, cancelled their provisional instructions for the vessel to go Cardiff and ordered her to the Tyne. This order was a serious inconvenience to the plaintiffs, who had already got their stores and donkey boiler at Cardiff, and they wrote protesting against it, not only on this ground, but also upon the ground that Newcastle was not a safe port within the meaning of the charterparty. They did not, however, withdraw the vessel from the service of the defendants, but allowed her to leave Havre upon Feb. 19, the day after that upon which, according to the German declaration, every hostile ship in the waters round Great Britain and Ireland was to be destroyed.

In spite of the German threat, the vessel appears to have had a safe and not very speedy voyage to Newcastle. She there loaded a cargo of coals for Barcelona, left, and had a similar voyage down the North Sea and English Channel. Judging from her log-book she was from first to last in no real danger or apprehension of danger. The plaintiffs contend that the order for the steamer to proceed to Newcastle was a breach of the charterparty because Newcastle was not a safe port. The defendants contend that Newcastle was perfectly safe, and, secondly, that, at any rate, the plaintiffs have waived their rights and are not entitled to withdraw the vessel because, after their protest, they allowed her to continue in the defendants' service.

The first point I have to decide is whether Newcastle was a safe port in February. It is admitted by both parties that Newcastle itself was safe, but the plaintiffs say that the dangers of the voyage there were such as to make the port unsafe within the meaning of the charterparty. The defendants, on the other hand, contend that the dangers of the voyage are not material to the question whether the port was a safe one, and, further, that such dangers as either existed or might be apprehended on the voyage were not of a character to make the port unsafe. Two cases were cited to me—namely, *Ogden* v. *Graham* (1), and *Nobel's Explosives Co.* v. *Jenkins & Co.* (2)—but neither seems to be conclusive. In my view, the word "safe," when used in connection with the word "port," implies that the port must be both physically and politically safe, and I think that the action either of nature or war may render a port unsafe. I have only to deal with the agency of war in the present case. At the moment no English port would be a safe port for a

German vessel. Neither is a place which a vessel can only go to at a certain risk of confiscation a safe port: see the observations of BLACKBURN, J., in *Ogden* v. *Graham* (1). There does not appear to be any sound distinction between a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels lying thereat or in the approaches thereto and a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels at a greater distance. Modern inventions like wireless telegraphy and submarines have quite altered old rules and old conceptions, and I am of opinion that dangers likely to be incurred on a voyage to a port may be taken into account in considering the question whether such port is safe to go to or not. In each case it is a question of fact and a question of degree.

I now consider whether the port of Newcastle had become unsafe. The German threat was that as from Feb. 18 every hostile merchant ship in English waters would be destroyed. The performance, however, fell short of the promise. The number of arrivals in and sailings from the time of overseas nationalities was 752 for February, 1915; the number lost or damaged from enemy causes in the North Sea was three; for the whole of the United Kingdom the numbers were 5,645 and twelve respectively. Such circumstances cannot have made the port of Newcastle unsafe in February last, since it is impossible to regard the results achieved by the German Navy as other than insignificant. Finding, therefore, that Newcastle was a safe port within the meaning of the charterparty, it is unnecessary to consider whether the plaintiffs have waived their rights, and the result is that I dismiss the action with costs.

Solicitors: *Botterell & Roche*, for *Weightman, Pedder & Co.*, Liverpool; *Thain Davidson & Co.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

R. *v.* HOPPER

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Bray and Lush, JJ.), March 29, 1915]

[Reported [1915] 2 K.B. 431; 84 L.J.K.B. 431; 113 L.T. 381; 79 J.P. 335; 31 T.L.R. 360; 59 Sol. Jo. 478; 25 Cox, C.C. 34; 11 Cr. App. Rep. 136]

Criminal Law—Trial—Summing-up—Duty of judge to direct jury on all points arising on evidence.

It is the duty of a judge to direct the jury on any point properly arising on the evidence at a trial, although counsel may not have relied, in his defence of the prisoner, on one or more of those matters.

At the trial of the appellant on a charge of murder the defence was that the killing was accidental, but counsel also relied on provocation as an alternative verdict. The judge, however, directed the jury that, unless they considered the killing accidental, there must be a verdict of murder.

Held: as there was no direction by the judge on the question of provocation and a possible verdict of manslaughter, the verdict of murder would be quashed and one of manslaughter substituted.

Notes. Considered: *R.* v. *Clinton* (1917), 12 Cr. App. Rep. 215. Followed: *R.* v. *Thorpe*, [1925] All E.R. Rep. 383. Considered: *Mancini* v. *D.P.P.*, [1941] 3 All E.R. 272; *Kwaku Mensah* v. *R.*, [1946] A.C. 83; *R.* v. *McCarthy*, [1954] 2 All E.R. 262. Considered: *Bullard* v. *R.* (1958), Cr. App. Rep. 1. Referred: *R.* v. *Beard* (1920), 84 J.P. 129; *R.* v. *Canham* (1925), 18 Cr. App. Rep. 163.

As to appeals to Court of Criminal Appeal, see 10 HALSBURY'S LAWS (3rd Edn.) 521 et seq.; as to appeals against conviction, see ibid., 535-541; as to judge's

summing-up, see ibid., 423–425; and as to provocation, see ibid., 710–713. For cases see 14 Digest (Repl.) 330 et seq., 647 et seq., and 15 Digest (Repl.) 938 et seq. For Criminal Appeal Act, 1907, s. 5, see 5 Halsbury's Statutes (2nd Edn.) 930.

Cases referred to in argument:

R. v. *Hampton* (1909), 2 Cr. App. Rep. 274, C.C.A.; 14 Digest (Repl.) 330, *3200*.

R. v. *Welsh* (1869), 11 Cox, C.C. 336; 15 Digest (Repl.) 938, *8992*.

R. v. *Horn* (1912), 86 J.P. 270; 28 T.L.R. 336; 7 Cr. App. Rep. 260, C.C.A.; 15 Digest (Repl.) 1027, *10,086*.

R. v. *May*, [1912] 3 K.B. 572; 82 L.J.K.B. 1; 108 L.T. 351; 77 J.P. 31; 29 T.L.R. 24; 23 Cox, C.C. 327; 8 Cr. App. Rep. 63, C.C.A.; 15 Digest (Repl.) 1027, *10,087*.

Appeal on a point of law against a conviction, before Atkin, J., at Cardiff Assizes, of murder.

On Christmas Day, 1914, the appellant, a sergeant in the 6th Welsh (Territorial) Regiment, had charge of twelve men on guard at Swansea Docks. There had been much drinking during the day, and at eight o'clock in the evening the appellant was quite intoxicated. Later he accused a private named Dudley of having stolen a bottle of whisky, which was missing. Dudley called the appellant a liar, and a fight then ensued between the two men. Another private named Gates came up to assist Dudley, who made threats to use his bayonet. The two men got the appellant down on the ground and knocked him about severely. An officer then arrived on the scene and ordered that the two privates should be disarmed and put under arrest. The appellant, as a non-commissioned officer, was ordered to take them to the guard room under an escort. On the way there Dudley refused to obey an order by the appellant to give up his bayonet, and put his hand upon the hilt of it. He refused again when ordered by the appellant to disarm, put his hand on the bayonet and threatened to use it. A struggle took place, and during this the appellant levelled his rifle and fired. Dudley fell back dead. The rifle used by the appellant was of the Lee-Metford pattern, with a light pull and no safety catch. The bayonet on the rifle was fixed, and the appellant was acting under orders in carrying a loaded rifle. At the trial counsel for the defence mainly relied on the question of an accidental killing, but he did not abandon an alternative defence of manslaughter based upon provocation. In giving evidence the accused said he was not angry at the time of the occurrence. In summing-up to the jury, Atkin, J., told them that they could not upon the evidence find a verdict of manslaughter, and directed them that if they did not consider the whole affair was accidental, they must find the accused guilty of murder. The jury found the accused guilty of murder with a strong recommendation to mercy.

Llewelyn Williams, K.C., and *Trevor Hunter* for the appellant.

Ellis Griffith, K.C., and *Clive Lawrence* for the Crown.

The judgment of the court was delivered by

LORD READING, C.J.—The appellant was a sergeant in the reserve battalion of the 6th Welsh (Territorial) Regiment. He was tried on a charge of murdering Private Dudley, in the same regiment, and at the time of the occurrence under the command of the appellant. The jury found the appellant guilty of murder, with a strong recommendation to mercy. The appeal is based upon the fact that the judge at the trial told the jury that they must either find the appellant guilty of murder or acquit him—that if they did not accept the theory of accidental killing put forward on his behalf, they could only find a verdict of murder. Counsel for the appellant has rightly argued the case on the ground that the killing was not accidental; the question which remains for our decision is whether upon the evidence the judge ought to have left to the jury the option of finding a verdict of manslaughter.

At the trial the cross-examination of the witnesses showed that the defence raised was that the killing was accidental. Counsel for the defence, however, before the judge summed up, indicated quite clearly that he did not intend to abandon the defence of manslaughter, and that he meant to ask the jury to return a verdict of manslaughter if they did not acquit the appellant altogether. In his summing-up the judge took the view that on the facts as given in evidence it was impossible for the jury to return a verdict of manslaughter, and directed the jury that they must either acquit the appellant on the ground that the killing was accidental, or convict him of murder. The question as to the crime being one of manslaughter only ought to have been left to the jury so as to enable them, if they thought fit, to return a verdict of manslaughter. It was not right to say that the jury had no alternative except to find a verdict of acquittal on the ground of accident, or one of murder. The jury had enough evidence before them to justify them in returning a verdict of manslaughter. It is not for this court to say whether they would have found that verdict, but the real question is whether it should not have been left open to them to find such a verdict if they thought fit. Provocation existed because of the fight and the "hammering" of the appellant by the two men; further, there is the important fact that directly before the shot was fired the deceased man said, not for the first time, that he would stick the appellant with his bayonet, and that he placed his hand on it; and it must be taken into account that all this amounted to grave insubordination towards a superior officer, while that it occurred in the presence of the other men would be an additional aggravation. Further, a great deal of drinking had taken place, and the circumstances of the fight all tended to make the appellant lose control of himself at a critical time.

Under these circumstances we think that the matter should have been so left to the jury that they could find a verdict either of manslaughter or murder. We do not agree that, as the line of defence adopted by counsel at the trial was based upon the supposition of accident, the judge was justified in omitting to direct the jury on the question of manslaughter. Whatever the line of defence adopted the judge should put before the jury such questions as seem to him to properly arise upon the evidence, even though these questions may not have been raised by counsel. In the present case counsel for the appellant did not rely only upon the defence of accident; he indicated clearly that if that view failed he should ask the jury to return a verdict of manslaughter and not murder, though the difficulty of putting forward the alternative defences may have accounted for counsel saying very little about manslaughter. Also, we cannot accept the argument that the statement by the appellant that he was not angry at the time negatived the idea of manslaughter. The appellant when he made that statement was trying to shelter himself on the plea of accident; the jury could well take the view that what he said was not true. It is not right to exclude other views of the facts which may not agree with the view put forward by the appellant in his evidence. The court, with the assistance of the jury, must arrive at the true view of the facts, and not pay too much attention to the views put forward by one side or the other. As the court considers that the question whether his crime was manslaughter and not murder should have been put before the jury, we have power, under s. 5 (2) of the Criminal Appeal Act, 1907, to substitute the verdict which we think should have been found by the jury, under a proper direction. We cannot say that the jury would have found a verdict of manslaughter, but as the question was not left to them the appellant is entitled to a verdict for the lesser offence. The order of the court will be that the verdict of murder be quashed and a verdict of manslaughter entered, and under all the circumstances the sentence will be one of four years' penal servitude.

Sentence reduced.

Solicitors: *Andrew & Thompson*, Swansea; *Director of Public Prosecutions*.

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law*.]

R. *v.* SIMPSON

COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Bray and Avory, JJ.), July 12, 1915]

[Reported 84 L.J.K.B. 1893; 114 L.T. 238; 31 T.L.R. 560; 25 Cox, C.C. 269; 11 Cr. App. Rep. 218; 74 J.P. Jo. 364]

Criminal Law—Manslaughter—Deliberate killing—Provocation—Killing of child by father—Child and home neglected by wife—Child ill and in great pain—Anger by father against wife.

Provocation by one person leading to the homicide of another person by the person provoked is not sufficient to reduce the crime of murder to that of manslaughter.

The appellant, a soldier, returned home on leave and found his home and children in a very neglected condition and that his wife had been unfaithful to him. Their infant son, aged two years, was suffering from a painful malady, but on the day of the crime the wife left the house, and, although repeatedly sent for, refused to return to the child, who was visibly in intense pain. The appellant, provoked by the continued neglect of his wife, killed the child.

Held: the wife's neglect of the child was not sufficient to reduce the killing of the child to manslaughter.

Notes. Section 3 of the Homicide Act, 1957, does not alter the rule that it is for the judge to decide whether there is any evidence of provocation to go to the jury, and for the jury to decide whether the provocation is sufficient to justify a verdict of manslaughter, nor the rule that the provocation must be sufficient to lead to loss of self-control by a normal reasonable man.

As to provocation in cases of homicide, see 10 HALSBURY'S LAWS (3rd Edn.) 710–713; for the Homicide Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 172; and for cases, see 15 DIGEST (Repl.) 938 et seq.

Case referred to in argument:

R. v. *Rothwell* (1871), 12 Cox, C.C. 145; 15 Digest (Repl.) 942, *9033*.

Appeal on a point of law against a conviction for murder before ROWLATT, J., at Newcastle-upon-Tyne Assizes.

Paley Scott for the appellant.

Waugh, K.C., and *Rowan Hamilton* for the Crown.

July 12, 1915. **LORD READING, C.J.,** delivered the following judgment of the court.—In this case, which is a very sad one, the appellant had returned home from the front on leave. He found his home in a shocking condition and his children neglected, and his wife admitted that she had been unfaithful to him. The wife had ample funds with which to keep the house properly and provide for the children. A boy of two years old was suffering from water on the brain, causing great pain and distress. On the morning of the occurrence the appellant went out and had some drink, but not any great quantity. He returned home at mid-day and found the child in great suffering. He sent for his wife twice, but she did not come. He sat and watched the child and was evidently brooding over his wrongs. He then formed the intention of killing the child and took a razor out of his pocket, with which he cut the child's throat, causing death almost immediately. At the trial the appellant was ably defended, and it is clear that everything possible was urged to induce the jury to return a verdict of manslaughter if such verdict could be legally sustained. The judge, after hearing the evidence and calling the attention of the jury to it, said that he felt bound to direct them to bring in a verdict of murder.

The proposition put forward by the defence is that provocation by one person, leading to the homicide of another person by the person provoked, is sufficient to

reduce the crime of murder to that of manslaughter. There is no authority for that proposition. Numerous authorities show the degree of provocation which may reduce the crime of murder to that of manslaughter, but there is no similarity between those cases and the one we are now dealing with. We think that in law no exception can be taken to the direction given by the judge to the jury. There was a definite intention to kill, and the justifiable anger of the appellant towards his wife would not warrant the jury in returning a verdict of manslaughter. They did very strongly recommend the appellant to mercy, and we do not wish to detract in any way from that recommendation. That, however, is a matter for the Home Secretary, and this court can do nothing but dismiss the appeal.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal: Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

PORTER *v.* FREUDENBERG. KREGLINGER *v.* SAMUEL AND ROSENFELD. Re MERTEN'S PATENTS

[Court of Appeal (Lord Reading, C.J., Lord Cozens-Hardy, M.R., Buckley, Kennedy, Swinfen Eady, Phillimore and Pickford, L.JJ.), November 19, 20, 24, 25, December 7, 1914, January 19, 1915]

[Reported [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R.P.C. 109]

Alien—Enemy—"Alien enemy" defined—Right to sue in English courts—Alien under protection of Crown—Right to defend action—Right to appeal against adverse decision—Effect of Hague Convention, 1907, *s.* 2, *c.* 1, *art.* 23 (*h*).

The test whether or not in time of war a person is an alien enemy is not his nationality, but the place where he resides or carries on his business, and, therefore, the term "alien enemy" includes, not only the subject of a State at war with Great Britain, but also any British subject or subject of a neutral State voluntarily residing and carrying on business in hostile territory. An alien enemy, as above defined, cannot during the war enforce his civil rights and cannot sue or proceed in the civil courts of this country.

Conversely, a person is treated as a subject of the Crown, notwithstanding that he is the subject of an enemy State, if he is in Great Britain under the protection and by permission of the Crown, and such a person is no longer under the disability attaching to an alien enemy and can maintain an action in our courts.

Article 23 (h) of c. 1 of s. 2 of the Annex to the Hague Convention, 1907, entitled Regulations respecting the Laws and Customs of War on Land, which provided that it was forbidden "to declare abolished, suspended, or inadmissible the rights of the subjects of the hostile party to institute legal proceedings," **held** not to abrogate the rule that an alien enemy's rights of action in this country are suspended during the war, for the paragraph has no concern with municipal law, but is directed to forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which would prevent the inhabitants of that territory from using their courts of law to assert or to protect their civil rights.

An alien enemy may be sued or proceeded against during war. He can appear and be heard in his defence, and may take all such steps as may be deemed necessary for the proper presentment of his defence. If judgment

proceed against him, the appellate courts are as much open to him as to any other defendant. But in the case of an enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue of his residence or place of business became an alien enemy, he cannot appeal when once hostilities have commenced, and if he has given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace, for, when appealing, he is seeking to enforce his right by invoking the assistance of the Sovereign in his courts just as much as if he sought the assistance of the Sovereign to enforce a civil right in a court of first instance.

Practice—Service—Substituted service—Need to prove impossibility of personal service—Method of service asked for in all reasonable probability bringing knowledge of writ to defendant.

Alien—Enemy—Action against—Service of writ—Substituted service—Service on agent managing branch business in England.

In order that substituted service of a writ may be permitted, it must be clearly shown that the plaintiff is unable to effect personal service and that the writ is likely to reach the defendant or come to his knowledge if the method of substituted service asked for by the plaintiff is adopted. The terms of R.S.C., Ord. 9, r. 2, which provides that the court may make such order as may seem just when the plaintiff is unable to effect prompt personal service, are of very wide application and give a very wide discretion. On an application for substituted service of a writ for service out of the jurisdiction the court must be satisfied that there exists a practical impossibility of actual service and that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainly, bring knowledge of the writ to the defendant. So also in the case of a notice of a writ to be served on a foreigner out of the jurisdiction.

Where an action is brought against an alien enemy carrying on business and resident out of the jurisdiction, but who carries on a branch business in this country through an agent, leave may be given to the plaintiff to issue a concurrent writ and serve notice of it by effecting substituted service upon the agent in this country subject to such further terms as may be imposed in chambers upon the plaintiff as to advertisement or other means of communication, and as to the period to be given to the defendant for appearance.

Notes. Followed: *Act. für Anilin* v. *Levinstein* (1915), 84 L.J.Ch. 842. Applied: *Re Wilson, Ex parte Marum* (1915), 113 L.T. 1116. Explained: *Schaffenius* v. *Goldberg*, ante p. 387. Followed: *Re Churchill & Co., Ltd. and Lonberg's Intended Action*, [1941] 3 All E.R. 137. Considered: *Vandyke* v. *Adams*, [1942] 1 All E.R. 139; *Netz* v. *Ede*, [1946] 1 All E.R. 628; *Reverall* v. *Grant Advertising Incorporated*, [1954] 3 All E.R. 389. Referred: *Rombach Baden Clock Co.* v. *Gent* (1915), 84 L.J.K.B. 1558; *Re Sutherland, Bechof* v. *Bubna* (1915), 31 T.L.R. 248; *Halsey* v. *Lowenfeld*, [1916–17] All E.R. Rep. 1044; *R.* v. *Vine Street Police Superintendent*, ante p. 393; *Tingley* v. *Müller*, [1916–17] All E.R. Rep. 470; *Rodriguez* v. *Speyer Bros.*, [1918–19] All E.R. Rep. 884; *Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107; *Re Sutherland, Bechof* v. *Bubna* (1921), 65 Sol. Jo. 513; *Meyer* v. *Louis Dreyfus et Cie*, [1940] 4 All E.R. 157; *Re an Arbitration between N. V. Gebr. Weiner* v. *Central Fund for German Jewry*, [1941] 2 All E.R. 29; *Re De Barbe, Ellissen* v. *Griffiths* (1941), 85 Sol. Jo. 474; *Van Udens Scheepvart en Agentuur Maats chappij and Sovfracht*, [1943] 1 All E.R. 76; *The Glenroy*, [1943] P. 109; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Boissevain* v. *Weil*, [1948] 1 All E.R. 893.

As to rights and disabilities of alien enemies and as to service and substituted service, see 1 HALSBURY'S LAWS (3rd Edn.) 500 et seq., and ibid., vol. 30, p. 319 et seq., respectively. For cases see 2 DIGEST (Repl.) 212 et seq., and DIGEST (Practice) 312 et seq.

Cases referred to :

(1) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 276, *639*.

(2) *Potts* v. *Bell* (1800), 8 Term Rep. 548; 101 E.R. 1540; 2 Digest (Repl.) 256, *562*.

(3) *Esposito* v. *Bowden* (1857), 7 E. & B. 763; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur. N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex.Ch.; 2 Digest (Repl.) 257, *564*.

(4) *Wells* v. *Williams* (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 242, *440*.

(5) *McConnell* v. *Hector* (1802), 3 Bos. & P. 113; 127 E.R. 61; 2 Digest (Repl.) 249, *496*.

(6) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 277, *646*.

(7) *Wolff* v. *Oxholm* (1817), 6 M. & S. 92; 105 E.R. 1177; 2 Digest (Repl.) 248, *495*.

(8) *A.-G.* v. *Weeden and Shales* (1699), Park. 267; 145 E.R. 776; 2 Digest (Repl.) 222, *331*.

(9) *Antoine* v. *Morshead* (1815), 6 Taunt. 237; 1 Marsh. 558; 128 E.R. 1025; 2 Digest (Repl.) 254, *544*.

(10) *Sylvester's Case* (1703), 7 Mod. Rep. 150; 87 E.R. 1157; 2 Digest (Repl.) 250, *507*.

(11) *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23; 101 E.R. 415; 2 Digest (Repl.) 254, *548*.

(12) *Ricord* v. *Bettenham* (1765), 3 Burr. 1734; 1 Wm. Bl. 564; 97 E.R. 1071; 2 Digest (Repl.) 243, *453*.

(13) *Boulton* v. *Dobree* (1808), 2 Camp. 163, N.P.; 2 Digest (Repl.) 242, *441*.

(14) *Alciator* v. *Smith* (1812), 3 Camp. 245; 2 Digest (Repl.) 242, *442*.

(15) *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217; 24 L.J.Q.B. 19; 24 L.T.O.S. 92; 1 Jur. N.S. 16; 13 W.R. 25; 119 E.R. 84; 2 Digest (Repl.) 243, *456*.

(16) *Ex parte Boussmaker* (1806), 13 Ves. 71; 33 E.R. 221; 2 Digest (Repl.) 243, *457*.

(17) *Princess Thurn and Taxis* v. *Moffitt*, ante p. 301, [1915] 1 Ch. 58; 84 L.J.Ch. 220; 112 L.T. 114; 31 T.L.R. 24; 59 Sol. Jo. 26; 2 Digest (Repl.) 242, *443*.

(18) *Flindt* v. *Waters* (1812), 15 East, 260; 104 E.R. 842; 2 Digest (Repl.) 250, *509*.

(19) *Robinson & Co.* v. *Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; 84 L.J.K.B. 238; 112 L.T. 125; 31 T.L.R. 20; 59 Sol. Jo. 7; 12 Asp. M.L.C. 574; 20 Com. Cas. 125; 2 Digest (Repl.) 247, *483*.

(20) *McVeigh* v. *United States*, [1870] 11 Wall. 259.

(21) *Hastings* v. *Blake*, Noy, 1.

(22) *Ramsden* v. *Macdonald* (1748), 1 Wils. 217.

(23) *Wilding* v. *Bean*, [1891] 1 Q.B. 100; 60 L.J.Q.B. 10; 64 L.T. 41; 39 W.R. 40 C.A.; Digest (Practice) 332, *502*.

(24) *Jay* v. *Budd*, [1898] 1 Q.B. 12; 66 L.J.Q.B. 863; 77 L.T. 335; 46 W.R. 34; 14 T.L.R. 1; 41 Sol. Jo. 859, C.A.; Digest (Practice) 332, *505*.

(25) *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.*, [1894] 1 Q.B. 784; 63 L.J.Q.B. 542; 70 L.T. 443; 42 W.R. 402; 10 T.L.R. 345; 38 Sol. Jo. 324; 9 R. 367, C.A.; Digest (Practice) 330, *484*.

(26) *Fry* v. *Moore* (1889), 23 Q.B.D. 395; 58 L.J.Q.B. 382; 61 L.T. 545; 37 W.R. 565, C.A.; Digest (Practice) 332, *501*.

(27) *Re Urquhart, Ex parte Urquhart* (1890), 24 Q.B.D. 723; 59 L.J.Q.B. 364; 38 W.R. 612; 7 Morr. 94, C.A.; Digest (Practice) 333, *511*.

(28) *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge*, [1905] 2 Ch. 472; 74 L.J.Ch. 751; 93 L.T. 664; 54 W.R. 62; 49 Sol. Jo. 701; Digest (Practice) 331, *492*.

(29) *Watt* v. *Barnett* (1878), 3 Q.B.D. 363; 38 L.T. 903; 26 W.R. 745, C.A.; Digest (Practice) 392, *959.*

(30) *Ford* v. *Shephard* (1885), 53 L.T. 564; 34 W.R. 63; Digest (Practice) 331, *491.*

(31) *Ditton* v. *Bornemann* (1886), 3 T.L.R. 3; Digest (Practice) 331, *497.*

Also referred to in argument:

St. Gobain, Chauny and Cirey Co. v. *Hoyermann's Agency*, [1893] 2 Q.B. 96; 62 L.J.Q.B. 485; 69 L.T. 329; 41 W.R. 563; 9 T.L.R. 481; 4 R. 441, C.A.; 36 Digest (Repl.) 521, *844.*

Deeley v. *Perkes*, [1896] A.C. 496; 65 L.J.Ch. 912; 75 L.T. 233; 12 T.L.R. 547; 13 R.P.C. 581, H.L.; 36 Digest (Repl.) 798, *1474.*

Re Armstrong's Patent (1897), 77 L.T. 267; 14 R.P.C. 747, C.A.; 36 Digest (Repl.) 784, *1346.*

Albrecht v. *Sussmann* (1813), 2 Ves. & B. 323; 35 E.R. 342; 2 Digest (Repl.) 250, *504.*

Sparenburgh v. *Bannatyne* (1797), 1 Bos. & P. 163; 2 Esp. 580; 126 E.R. 837; 2 Digest (Repl.) 250, *512.*

Maria v. *Hall* (1800), 2 Bos. & P. 236; (1807), 1 Taunt. 33; 127 E.R. 741; 2 Digest (Repl.) 242, *448.*

Duhammell (*Administrator of Tailleme*) v. *Pickering* (1817), 2 Stark. 90; 2 Digest (Repl.) 254, *545.*

Le Bret v. *Papillon* (1804), 4 East, 502; 102 E.R. 923; 2 Digest (Repl.) 250, *508.*

Shepheler (*Schepeler*) v. *Durant* (1854), 14 C.B. 582; 23 L.J.C.P. 140; 2 W.R. 467; 2 C.L.R. 729; 139 E.R. 240; sub nom. *Chepeler* v. *Durant*, 23 L.T.O.S. 79; 2 Digest (Repl.) 250, *506.*

The Möwe, [1915] P. 1; 84 L.J.P. 57; 112 L.T. 261; 31 T.L.R. 46; 59 Sol. Jo. 76; 13 Asp. M.L.C. 17; 37 Digest 592, *289.*

Barrick (*Barwick*) v. *Buba* (1857), 2 C.B.N.S. 563; 26 L.J.C.P. 280; 29 L.T.O.S. 199; 5 W.R. 665; 140 E.R. 536; 2 Digest (Repl.) 252, *525.*

Daubigny v. *Davallon* (1794), 2 Anst. 462; 145 E.R. 936; 2 Digest (Repl.) 250, *514.*

Hall v. *Trussell* (1603), Moore, K.B. 753.

Verney (*otherwise Joyner's*) *Case* (1565–66), 2 Dyer, 245 b.

De Wahl v. *Braune* (1856), 1 H. & N. 178; 25 L.J.Ex. 343; 27 L.T.O.S. 188; 4 W.R. 646; 156 E.R. 1166; 2 Digest (Repl.) 222, *329.*

Willison v. *Patteson* (1817), 1 Moore, C.P. 133; 7 Taunt. 439; 129 E.R. 176; 2 Digest (Repl.) 254, *546.*

Bendelack v. *Morier* (1794), 2 Hy. Bl. 338.

Appeals in the first and second cases by the plaintiffs ex parte from orders of SCRUTTON, J., at chambers, giving leave to issue concurrent writs against the defendants and to serve notice of the writs upon the defendants in the first case at Berlin, and, in the second, at Hamburg, or, in both cases, elsewhere within the German Empire. In both cases the plaintiffs applied for leave for substituted service of notice of the writ on agents of the defendants in Great Britain. The third case was a notice of motion for an order to set aside a notice of appeal by the Deutsche Mertens Gesellschaft, a German company, the registered owners of a patent for "improvements in printing" taken out by Edward Mertens on Aug. 5, 1904, on the ground that the appellants were, at the date of the notice, alien enemies of His Majesty and not competent to take any step in the proceedings.

War broke out between Great Britain and Germany on Aug. 4, 1914.

In *Porter* v. *Freudenberg* the plaintiff issued a writ against one Philip Freudenberg (trading as Hermann Gerson), to recover a quarter's rent due on Sept. 29, 1914, under a lease made in 1903 at a rental of £625 of certain premises situate at Nos. 24 and 25, Prince's Street, Hanover Square, London. The defendant, who was a German subject, resided and carried on business as a mantle

manufacturer in Berlin, and had for some time before the outbreak of war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the affidavit of the plaintiff a quantity of stock was usually kept on the premises, but immediately before Sept. 29 the whole of the stock, fixtures, and fittings were removed from the premises. On Sept. 28 the keys of the premises were sent to the plaintiff by Arthur Barnes which the plaintiff intimated would be held at the disposal of Arthur Barnes as the agent of the defendant. The plaintiff having issued his writ applied to SCRUTTON, J., for directions as to the manner of serving the writ in Berlin, the learned judge made the order appealed against. The plaintiff now applied for leave for substituted service of notice of the writ upon Barnes, the defendant's agent in England, or otherwise as the court might direct.

Cecil Fitch for the plaintiff.

The defendant was not represented.

In *Kreglinger* v. *S. Samuel and Rosenfeld* the plaintiffs, a firm of skin and hide merchants carrying on business in London and Antwerp, made two contracts before the outbreak of the war in 1914 with the defendants to sell cargoes of hides from Australia, payment to be made by cash against documents on arrival of the goods at Dunkirk and Antwerp respectively. In August the defendants repudiated the contracts. The plaintiffs in September issued a writ and served it on one Bonome, as the person in charge of the business of the defendants in London. Bonome entered a conditional appearance and took out a summons to set aside the writ, or service thereof, on the ground that the sole proprietor of the defendants' business was one Alfred Cohen, a German subject, residing at Hamburg. Bonome had full authority to act in all matters in England in respect of the business. An order was made setting aside service of the writ. The plaintiffs then asked for leave to issue a concurrent writ against Alfred Cohen for service out of the jurisdiction and for leave to serve notice of such writ out of the jurisdiction, and also for leave to make substituted service of the notice of such writ upon Bonome. SCRUTTON, J., gave leave to issue the concurrent writ and serve notice thereof out of the jurisdiction, but refused leave to effect substituted service on Bonome. The plaintiffs appealed.

Storry Deans for the plaintiffs.

The defendants were not represented.

In *Re Merten's Patent*, Soldau & Co., Ltd., an English company, presented a petition for revocation of the patent. WARRINGTON, J., held that the patent was void for want of subject-matter, and made an order for revocation, but, if notice of appeal were given on or before Aug. 28, 1914, the operation of the order was to be suspended until the hearing of the appeal. The Deutsche Mertens Gesellschaft, of Freiburg in Breisgau, Germany, gave notice of appeal from that decision on Aug. 28, and the present application was to set aside that notice of appeal.

Walter, K.C. (*Courtney Terrell* with him), in support of the motion.

H. Fletcher Moulton for the Mertens company.

The *Attorney-General* (*Sir John Simon, K.C.*), *Branson* and *Nesbitt* as amici curiæ.

Cur. adv. vult.

Jan. 19, 1915. **LORD READING, C.J.,** read the following judgment of the court. -Before determining the respective merits of these three appeals it would be to serve the public interest to examine the law relating to proceedings in the King's courts by or against alien enemies during a state of war, so that conclusions might be drawn which would be a guide to the solution of some of the present-day problems. In the first and second appeals the respondents had not been served and were not represented. Having regard, however, to the importance of the propositions of law to be discussed, the Attorney-General, acting as amicus curiæ

upon the invitation of the court, undertook the burden of representing the law in all its aspects. We are much indebted to him for his valuable assistance.

The main questions to be considered are, first, the capacity of alien enemies to sue in the King's courts; secondly, their liability to be sued, their capacity to appeal to the appellate courts, and, generally, their right to appear and be heard in the King's courts. There is much learning to be found in the books in reference to the enforcement of civil rights of alien enemies. Pronouncements on the subject were delivered by great judicial authorities during the Napoleonic wars and again during the Crimean war, and in reference to incidents arising out of those wars. Happily, with the exception of the South African war, there has been hitherto no occasion in recent times for the courts to examine this branch of legal knowledge. It may, therefore, be useful to refer to some of the early authorities, although the main propositions of law have long been well settled.

It is necessary at the outset to keep clearly in mind the meaning of the term "alien enemy" when used in reference to civil rights and liabilities. Its natural meaning indicates a subject of enemy nationality—that is, of a State at war with the King—and would not in any circumstances include a subject of a neutral State or of the British Crown, but that is not the sense in which the term is used in reference to civil rights. Ever since the great case of *The Hoop* (1) the law has been firmly established as pronounced in the judgment of LORD STOWELL (then SIR WILLIAM SCOTT) that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign: see also *Potts* v. *Bell* (2). This branch of law was again considered as a result of the Crimean war, and WILLES, J., in delivering the judgment of the Court of Queen's Bench in *Esposito* v. *Bowden* (3), said (7 E. & B. at p. 779):

> "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal."

This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the State at war with the Crown, and later it was grounded upon public policy which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral State carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality, but the place of carrying on the business: *Wells* v. *Williams* (4); *McConnell* v. *Hector* (5); *Janson* v. *Driefontein Consolidated Mines* (6). When considering the enforcement of civil rights a person may be treated as the subject of an enemy State, notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State. As LORD LINDLEY said in *Janson* v. *Driefontein Consolidated Mines* (6) ([1902] A.C. at pp. 505, 506):

> "When considering questions arising with an alien enemy, it is not the nationality of a person but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts. . . . Again, the subject of a State at war with this country but who is carrying on business here or in a foreign neutral country is not treated as

an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses."

LORD LINDLEY'S statement is not intended to be, and is not, exhaustive. His Lordship, for the purposes of the appeal then before the House of Lords, was considering the character of a trading corporation, and did not purport to deal with persons residing, but not carrying on business, in the enemy territory. Such a person is equally treated as an alien enemy provided he is voluntarily resident there, having elected to live under the protection of the enemy State. For the purpose of determining civil rights a British subject or the subject of a neutral State, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory. PROFESSOR DICEY, in his treatise on PARTIES TO AN ACTION, at p. 3, states the law accurately in the following proposition:

"Under the term 'alien enemy' are included not only the subjects of any State at war with us, but also any British subjects or the subjects of any neutral State voluntarily residing in a hostile country."

In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown: BLACKSTONE (21st Edn.), vol. 1, c. 10, at p. 373. Indeed, under the ancient common law, "debts and goods found in this realm belonging to alien enemies belong to the King and may be seized by him": see HALE'S PLEAS OF THE CROWN, vol. 1, at p. 95. That the enemy's property was liable to confiscation is also shown by the privilege granted under c. 30 of Magna Charta to merchant strangers coming into this realm, whereby the privilege was conceded to merchants of a land making war against the Sovereign and found in this realm that they should be attached without harm of body or goods until it became known how English merchants were treated in the hostile State. If well treated, the enemy merchants were to be well treated here, so that confiscation of the enemy merchants' property would only occur by way of reprisal or retaliation. Whether the right of the Sovereign to confiscate any of the alien enemies' goods or debts in this realm was ever exercised or not: see *Wolff* v. *Oxholm* (7), 6 M. & S. at p. 102, per LORD ELLENBOROUGH, there can be no doubt about the existence of the right: see *A.-G.* v. *Weeden and Shales* (8). GIBBS, C.J., in *Antoine* v. *Morshead* (9) affirmed the principle that the Crown during the war may lay hands on debts due to the alien enemy, but if it do not, then on the return of peace the rights of the contracting alien are restored and he may himself sue to recover the debts: see also WALFORD'S PARTIES TO ACTIONS at p. 653, and the authorities there cited from 19 Edw. 4 to *Antoine* v. *Morshead* (9). The right of confiscation is only of importance to trace the history and foundation of our common law, since there is manifestly no question of exercising this right. The severity of the common law rule was, however, in early days relaxed in favour of those who had the King's permission to come here. So long ago as the year 1454 it would follow, from the reported observations of ASHTON, J. (YEAR BOOK, 32 Hen. 6, 23 (b) 5), that, if an alien enemy came here under the King's licence or a safe conduct, he could maintain an action for trespass if any person took his goods from his house. Later, in 1697, in *Wells* v. *Williams* (4), it was held that although an alien enemy came here in time of war and without a safe conduct, yet, if he has continued to reside here by the King's leave and protection, he may be allowed to sue in the King's court, for such a right is consequent to the protection offered him. In COKE ON LITTLETON

(19th Edn., vol. 1, at p. 129 (a)), it is stated that an alien enemy cannot maintain a real or personal action until both nations are at peace. An editorial note (A.D. 1832) adds that

> "On declaring war the King usually in a proclamation of war qualifies it by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves; and without doubt such persons are deemed to be alien friends in effect."

The passage in BACON'S ABRIDGEMENT (7th Edn.), vol. 1, at p. 183, dealing with enemy aliens, is of similar effect:

> "If an alien enemy comes here sub salvo conducto he may maintain an action; so if an alien enemy comes here in times of peace per licentiam domini regis, as the French Protestants did, and lives here sub protectione and a war afterwards happens between the two nations, he may maintain an action, for suing is but a consequential right of protection; and therefore an alien enemy who is here in peace under protection may sue a bond; aliter of one commorant in his own country."

This passage is mainly based upon *Wells* v. *Williams* (4) and *Sylvester's Case* (10). The decision in this last-mentioned case threw no doubt upon the principle of law, but held that in an action by an alien enemy, and when there was a plea in abatement of "alien enemy," it was incumbent on him to plead a replication that he was here under the protection of the Crown. Towards the end of the eighteenth century LORD KENYON, C.J., in delivering the judgment of the Court of King's Bench in *Brandon* v. *Nesbitt* (11), said that (6 Term Rep. at p. 28):

> "An action will not lie either by or in favour of an alien enemy . . . [and that the court] had not found a single case, in which the action had been supported in favour of an alien enemy. For though it was held in *Ricord* v. *Bettenham* (12) that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection."

So clear a statement of the law was made by LORD ALVANLEY, C.J., in *McConnell* v. *Hector* (5) (3 Bos. & P. at p. 114) that we quote it in extenso:

> "Most certainly every natural-born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct; but if he live in an enemy country he forfeits that right. Though these persons may not have done that which amounted to treason, yet there is an hostile adherence and a commercial adherence; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile State and who is so far a merchant settled in that State that his goods would be liable to confiscation in a court of prize is as yet to be considered as entitled to sue as an English subject in an English court of justice. The question is whether a man who resides under the allegiance and protection of a hostile State for all commercial purposes, is not to be considered for all civil purposes as much an alien enemy as if he were born there? If we were to hold that he was not, we must contradict all the modern authorities upon this subject. That an Englishman from whom France derives all the benefit which can be derived from a natural-born subject of France should be entitled to more right than a native Frenchman would be a monstrous proposition. While the Englishman resides in the hostile country, he is a subject of that country, and it has been held that he is entitled to all the privileges of a neutral country while resident in a neutral country."

The later cases of *Boulton* v. *Dobree* (13) and *Alciator* v. *Smith* (14), while affirming the principle already stated, decided that the burden was upon the alien enemy to establish that he was within this realm by the licence of the King, and, as

the evidence was not sufficient in either case to discharge this burden, there was a non-suit in both cases. A

During the Napoleonic wars it was thus firmly established that an alien enemy, unless here by permission of the King, could not sue in the King's court. In a case arising out of the Crimean war, *Alcinous* v. *Nigreu* (15), the principle was again affirmed. The point arose on demurrer to the plea that the plaintiff was residing in this kingdom without the licence, safe conduct, or permission of the Sovereign. LORD CAMPBELL, C.J., held that the court must take judicial notice that our Sovereign was at war with the empire of Russia and was of opinion that, as the contract was entered into before the war, the plaintiff could enforce it when peace was restored, but that by the law of England, so long as hostilities prevailed, a Russian subject who was here without the permission, express or implied, of the Sovereign could not sue here. B C

In WALFORD'S treatise of the LAW RESPECTING PARTIES TO ACTIONS, published 1842, there is a chapter in vol. 1, at p. 647, dealing with disabilities of civil origin which well repays close and diligent study. When treating of alien enemies the learned author at p. 650 thus states the law:

> "Alien enemies are distinguishable according as they are under the King's special protection or not. If an alien enemy came here under a safe conduct or is commorant here by the King's licence and under his protection he seems to stand in the same position as to the right of maintaining actions in our courts as an alien friend, a right of suing being an incidental right to protection" D

—that is, he is no longer under the disability attaching to an alien enemy. E

Whenever the capacity of an alien enemy to sue or proceed in our courts has come for consideration, the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil courts of the realm. *Ex parte Boussmaker* (16), however, requires examination. In that case LORD ERSKINE, L.C., allowed alien enemies to enter a claim as creditors in a petition under a commission for bankruptcy on the ground that upon a return to peace the right to prove would survive, inasmuch as the debt arose from a contract made when the two nations were at peace. He came to the conclusion that it would be contrary to justice to confiscate the dividend, and as the right to recover was only suspended, that was not a reason why the fund available for the creditors should be divided among the other creditors without regard to the alien enemies' suspended rights. He, therefore, ordered that a claim be entered and the dividend of the alien enemy be reserved. The contention to which the Lord Chancellor there gave effect was that, in the administration of the fund in bankruptcy, the other creditors should not be permitted to take a larger dividend by the exclusion of the alien enemy. If the alien enemy could not take the dividend the Crown would be entitled to it. Under these circumstances the Lord Chancellor admitted, not a proof, but a claim. The result would be that there would be divided among the other creditors the differential sum remaining after reserving the dividend on the claim, and that, as his Lordship said (13 Ves. at pp. 71, 72) F G H

> "upon the return of peace the right would survive. It would be contrary to justice to confiscate the dividend."

This differs from a case in which the alien enemy comes into court to prove the existence of the debt and claim judgment for the amount. It must not, however, be regarded as an authority for the proposition that an alien enemy can present a petition to the court and be heard upon it. There was no argument before the Lord Chancellor as to whether such a petition could be presented by an alien enemy, and the point does not appear to have been considered. According to the report of the case, no interest was represented before his Lordship except that of the petitioner, but from the record, which we have had the opportunity of examining, it appears that the assignees in bankruptcy were also represented. The petitioner's I

A argument was that there was a valid debt, and that, therefore, a sufficient amount should be reserved from the fund to be distributed. The Lord Chancellor, having expressed the opinion that the contract was valid and the debt due, had nevertheless become aware that the alien enemy would be entitled on restoration of peace to payment of a dividend upon his debt, and his Lordship thought the right and convenient course was to enter the claim and reserve the amount until after B the war. It is as if a trustee in bankruptcy, about to distribute funds arising from the debtor's estate to the creditors, received notice of a claim by an alien enemy and, having satisfied himself as to its validity, kept in his hands sufficient to pay a dividend on the debt after the conclusion of the war.

The latest adjudication upon the alien enemy's right to sue is *Princess Thurn and Taxis* v. *Moffitt* (17), where Sargant, J., held that the subject of an enemy C State who was registered under the Aliens Restriction Act, 1914, as an alien and the subject of an enemy State is entitled to sue in the King's courts. This decision is, in our opinion, clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the Executive of his presence in this country, and has been allowed thereafter to remain here. He is sub protectione domini regis.

D Having stated the common law of England in regard to the question of the alien enemy's right to sue in our courts of law, we have now to consider whether the Hague Convention of 1907 upon the Laws and Customs of War on Land, art. 23 (h) of c. 1 of s. 2 of the Annex entitled "Regulations respecting the Laws and Customs of War on Land," has any bearing upon the questions we have to determine. The heading of that section is "Of Hostilities." Section 3 is headed E "Military Authority over the Territory of a Hostile State. Chapter 1 of s. 2 is entitled "The Means of injuring the Enemy; Sieges and Bombardments." The articles in it are numbered from 22 to 28. Articles 22 and 23 are as follows:

Article 22: "Belligerents have not got an unlimited right as to the choice of means of injuring the enemy."

F Article 23: "In addition to the prohibitions provided by special Conventions it is particularly forbidden: (a) To employ poison or poisoned weapons; (b) To kill or wound by treachery individuals belonging to the hostile nation or army; (c) To kill or wound an enemy who, having laid down his arms or no longer having means of defence, has surrendered at discretion; (d) To declare that no quarter will be given; (e) To employ arms, projectiles or materials G calculated to cause unnecessary suffering; (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy as well as of the distinctive signs of the Geneva Convention; (g) To destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of war; (h) To declare abolished, suspended, or inadmissible the rights of the subjects of the hostile party to institute legal I proceedings. A belligerent is likewise forbidden to compel the subjects of the hostile party to take part in the operation of war directed against their own country even if they were in the service of the belligerent before the commencement of the war."

The remaining articles refer to ruses of war, bombardments, sieges, and assaults. The important paragraph is 23 (h). It is desirable to give it also in French:

I "De déclarer éteints, suspendus ou non recevables en justice les droits et actions des nationaux de la partie adverse."

This para. (h), in a form which was not substantially different, was originally introduced in one of the committees of the Hague Conference by General von Gundell, a German delegate, and Herr Göppert, another German delegate, undoubtedly stated in reference to it that the intention of the proposed clause was to prohibit all legislative measures which in time of war would place the subject of an enemy State in the position of inability to enforce the execution of a contract

by recourse to the tribunals of the State in regard to which he was an alien enemy. The text of the paragraph must, of course, be interpreted by us as it now stands in the ratified Convention, and the intention of its proposer is immaterial, but it is only fair to add that the paragraph as originally proposed did not contain the words "en justice" and instead of the words "les droits et actions des nationaux" the words were "les réclamations privées des ressortissants." These changes of language appear, so far as they go, rather to be in accord with Herr Göppert's statement of the object of the proposal. They were, as we understand, made in the course of the drafting of the Annex without discussion or debates taking place in regard to them, and the paragraph as it now stands was submitted for the final approval of the conference without any suggestion of this being in any way material.

The meaning and force of the paragraph have been subjected to a considerable discussion by learned writers upon international law in this country, in America, and on the Continent, and the Attorney-General in the course of his argument in this case both by reference and by citation placed us in possession of the most valuable of the opinions of those writers. It would, in our view, serve no useful purpose to attempt here any elaborate examination of these opinions. Suffice it to say that the substantial question being whether the operation of this paragraph is or is not to abrogate the old rule (not peculiar to English law, though it has been more prominent in England than elsewhere) that an alien enemy's rights of action are suspended during the war, jurists of eminence have expressed widely divergent views upon the point, and this court has given to those views its very careful consideration. We are all clearly of the opinion that the paragraph in question cannot be treated as effecting any such abrogation. If we look in the first place at the terms of the paragraph itself and apart from its collocation and context, we find that what it forbids is, as also in para. (d), a "declaration"—"it is forbidden to declare." This has no application to a country in which, as in England, there is no room for a declaration. By the existing law of the country the mere fact of war operates ipso facto to suspend any right of action which at the time of the outbreak of war any alien enemy may possess. It is interesting to observe that Dr. Sieveking, an eminent German jurist, while holding that the paragraph was intended to have all the effect foreshadowed by Herr Göppert, is of opinion that, as to England at any rate, it is ineffectual because it only prevents some executive authority from declaring that rights of action are suspended, extinguished, or inadmissible. He rightly points out that no such declaration is required in English law for the reasons already given. Extending our view from the paragraph itself to the immediate context, we find that it is included in a group of paragraphs forming art. 23, every other of which relates solely to the conduct of a military force and its commanders in a campaign and not at all to the administration of the law respecting alien enemies at home; that the chapter of which the article forms part is entitled "Means of injuring the Enemy; Sieges and Bombardments," and that the section of the Annex to which the chapter belongs bears the general heading "Of Hostilities." Extending our view still further to the Convention itself, we find the declaration which governs the whole Annex and controls its application in art. 1:

> "The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the regulations respecting the laws and customs of war on land annexed to the present Convention."

It is impossible to suppose that this means (as it must do if the effect of para. (b) is to abrogate the law existing hitherto in England and to give an alien enemy the position of a persona standi in judicio in English courts of law) that the War Office of Great Britain shall in the present war for this purpose issue instructions to Sir John French, commanding our land forces in the field, forbiding him to "declare" that the rights of alien enemies—Germans, Austrians, or Turks—to institute legal proceedings in the High Court of Justice in London are suspended or inadmissible. Yet this absurdity seems necessarily to follow from the scheme

of the Convention as applied to para. (h) if the interpretation of this paragraph is that which is contended for by those who find in it an abrogation of our law, which hitherto has not given to an alien enemy the position of a persona standi in judicio.

Our view is that art. 23 (h), read with the governing art. 1 of the Convention, has a very different and a very important effect, and that the paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights. For example, if the commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have a right to sue in the courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article. If such a declaration were made, it would be doing that which this paragraph was intended to make particularly forbidden by the solemn compact between all the States which ratified the Hague Convention of 1907. According to eminent jurists the occupying military power is forbidden as a general rule to vary or suspend laws affecting property and private personal relations: see Hall's International Law (6th Edn.), at p. 465. This art. 23 (h) has now enacted that, whatever else the occupying military power may order in the territory of the enemy which it dominates, it shall not henceforth declare that the right of the subjects of the enemy to institute legal proceedings in the courts of that territory is abolished, suspended, or inadmissible. If this be its true force, the enactment as an international compact is not only of high value, but it has been inserted quite naturally and appositively in the position in the section and the chapter of the Annex to the Convention which it occupies.

There are two matters brought before us by the learned Attorney-General in connection with the interpretation of art. 23 (h) which, in our opinion, ought not to be left unnoticed. The first of these is the letter addressed on Mar. 27, 1911, by our Foreign Office to Professor Oppenheim, of Cambridge, in answer to an inquiry made by him on the preceding Feb. 28 in reference to the views which had been expressed in regard to the paragraph by some foreign jurists. The reply of the Foreign Office was published. It contains a powerfully reasoned exposition of the view that this paragraph has no concern with the municipal law, but relates to the conduct of those who are in command of an army in occupation of the territory of an enemy. The second matter is an incident of a diplomatic character. On the eve of the outbreak of the present war the German ambassador in London addressed a communication to our Foreign Office to this effect:

> "In view of the rule of English law the German government will suspend the enforcement of any British demands against Germans unless the Imperial government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen."

No arrangement was arrived at. We refer to these two incidents, not because either of them can affect our judgment on the question of the interpretation of art. 23 (h), but because it is right that it should be made quite clear to everyone that as early as the spring of 1911 the view of the British government as to its true interpretation was made public to the world and that the situation was perfectly well understood by the German government. It is to be regretted that the paragraph should be so drawn as to give rise to controversy as to its proper interpretation, but, for the reasons given, we think the paragraph has not the extended meaning claimed for it and does not affect the ancient rule of the English common law, that an alien enemy, unless with special licence or authorisation of the Crown, has no right to sue in our courts during the war.

Having now explained the meaning of "alien enemy" for civil purposes, and having decided that such alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's courts is suspended during the progress of hostilities and until after peace is restored (see also *Flindt* v. *Waters* (18)), the next point to consider is whether he is liable to be sued in the King's courts during the war. To allow an alien enemy to sue or proceed during war in the civil courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. Primâ facie there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by BAILHACHE, J., in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (19) ([1915] 1 K.B. at p. 159):

> "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule."

In our judgment, the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects. It is very noteworthy that when dealing with the rights of alien enemies there is no shadow of doubt suggested in the books as to the right to sue alien enemies. More often there is no mention of it, but sometimes it is the subject of express reference, and then always to the same effect, that the alien enemy can be sued during the progress of hostilities. BACON'S ABRIDGMENT (7th Edn.), vol. 1, at p. 183, asserts this liability of the alien enemy without doubt or hesitation.

> "The plea of 'alien enemy' is a bar to a bill for relief in equity as well as to an action at law, but it would seem not sustainable to a mere bill for discovery, for as an alien enemy may be sued at law and may have process to compel the appearance of his witnesses so he may have the benefit of a discovery."

This is an important passage in other respects also, and, in our judgment, it is a correct statement of the law. WALFORD, in his valuable work above mentioned on PARTIES TO ACTIONS, at p. 656, says:

> "With respect to the liabilities of aliens, whatever be their description, whether friends or enemies, whether with or without protection, they seem to be open to be sued just the same as native subjects, there being nothing in their character either originally to incapacitate them from contracting an obligation, or committing a civil injury, or to shelter them in any action brought against them in consequence."

Section 53 of STORY'S COMMENTARIES ON EQUITY PLEADINGS is of similar effect:

> "An exception might perhaps be allowed where the alien enemy is the defendant in a suit at law in the country where he brings the bill for discovery, since it may be the only essential means on his part to establish a perfect defence to the suit at law."

This passage shows that in the opinion of the learned author an alien enemy might be defendant in a suit. In LUSH'S PRACTICE (3rd Edn.), vol. 1, at p. 6, it is stated that outlaws, aliens, enemies, felons, &c., are all liable to be sued. PROFESSOR DICEY in his work on PARTIES TO ACTIONS has a passage to the same effect. WALFORD, at p. 666 of the treaties on the LAW RESPECTING PARTIES TO ACTIONS, also expresses the opinion that a person attainted, outlawed, or excommunicated

A is open to be sued like an ordinary person, as he has already observed, like an alien friend or enemy.

The Supreme Court of the United States had to consider the position of an alien enemy defendant in *McVeigh* v. *United States* (20). The United States under a statute then in force filed a libel of information in the District Court of Virginia for the forfeiture of certain real and personal property of McVeigh on the ground B that he was "a resident of the city of Richmond within the Confederate lines and a rebel." McVeigh appeared by counsel and filed a claim to the property and an answer. The Attorney of the United States moved that the claim and answer and appearance be stricken from the files, and the court granted the motion and the decree was made for forfeiture of the property. The case eventually was brought to the Supreme Court on writ of error. SWAYNE, J., in delivering the C judgment of the court, said:

> "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy and hence could have no locus standi in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and D civilisation. . . . Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to consider because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country, it is clear that he is liable to be sued, and this carries with it the E right to use all the means and appliances of defence."

The learned judge relied upon the above-mentioned passage in BACON'S ABRIDGMENT as an authority for this proposition, and the Supreme Court acted upon it by reversing the judgment of the District Court and of the Circuit Court.

Although there is no case in English law which has directly decided that an alien enemy can be sued in our courts until the recent decision of BAILHACHE, J., F it is instructive to glance at cases dealing with forfeiture of civil rights resulting from some act of misconduct. The traitor, the felon, the outlaw, and the excommunicated person were under civil disabilities. They were held by their misconduct to have wiped out and obliterated the original traces of their character as citizens: see WALFORD'S PARTIES TO ACTIONS at p. 647. Such misconduct generally speaking carried the same denial of the rights to sue in the courts as attached to an alien G enemy. In NOY'S REPORTS (NOY was Attorney-General to Charles I) this judicial observation occurs in *Hastings* v. *Blake* (21):

> "Men attaint or outlawed shall be put to answer in any action against them because it is to their prejudice; but in an action brought by them they shall not be answered because it is to their benefit."

H In *Ramsden* v. *Macdonald* (22), LEE, C.J., said: "There is no doubt that a person attainted may be sued." These are not direct authorities to support the proposition now under discussion with reference to alien enemies, but they are instances to show that there is no reason in principle why a person attainted or outlawed should not be sued. These are cases arising, it is true, out of misconduct, but they involved the parties in the same disability to sue as attached to an alien enemy, I and we are at a loss to conceive why the same liability to be sued should not equally apply to him. The real difficulty that arises in seeking to enforce a right against an alien enemy is that of fixing him with proper notice of the suit and the proceedings in the action, with which we will deal later.

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny

him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice. Equally it seems to result that, when sued, if judgment proceed against him, the appellate courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate court by giving the notice of appeal, which is the first necessary step to bring the case before that court; but he is entitled to have his case decided according to law, and if the judge in one of the King's courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant. The decision in *McVeigh* v. *United States* (20) in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the District and Circuit Courts and succeeded in reversing the judgments of those courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit, and then by virtue of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a court of first instance and an alien enemy seeking to enforce such right by recourse to the appellate courts. He is in either case seeking to enforce his right by invoking the assistance of the King in his courts. He is the "actor" throughout. He is not brought to the courts at the suit of another: it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace.

Having now dealt with general principles, we proceed to consider their application to the three appeals before us. The plaintiff in the first appeal issued a writ against one Philip Freudenberg (trading as Hermann Gerson) to recover a quarter's rent due on Sept. 29, 1914, under a lease made in 1903 of certain premises situate in Hanover Square, London. The defendant resides and carries on business as a mantle manufacturer in Berlin in the empire of Germany, and had for some time before the outbreak of war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the affidavit of the plaintiff, a quantity of stock was usually kept on the premises, but immediately before Sept. 29 the whole of the stock, fixtures, and fittings was removed from the premises. On Sept. 28 the keys of the premises were sent to the plaintiff by Barnes, which the plaintiff intimated would be held at the disposal of Barnes as the agent of the defendant. The plaintiff having issued his writ applied to SCRUTTON, J., for directions as to the manner of serving it upon the defendant in Berlin. The learned judge gave liberty to the plaintiff to issue a concurrent writ against the defendant and to serve notice of the writ in Berlin. In view of the difficulty of serving the notice of writ on the defendant, counsel for the plaintiff asked this court to make an order for substituted service of the notice of writ by allowing service of it upon Barnes or otherwise as the court might direct.

In the second appeal the plaintiffs Kreglinger are skin and hide merchants carrying on business in London and at Antwerp. Before the outbreak of war they had entered into contracts for the sale of cargoes of hides from Australia to the firm of S. Samuel and Rosenfeld, carrying on business in London. Before the outbreak

of war the firm of S. Samuel and Rosenfeld intimated that they did not intend to carry out the contracts. After the outbreak of war a writ was issued and the plaintiffs claimed to have effected proper service of it upon the firm by leaving it upon one Bonome, a person who appeared to be in control or management of the business here: see R.S.C. Ord. 48A, r. 3. Bonome entered a conditional appearance and applied to set aside the service. SCRUTTON, J., set it aside on the ground that one Alfred Cohen, who resided at Hamburg, was the sole proprietor of the business of S. Samuel and Rosenfeld, and, therefore, Ord. 48A, r. 3, did not apply, as there were not two or more partners carrying on business within the jurisdiction. An unsuccessful attempt was made to establish that Bonome was a partner in the firm. Evidence was taken before the master, and it appeared that Bonome was not a partner, but was the manager of the business in London for Alfred Cohen with full authority to act in all matters in respect of the said business. The plaintiffs only knew Bonome and transacted all their business with the firm with him. SCRUTTON, J., on the plaintiffs' application, gave leave to issue a concurrent writ against Alfred Cohen with liberty to serve notice of the writ at Hamburg in Germany, but refused leave to make substituted service of the notice of writ by serving it on Bonome, thinking himself bound to refuse by reason of the decision in *Wilding* v. *Bean* (23). The plaintiffs appeal from this refusal and ask this court, in view of the circumstances and of the difficulty, if not impossibility as they suggest, of effecting service upon Alfred Cohen during the war, to permit them to make the service upon Bonome, inasmuch as he appears to be the person in charge of the defendants' interests in this country. We are at this moment engaged only in determining questions as to the proper mode of service, and are expressing no opinion, except in this connection, as to the position of Bonome.

The courts having decided that the alien enemy can be sued, have to consider how effective notice of the proceedings in the courts of this country can be served on the alien enemy in the enemy country. Diplomatic relations between the two nations have been broken off, and a serious question might have arisen whether in these circumstances Ord. 11, r. 8, of the Rules of the Supreme Court was applicable. Before the outbreak of war Germany was, by order of the Lord Chancellor, a country to which this rule applied, and, so long as that order stood, the procedure to be adopted for service in Germany was regulated by that rule. That order has, however, been revoked by the Lord Chancellor, and it, therefore, becomes unnecessary further to consider whether the rule that this procedure therein described "shall be adopted" could be held applicable during a war between us and the country in which the service was to be effected. Unless an order for substituted service in this country of a notice of writ for service out of the jurisdiction can be made in a proper case, great hardship may be inflicted upon persons who are subjects of and resident in this country who have given credit to or entered into contractual relations with or have claims against persons who are now alien enemies, to the manifest advantage of the alien enemies and disadvantage of British subjects and subjects of other States who wish to sue in this country. This court whilst bearing this consideration in mind, must also take into account the position of the defendant, the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. It is obvious that in all cases against the alien enemy the plaintiff will seek, if possible, an order to make substituted service in this country.

It is desirable, therefore, to consider in some detail (i) in what circumstances substituted service can be ordered; and (ii) whether substituted service within the jurisdiction can be ordered of a notice of writ for service without the jurisdiction. The general rule is that an order for substituted service of a writ of summons within the jurisdiction cannot be made in any case in which, at the time of the issue of the writ, there could not be at law a good personal service of the writ because the defendant is not within the jurisdiction.

"If the writ had not been issued until the defendant had left the country, the only way in which the defendant could have been properly served would have been by proceeding under the practice as to writs for service out of the jurisdiction":

per COLLINS, L.J., in *Jay* v. *Budd* (24) ([1898] 1 Q.B. at p. 19).

"There cannot be a good substituted service where personal service would not be legally possible":

per LORD ESHER, M.R., and LOPES, L.J., in *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.* (25).

"There cannot be substituted service on a person on whom personal service could not be validly effected":

per DAVEY, L.J. ([1894] 1 Q.B. at p. 792). See also *Fry* v. *Moore* (26); *Re Urquhart* (27); *Wilding* v. *Bean* (23), especially per LORD ESHER, M.R. The rule was also acted upon by FARWELL, J., in *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge* (28). This general rule is not applied where the court is satisfied that the defendant went outside the jurisdiction before the issue of the writ in order to evade the service of the writ within it: see *Re Urquhart* (27); *Watt* v. *Barnett* (29). If the defendant went out of the jurisdiction after the issue of the writ, although not for the purpose of evading service, substituted service may be allowed if the court is satisfied that the issue of the writ came to his knowledge before he went outside the jurisdiction, and special circumstances show that such substituted service would be just within Ord. 9, r. 2: see *Jay* v. *Budd* (24), per LORD HALSBURY, L.C., and COLLINS, L.J., RIGBY, L.J., dissenting.

In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted. The court may then make such order as may seem just: Ord. 9, r. 2. The terms of this rule are of very wide application and give a very wide discretion, which we are not inclined to limit. In the case of a writ properly issued under one of the heads of Ord. 11, r. 1, for service out of the jurisdiction, substituted service either within or without the jurisdiction may be permitted in special circumstances, as, e.g., that the defendant is evading personal service of such writ, and that the proposed form of substituted service will be effectual in bringing the writ to the defendant's knowledge: *Ford* v. *Shephard* (30); *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge* (28). In the case of a notice in lieu of writ to be served on a foreigner out of the jurisdiction on an order properly obtained under Ord. 11, r. 1, there is no reason why substituted service of that notice should not be permitted in similar circumstances to those in which it is permitted in the case of a writ for service out of the jurisdiction. As to substituted service of such a notice, Ord. 9, r. 7, and Ord. 11, r. 2, give power to order it. Certainly under Ord. 11, rr. 8 (4) and 8 (5), it is contemplated that this may be done, for it prescribes the method of doing it and *Ditton* v. *Bornemann* (31) (a decision on the practice before the introduction of rr. 8 and 8 (a)) favours the view that the substituted service of a notice of a writ may be allowed. LORD COLERIDGE, C.J., and BOWEN, L.J., sitting as a Divisional Court, made the order, which had been refused by the judge in chambers, that service of the notice of the writ should be made by registered letter to Germany to the trustee of the estate of the defendant, whose affairs were in compulsory liquidation in Germany, and also to the defendant's wife, and that the defendant should have a month to appear after the letter would arrive. The judge in chambers before whom the application is made for substituted service of a writ for service out of the jurisdiction or of a notice of such a writ ought to be careful before acceding to the application (a) to satisfy

himself that there exists a practical impossibility of actual service, as otherwise, inasmuch as there is always a certain amount of difficulty and delay in effecting service out of the jurisdiction under Ord. 11, a plaintiff will always seek to obtain an order for substituted service, with the serious risk that the defendant may never have notice of the proceedings and judgment in default of appearance may be given against him unjustly; (b) to satisfy himself for the same reason that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant.

Our English procedure has hitherto been laudably superior to the Continental in not permitting that which may be called "constructive service," such as, e.g., by public notices or advertisements, whereby a defendant may be condemned unheard because he has had no knowledge of the proceedings against him. In *Porter* v. *Freudenburg* the writ was issued for service within the jurisdiction, the defendant being abroad at the time of the issue of the writ. There could, therefore, be no order for substituted service of that writ. Leave having now been given to issue a concurrent writ and to serve notice out of the jurisdiction, that difficulty is removed. The proper order to make in the circumstances in this case and also in *Kreglinger* v. *S. Samuel and Rosenfeld* is to give the leave to make substituted service and to refer both cases back to chambers for directions as to the mode of effecting it. Upon the materials now before us we think service of the notice should be effected in the one case by substituted service upon Barnes and in the other upon Bonome, and such further terms should be imposed in chambers upon the plaintiff as to advertisement or other means of communication and as to the period to be given to the defendant for appearance as may seem proper. The Rules Committee may think it necessary now to consider whether further rules should be made to meet some of the present difficulties of service of notice of proceedings in our courts against an alien enemy. It should, however, be borne in mind that there is little, if any, value in obtaining judgment in our courts in default of appearance of the defendant resident in an enemy State, unless there is property in this country which can be reached in execution of the judgment. Where there is property in this country there is frequently some person upon whom an order for substituted service could be made supplemented by other provisions as to giving notice to the defendant of the proceedings to which we have already called attention. In each of these appeals the order of Scrutton, J., will be varied in accordance with the views we have expressed, and the matters will be referred back to chambers to be there dealt with.

In the third appeal the matter came before us on a motion to set aside the appeal on the ground that the appellants were alien enemies. Soldau & Co., Ltd., an English company, presented a petition for revocation of a patent granted to a German subject resident in Germany, of which patent a German company were the owners. The petition was heard by Warrington, J., who made an order on July 28, 1914, for revocation of the patent, but, if notice of appeal was given on or before Aug. 28, 1914, the operation of the order was to be suspended until the hearing of the appeal. Notice of appeal was given on Aug. 28. War had been declared between His Majesty the King and the Emperor of Germany on Aug. 4. Therefore, at the date of giving the notice of appeal the appellants were alien enemies, and the notice of the motion now before the court was launched to set aside the notice of appeal upon that ground. At the hearing before us counsel for the petitioners admitted that he could not succeed on the motion, and did not now apply to set aside the appeal, but he did ask the court to express its opinion that the hearing of the appeal was not suspended, and that it could be heard during the war. The position was peculiar, inasmuch as counsel for the appellants did not dispute that his clients were alien enemies, but insisted, in the interest of his clients, not upon their right to be heard, but that their appeal could not be heard until after the restoration of peace. If we acceded to that view, and the

order for suspension of the revocation of the patent stood as made by WARRINGTON, J., alien enemies who are the owners of the patent would be in a distinctly advantageous position so long as the war lasted. It is not surprising, therefore, that counsel for the petitioners insisted that the appeal of the alien enemy could be heard, and asked this court to give an intimation to that effect. The appellants were the respondents to a petition. They were brought to the court at the instance of another because they were the owners of the patent rights. The alien enemy appellants were not the "actors" in the proceedings; these were initiated by the petitioners, and notice was served upon the appellants for revocation of the patent rights they had acquired. The appellants must be regarded for this purpose as being in the same position as a defendant in a suit who appeals from a judgment given against him. In accordance with the opinion we have already expressed, the appellants were, therefore, entitled not only to appear and be heard on this motion, but to have their appeal heard in the ordinary course notwithstanding the war. We cannot accede to their contention that the hearing of the appeal must be suspended during the war. We take a more favourable view of the appellants' rights in this respect than the appellants, and we agree with the contention of counsel for the petitioners that the appeal must take and keep its place in the ordinary way in the list. It should be distinctly understood that nothing that we have said is intended in any degree to interfere with or limit the discretion of the court before which the appeal will come for hearing to make any such order for postponement or otherwise of this appeal as it may think fit. The appellants can make any such application based upon the difficulties arising from the war as they may deem right and necessary, and the court will deal with it upon the facts then presented in the usual way. The motion must be dismissed, but, in view of the peculiar circumstances, without costs. The late **KENNEDY, L.J.**, had approved this judgment before his death.

Order varied in PORTER *v.* FREUDENBERG *and in* KREGLINGER *v.* S. SAMUEL AND ROSENFELD: *motion dismissed in* RE MERTEN'S PATENTS.

Solicitors: *W. W. Young, Son & Ward; Alfred Double & Sons; Bower, Cotton & Bower; White & Leonard.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HIGGINS *v.* BEAUCHAMP

[KING'S BENCH DIVISION (Horridge and Lush, J.), July 24, 1914]

[Reported [1914] 3 K.B. 1192; 84 L.J.K.B. 631; 111 L.T. 1103; 30 T.L.R. 687]

Partnership—Borrowing—Right of partners to borrow on credit of firm—"Trading firm"—Purchase and sale of goods—Position of theatre proprietors.

For a firm to come within the rule by which the members of a trading firm have an implied authority to borrow money on the credit of the firm for business purposes, the business carried on must depend on the buying and selling of goods. A business of cinematograph theatre proprietors is not a trading business within the meaning of the rule.

Notes. As to relations between partners and third parties, see 28 HALSBURY'S LAWS (3rd Edn.) 503 et seq.; and for cases see 36 DIGEST (Repl.) 460 et seq.

Cases referred to:

(1) *Brown* v. *Kidger* (1858), 3 H. & N. 853; 28 L.J.Ex. 66; 36 Digest (Repl.) 467, *376.*

(2) *Wheatley* v. *Smithers*, [1906] 2 K.B. 321; 75 L.J.K.B. 627; 95 L.T. 96; 54 W.R. 537; 22 T.L.R. 591; 50 Sol. Jo. 513, D.C.; on appeal, [1907] 2 K.B. 684; 76 L.J.K.B. 900; 97 L.T. 418; 23 T.L.R. 585; 36 Digest (Repl.) 467, *371.*

Also referred to in argument:

Bank of Australasia v. *Breillat* (1847), 6 Moo. P.C.C. 152; 13 E.R. 642; sub nom. *Bank of Australasia* v. *Bank of Australia*, 12 Jur. 189, P.C.; 36 Digest (Repl.) 460, *300.*

Appeal from Bath County Court.

The defendant entered into partnership with one Sydney Milles and another person

> "in the business of proprietors and managers of picture palaces, cinematograph theatres and exhibitions, variety entertainments, concerts, theatrical performances, and all other forms of entertainment."

One of the terms of the deed of partnership provided that no partner should, without the consent of the other partners, contract any debt on account of the partnership or in any manner pledge its credit except in the usual and regular course of business. The defendant was a sleeping partner in the business which was carried on entirely by Milles. Milles borrowed from the plaintiff sums of £50 and £34, stating that it was wanted for the purposes of the partnership business. In fact he never had the intention of using the money in the business, and appropriated it. The plaintiff sued the defendant to recover the sums advanced by him as being money lent to the firm. The learned county court judge held that the plaintiff was entitled to recover the money, and gave judgment in his favour. The defendant appealed.

Rawlinson, K.C., and *F. E. Weatherley* for the defendant.

Foote, K.C., and *E. H. C. Wethered* for the plaintiff.

HORRIDGE, J.—The plaintiff brought an action against the defendant to recover two sums of money amounting to £84 which had been borrowed from him by a man named Milles, who was managing a cinematograph entertainment at Midsomer Norton. The money in question, as found by the learned judge, was borrowed from the plaintiff on the representation that it was required for the purposes of the firm of which the defendant was a member and of which Milles was also a member, as well as being the manager. The partnership deed which we have before us expressly negatives any power on the part of any one partner, without

the consent of the others, to borrow money so as to bind the partnership, and, therefore, the question is whether Milles, from the nature of the business he was managing, had ostensible authority to borrow money for the purposes of the firm so as to render the firm liable to the person who lent it.

It is quite clear from several cases, and particularly from *Brown* v. *Kidger* (1), that, in the case of a real trading partnership, a partner who borrows money can bind the other partners who are not parties to the transaction even if he afterwards applies the money to wrongful purposes. On the threshold of this inquiry, therefore, in order to render the defendant liable as a partner, I think the fact must be found that this was a trading company as dealt with and described in the cases which show that there is such an implied authority in the case of a trading company. I look at the deed of partnership to ascertain whether or not this was such a trading company. The purpose of the partnership is defined in cl. 1, which says that the business of the firm shall be that

> "of proprietors and managers of picture palaces, cinematograph theatres and exhibitions, variety entertainments, concerts, theatrical performances and all other forms of entertainment."

I do not think that the managing of these places of entertainment is carrying on a trading concern of a character which is one from which could be implied either a power to borrow money or a power to accept bills. There was no other evidence before the learned judge except the bare fact that this was a cinematograph entertainment which was being carried on at this place. I do not think the learned judge ever applied his mind to the question whether or not this was such a trading company as I have indicated. In his judgment he laid down the following proposition:

> "He [the defendant] allows Mr. Milles to hold himself out as the manager of this company. If he does that and allows a man so to act, and that man borrows money by false pretences, the law is that he is liable for the acts of that person unless it is shown that there has been negligence on the part of the borrower."

As a proposition of law that clearly cannot be sustained. To say that because you put a manager into a business you are responsible for everything he does is to make a statement of the wildest description. As I have said, the learned judge did not apply his mind to the question whether this particular trading concern was of such a nature that Milles had an implied authority to borrow money. The only evidence before him was that this was a partnership entered into for the purpose of conducting a cinematograph entertainment. That being so, I think there was no evidence on which he could find that Milles had ostensible authority to borrow money. It lay on the plaintiff to prove his case, and, no evidence having been given in support of it, in my opinion, judgment should have been given for the defendant, and this appeal must be allowed.

LUSH, J. —I agree. As between Milles and his partners he had no actual authority to contract these loans. The plaintiff, therefore, in order to succeed, must show that he was entitled to assume that Milles had authority to borrow and that he acted reasonably on that assumption. He could show that in one of two ways: First by proving that the defendant had so acted towards him as to lead him to infer that Milles had authority, which was not suggested because the defendant had done nothing as between himself and the plaintiff to entitle the latter to assume against the defendant that Milles had authority to bind him; second, by showing that there was an implied authority on Milles's part to borrow money on behalf of the firm having regard to the particular business which was being carried on. This it was which the plaintiff endeavoured to prove. The learned judge gave judgment for the plaintiff on a ground which was not correct in law because he did not hold that this business was one of the class I have

mentioned, but held generally that the manager, having been authorised to act for the firm, had authority to bind it.

We were pressed to say, however, that this was a trading business, and, that being so, it was within the apparent authority of a partner to borrow money for the partnership business; and, if that had been so, the plaintiff, knowing that this was a business of that class, would have been entitled to lend money on the credit of the firm. But, in my opinion, this was not a trading business. The learned judge has not found that it was, and there was no evidence that it was. In *Wheatley* v. *Smithers* (2), the question was whether an auctioneer was a trader, and the court held that he was not, RIDLEY, J., saying that buying and selling were essential features of trading and that an auctioneer does not buy. When that case was in the Court of Appeal, the same expression occurs—namely, that the business was not a business for the buying or selling of goods. In my opinion, it would be wrong to say that every business which necessarily involves the expenditure of money for the purpose of buying goods which the business requires is a trading business. It seems to me that a trading business is one which involves the purchase of goods and the selling of goods. At all events, I am not prepared to say that a business of the kind we are concerned with here is a trading business. In my view, it is not one of those trading businesses in which a partner who, as between himself and his co-partners, is prohibited from borrowing money has apparent authority so as to entitle a third person to lend it to him on the credit of the firm. That being so, in my opinion this appeal must be allowed.

Appeal allowed.

Solicitors: *Hookway*, Bath; *Wansbrough, Robinson & Taylor.*

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

Re SAFFORD'S SETTLEMENT. DAVIES *v.* BURGESS

[CHANCERY DIVISION (Joyce, J.), June 10, 24, 1915]

[Reported [1915] 2 Ch. 211: 84 L.J.Ch. 766; 113 L.T. 723; 31 T.L.R. 529: 59 Sol. Jo. 666]

Power of Appointment—Exercise—Marriage settlement—Power to be exercised by wife by will during coverture—Will made during husband's lifetime Death of wife after expiration of coverture—Validity of appointment.

Under a marriage settlement the settled funds, after the death of the survivor of the husband and the wife and in the event of there being no issue of the marriage, were directed to be held on trust for such persons as the wife should "by will during the continuance of the said intended coverture direct or appoint," and in default of appointment on trust as therein mentioned. There was no issue of the marriage. During the coverture, the wife made a will disposing of all her property which she had power to appoint or dispose of by will, either under the marriage settlement or otherwise. She survived her husband.

Held: although the appointment did not become effective during the continuance of the coverture through the death of the wife, what the wife had done satisfied the requirements of the deed in reference to the manner in which the power was to be executed, and, accordingly, there had been a good and valid execution of the power of appointment.

Notes. As to powers of appointment by married women, see 19 HALSBURY'S LAWS (3rd Edn.) 829–831; and for cases see 27 DIGEST (Repl.) 119–121.

Cases referred to:

(1) *Cooper* v. *Martin* (1867), 3 Ch. App. 47; 17 L.T. 587; 16 W.R. 234, L.JJ.; 37 Digest 426, *341*.

(2) *Re Illingworth, Bevir* v. *Armstrong*, [1909] 2 Ch. 297; 78 L.J.Ch. 701; 101 L.T. 104; 53 Sol. Jo. 616; 37 Digest 426, *343*.

Also referred to in argument:

Re Moses, Beddington v. *Beddington*, [1902] 1 Ch. 100; 71 L.J.Ch. 101; 85 L.T. 596; 18 T.L.R. 147, C.A.; affirmed sub nom. *Beddington* v. *Baumann*, [1903] A.C. 13; 72 L.J.Ch. 155; 87 L.T. 658; 51 W.R. 383; 19 T.L.R. 58; 47 Sol. Jo. 90, H.L.; 37 Digest 446, *496*.

Re Marten, Shaw v. *Marten*, [1902] 1 Ch. 314; 71 L.J.Ch. 203; 85 L.T. 704; 50 W.R. 209; 46 Sol. Jo. 163, C.A.; 37 Digest 464, *652*.

Adjourned Summons.

The facts are set out in the judgment.

F. J. Kerr for the trustees of the settlement.

Tomlin, K.C. and *H. Mather* for persons claiming in default of appointment.

Hughes, K.C., and *C. E. Shebbeare* for the executor of the will.

Cur. adv. vult.

June 24, 1915. **JOYCE, J.**—In 1854 a marriage settlement was executed under which, after the death of the survivor of the husband and wife, the settled trust funds, in the event of there being no issue of the marriage, were directed to be held on trust for such persons as the wife should "by will during the continuance of the said intended coverture direct or appoint," and in default of appointment on the trust therein mentioned. The form of the limitation is unusual, and is the result of extensive erasures and alterations in the deed after it was engrossed, but we must take the words as we find them. There was no issue of the marriage, and, in 1896, Mrs. Safford, the wife, made a will purporting to dispose of all her property which she had power to appoint or dispose of by will, either under the marriage settlement or otherwise. Her husband died in 1897, leaving Mrs. Safford his widow, who survived until 1914.

The question is now raised whether the settlement funds pass under the appointment made by the will, or as in default of appointment, it being contended that Mrs. Safford's will, although duly made, is ineffectual as an appointment of the funds subject to the trusts of the marriage settlement, because it did not, it is said, come into operation during the continuance of the coverture by the death of the testatrix while she was covert. I do not see how the will of any testatrix could possibly come into operation during the continuance of her coverture. Her coverture would determine by her death, and her will does not come into operation until after her death when the coverture has determined.

But really the words of the limitation creating the power are perfectly plain, simple and unambiguous, and, to my mind, there can be no doubt or question about their meaning, and it is not necessary to supply or understand a single word that is not there. The testatrix has directed and appointed by will how the fund is to be disposed of, and she has done this while covert "during the continuance of the intended coverture." What she has done satisfies the requirements of the deed in reference to the manner in which the power is to be executed. There is no more to be said. There is no authority requiring me to supply or understand at all the additional condition that the testatrix shall not only make her will, but shall also die during the coverture. In *Cooper* v. *Martin* (1), a testator directed the proceeds of sale of real estate to be held on trusts for his children and issue in such manner

A and in such shares as his wife before each and every of his said children should have attained the age of twenty-five years or have died under that age by any deed or instrument in writing to be sealed and delivered by his said wife should, either absolutely or with power of revocation and new appointment, direct, limit, or appoint, and in default in trust for the younger children equally. On April 5, 1841, the widow, before the youngest child attained twenty-five, duly executed an B appointment by deed poll reserving a power of revocation and new appointment by deed. Then, later in the same month of April, 1841, she made a will giving and appointing Pain's Hill Estate, a specific part of the real estate, to the eldest son. This also was before the youngest child attained twenty-five, which did not happen until 1851, and the testatrix lived until 1863. In the circumstances, CAIRNS, L.J., declined to treat the will as being in equity a valid execution of the testatrix's C power to appoint by deed before the youngest child attained twenty-five, which he considered an essential requisite to the exercise of the power. ROLT, L.J., agreed and, as I understand, considered that the power could not be exercised by will at all, even in equity, but only by deed. If in the present case, Mrs. Safford's power had been a power to appoint, not by will, but by deed, the decision in *Cooper* v. *Martin* (1) might have been relevant to the question I have to determine, D but, in the circumstances, inasmuch as her power to appoint was by will, and only by will, not by deed, I think that *Cooper* v. *Martin* (1) has no application. In *Re Illingworth* (2), where the power to appoint was "during the coverture by will or deed," EVE, J., held that the execution by the wife of her will in the lifetime of her husband, whom she survived, operated as a good exercise of the power of testamentary appointment contained in the settlement, notwithstanding E that she died discovert. I agree with that decision, but, in the present case, I prefer to base my judgment on the reasons I have given rather than on any of the authorities cited in *Re Illingworth* (2) and having very little to do with the question. I shall, therefore, make a declaration that there has been a good and valid execution of the power of appointment by the testatrix.

F Solicitors: *Robert Davies & Co.*, Warrington.

[*Reported by* JOHN L. DENISON, ESQ., *Barrister-at-Law.*]

A

GREEN & SONS (NORTHAMPTON), LTD. *v.* MORRIS

[CHANCERY DIVISION (Warrington, J.), February 6, 1914]

[Reported [1914] 1 Ch. 562; 83 L.J.Ch. 559; 110 L.T. 508; 30 T.L.R. 301; 58 Sol. Jo. 398]

B

Trade—Goodwill—Sale by trustee under deed of assignment for benefit of creditors—Solicitation of old customers by assignor.

A sale of the goodwill of a business by a trustee under a deed of assignment by a debtor for the benefit of his creditors does not prevent the debtor subsequently soliciting his former customers.

Trego v. *Hunt* (1), [1896] A.C. 7, distinguished. C

Walker v. *Mottram* (2) (1881), 19 Ch.D. 355, applied.

Notes. Followed: *Farey* v. *Cooper*, [1927] All E.R. Rep. 311. Referred to: *Boorne* v. *Wicker*, [1927] All E.R. Rep. 388; Referred to: *R. J. Reuter Co.* v. *Ferd Mulhens*, [1953] 2 All E.R. 1160.

As to the goodwill of a business, see 32 HALSBURY'S LAWS (2nd Edn.) 448 et seq.: and for cases see 43 DIGEST 77 et seq. D

Cases referred to:

(1) *Trego* v. *Hunt*, [1896] A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80, H.L.; 43 Digest 9, *44*.

(2) *Walker* v. *Mottram* (1881), 19 Ch.D. 355; 51 L.J.Ch. 108; 45 L.T. 659; 30 W.R. 165, C.A.; 43 Digest 83, *872*.

(3) *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322; 41 L.J.Ch. 427; 25 L.T. 894; 36 J.P. 404; 20 W.R. 309; 43 Digest 82, *866*. E

Also referred to in argument:

Temperton v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 43 Digest 114, *1185*. F

National Phonograph Co., Ltd. v. *Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335; 77 L.J.Ch. 218; 98 L.T. 291; 24 T.L.R. 201; C.A.; 42 Digest 988, *177*.

Jennings v. *Jennings*, [1898] 1 Ch. 378; 67 L.J.Ch. 190; 77 L.T. 786; 46 W.R. 344; 14 T.L.R. 198; 42 Sol. Jo. 234; 43 Digest 84, *891*.

Re David and Matthews, [1899] 1 Ch. 378; 68 L.J.Ch. 185; 80 L.T. 75; 47 W.R. 313; 43 Digest 85, *894*. G

Motion for an injunction restraining the defendants from soliciting the customers of a firm, of which they had been members, the goodwill of which had been assigned to the plaintiffs by the trustee under a deed of assignment by the firm for the benefit of their creditors.

H

Clauson, K.C., and *J. M. Gover* for the plaintiffs.

G. T. Simonds (*Gore-Browne, K.C.*, with him) for the defendants.

WARRINGTON, J. This is a motion for an injunction to restrain the defendant Morris from soliciting, and the defendant Stevens from instigating him to solicit, the customers of his late firm. The question is whether the defendant Morris is or is not in the same position as a vendor of a goodwill who has received the purchase money, in which case, according to the principle affirmed by the House of Lords in *Trego* v. *Hunt* (1), he would be committing a breach of the obligation imposed on him by the receipt of the purchase money if he solicits the customers of his late firm. I

The facts in the case are, shortly, that Morris was a member of a firm which, until August of last year, was carrying on the business of boot and shoe manufacturers. On Aug. 15, 1913, the firm executed a deed of assignment of all

A their property to a trustee for the benefit of their creditors. The deed of assignment did not in terms include the goodwill of the business, but, as it comprised the whole of the property of the assignors except some specified things, the goodwill must be taken to have been included. On Oct. 20, 1913, the trustee under the deed sold the goodwill of the business and other things connected with it to the plaintiffs, and the defendant Morris entered the employment of the defendant B W. B. Stevens, and with his concurrence Morris solicited customers of his late firm.

There is no question about the general principle that, if a man sells the goodwill of his business to a purchaser and receives the purchase money, he cannot afterwards destroy that which he has sold by soliciting his old customers. But that principle has never been extended to anything except a sale or some contract C equivalent to a sale; and, in particular, in *Walker v. Mottram* (2), it was decided that the rule to which I have referred, and which was there referred to as the rule in *Labouchere* v. *Dawson* (3), did not apply to the case of a sale not made by the man who was carrying on the business, but by his trustee in bankruptcy. It was further held in that case that it made no difference in principle whether the bankruptcy was brought about by the bankrupt filing his own petition or by D the hostility of his creditors, and in the course of the argument, when the motion was before him, SIR GEORGE JESSEL, M.R., put the position of a bankrupt and a liquidating debtor under the Bankruptcy Act, 1869, on exactly the same footing for the purposes of the case. I think that the short answer to the present motion is that it is impossible to find any rational distinction between the case of a man who becomes bankrupt on his own petition and has lost his property, which has E become vested in his trustee in bankruptcy, and that of a man who brings about the same result by executing a deed of assignment for the benefit of his creditors. The liquidating debtor is a person who is compelled by circumstances to take steps so that his property may be distributed among his creditors in exactly the same way as a bankrupt who presents a petition under the present Bankruptcy Act. F I can see no rational distinction between *Walker* v. *Mottram* (2) and the present case. In one sense, what the debtors have done is voluntary; in another sense it is not voluntary at all, as they may have taken the steps they did take to avoid other proceedings being taken by the creditors. In such a case as this, a man does not establish the relation of vendor and purchaser simply by divesting himself of his property. The motion against the defendant Morris fails.

G The notice of motion also asks that the defendant Stevens may be restrained from instigating the defendant Morris to solicit the customers, but it is clear that Stevens cannot be restrained from instigating Morris to do what it is not illegal for him to do, and the motion against Stevens must fail also.

Solicitors: *Sharpe, Pritchard & Co.*, for *Becke, Green & Stops*, Northampton; *Deacon, Gibson & Co.*, for *Browne & Wells*, Northampton.

[*Reported by* N. TERBUTT, ESQ., *Barrister-at-Law.*]

A

Re WILSON

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Bankes and Warrington, L.JJ.). November 5, 1915]

[Reported [1916] 1 K.B. 382; 85 L.J.K.B. 329; 114 L.T. 32; 32 T.L.R. 86; 60 Sol. Jo. 90; [1916] H.B.R. 17]

B

Bankruptcy—Deed of arrangement—Application by debtor to set aside Deed "not complying with provisions of Act"—No question raised of enforcement of trust or determination of question under deed—Jurisdiction of Court of Bankruptcy—Deeds of Arrangement Act, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 23.

C

An application by a debtor for a declaration that a deed of arrangement is void under the Deeds of Arrangement Act, 1914, s. 23, on the ground that it does not comply with the provisions of that Act is not an application for "the enforcement of the trusts" or "the determination of questions under it" within s. 23, and, therefore, a county court having jurisdiction in bankruptcy has no jurisdiction to entertain such an application.

D

Notes. Applied: *Re Ellis*, [1925] Ch. 564. Referred to: *Huddersfield Fine Worsteds* v. *Todd* (1925), 42 T.L.R. 52.

As to compositions and arrangements apart from the Bankruptcy Acts, see 2 HALSBURY'S LAWS (3rd Edn.) 608 et seq.; and for cases see 5 DIGEST (Repl.) 1135 et seq. For the Deeds of Arrangement Act, 1914, s. 23, see 2 HALSBURY'S STATUTES (2nd Edn.) 318.

E

Appeal from the Divisional Court.

The debtor was a farmer and maltster, and was at the outbreak of war on the reserve of officers. He received an order to proceed to France on Nov. 1, 1914. While on active service he executed a power of attorney authorising his sister to execute a deed of arrangement with his creditors. The deed of arrangement was executed by his sister on Mar. 17, 1915. The debtor returned to England in September, 1915, and in October, 1915, applied to the county court to declare the deed of arrangement void on the following grounds: (i) That by the Deeds of Arrangement Act, 1914, ss. 1, 2, 4, the deed must be executed by the debtor personally; (ii) That the affidavit in support of registration must be sworn by the debtor personally; (iii) That the power of attorney was in itself a deed of arrangement under s. 1 (2) (e), and, not being registered, was void; (iv) That the assent of the statutory majority of creditors under s. 3 of the Act had not been obtained.

F

G

The county court judge dismissed the application. The debtor appealed to the Divisional Court (HORRIDGE and ROWLATT, JJ.), who held that there was jurisdiction to entertain the appeal on its merits. But their Lordships dismissed the appeal on the ground that the debtor was estopped by his conduct from setting up the case that the deed was void.

H

From that decision the debtor now appealed to the Court of Appeal, when the preliminary objection was again taken on behalf of the trustee of the deed of arrangement that the Deeds of Arrangement Act, 1914, s. 23, which gave the Bankruptcy Court jurisdiction under the Act to deal with applications "for the enforcement of the trusts or the determination of questions under" a deed of arrangement did not confer jurisdiction to declare a deed void.

I

McCall, K.C. (with him *Tindale Davis*), for the appellant debtor.

E. W. Hansell (with him *Graham Milward*) for the respondent trustee.

LORD COZENS-HARDY, M.R.—The appeal on this preliminary point raises an extremely important question—namely, whether the Court of Bankruptcy has any jurisdiction conferred on it by the Deeds of Arrangement Act, 1914, to declare that a deed of arrangement is void on an application made for that purpose. The point was raised before the Divisional Court, though not before the county court.

Horridge, J., really did not deal with it much. He said that there was jurisdiction in his opinion, but he did not reason it out at all. Rowlatt, J., in his very—if I may be allowed to say so—careful judgment assigns reasons which to my mind are extremely strong to show that no jurisdiction is given in a case of this kind. It all depends upon the language of s. 23. Certain applications, and only certain applications, can be made under that section. In the first place, the section defines who are the persons who may make the application. The trustee is one person; the debtor is another; and any trust creditor entitled to the benefit of such an arrangement is another.

In the present case, the application was made by the debtor. There was a trust deed, the trustee of which was the respondent to the motion. What sort of application can be made under this new jurisdiction conferred by s. 23? Any one of this class of applicants may apply for the enforcement of the trusts. Clearly this case does not come within that. It is not an application for the enforcement of the trusts. It is an application that there are no trusts to be enforced. Then is it a determination of the questions under it? In my opinion it is not. The application has to say there is no "it"—if I may say so—under which any application can be made. I feel that I am only repeating inadequately the observations of Rowlatt, J., who, according to his reasoning, decided that there was no jurisdiction. But finally he thought it would be inconvenient and not in consonance with the present policy of legislation, or a thing which he thought the Legislature intended, and, therefore, against his own opinion, he held that there was jurisdiction, and so decided. Statutory jurisdiction was for the first time given by s. 23. But we ought not, in my opinion, to be influenced by that. We are limited to the language used, and, in my opinion, we ought to hold that the Court of Bankruptcy had no jurisdiction to declare this deed void.

BANKES, L.J.—I agree with some hesitation, because I think the language of the section is possibly capable of two constructions. But, on the whole, I think that probably the view expressed by the Master of the Rolls is the better view. The section gives a right to three persons or classes of person to make an application. The persons entitled are the trustee, the debtor, or any creditor entitled to the benefit of the deed of arrangement. Those are the three classes of persons who are entitled to go to the court. What they are entitled to go to the court for is to ask for the enforcement of the trusts or the determination of questions under the deed. The expression "determination of questions under the deed" is a very vague and loose expression, and I must say that I think it is capable of either construction. But, taking the section as a whole, I prefer the hitherto accepted view that what the section contemplates is a class of applications which are made on the assumption that the deed is a valid and operative deed.

For these reasons I think that in this case I ought to hold that there was no jurisdiction in the county court ab initio to entertain this application, and that the order of the county court was an inoperative order, and that it is open to the debtor to make a proper application to the Court of Chancery which would have the same effect as his original application to the county court.

WARRINGTON, L.J.—I am of the same opinion. The jurisdiction is given by s. 23 of the Deeds of Arrangement Act, 1914, in these terms:

> "Any application by the trustee or by the debtor or by any creditor entitled to the benefit of such a deed of arrangement, for the enforcement of the trusts or the determination of questions under it, shall be made to the court having jurisdiction in bankruptcy."

I cannot bring myself to think that an application the object of which is to have it decided that there is no deed can come under the definition of an application for the "determination of questions under it." It seems to me that the section appears to contemplate the existence of a deed of which there is a trustee, and

under which there are creditors entitled to the benefit of it, and that that assumption runs through and governs the construction of the entire section.

The question here is somewhat analogous to questions which are sometimes raised under the originating summons part of the Rules of the Supreme Court governing the High Court. Jurisdiction was given to the judge in chambers to determine certain questions under a deed of settlement for example. It has always been held, so far as my experience goes, that any application seeking to avoid a deed must be brought by an action commenced by writ and not by originating summons, and that the judge in chambers would have no jurisdiction on an originating summons to entertain such an application. I think that this case is analogous to that class of case, and I think, therefore, that, on the true construction of this section, the present application is one which the county court had no jurisdiction and which the Divisional Court had no jurisdiction to entertain.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, for *Ansell & Sherwin*, Birmingham; *Miller & Smiths*, for *Hall, Pratt & Pritchard*, Bilston.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

R. *v.* BISHOP OF SARUM

[KING'S BENCH DIVISION (Ridley, Lush and Low, JJ.), December 7, 15, 1915]

[Reported [1916] 1 K.B. 466; 85 L.J.K.B. 544; 114 L.T. 366; 80 J.P. 53; 32 T.L.R. 203; 14 L.G.R. 335]

Ecclesiastical Law—Churchwarden—Elected churchwarden—No statutory or common law disability—Right to be allowed to make statutory declaration.

Where a person has been elected churchwarden and is under no statutory or common law disability, the bishop is bound to admit him to make the declaration required by the Statutory Declarations Act, 1835, s. 9.

Notes. As to churchwardens, see 13 HALSBURY'S LAWS (3rd Edn.) 164 et seq.; and for cases see 19 DIGEST 277 et seq. For the Statutory Declarations Act, 1835, s. 9, see 9 HALSBURY'S STATUTES (2nd Edn.) 548.

Cases referred to:

(1) *R.* v. *Garland* (1870), L.R. 5 Q.B. 269; 39 L.J.Q.B. 86; 22 L.T. 160; 18 W.R. 429; 16 Digest 277, *898*.

(2) *R.* v. *Rice* (1697), 5 Mod. Rep. 325; Comb. 417; 1 Ld. Raym. 138; 3 Salk. 90; Sett. & Rem. 218; 87 E.R. 684; sub nom. *R.* v. *Rees*, Carth. 393; 12 Mod. Rep. 116; sub nom. *Morgan* v. *Cardigan*, 1 Salk. 166; 19 Digest 284, *731*.

(3) *R.* v. *Simpson* (1724), 1 Stra. 609; 8 Mod. Rep. 325; 93 E.R. 731; sub nom. *R.* v. *Sympson*, 2 Ld. Raym. 1379; 19 Digest 283, *713*.

(4) *R.* v. *Williams* (1828), 8 B. & C. 681; 3 Man. & Ry. K.B. 402; 2 Man. & Ry. M.C. 32; 7 L.J.O.S.M.C. 46; 108 E.R. 1196; 19 Digest 281, *691*.

(5) *R.* v. *Sowter*, [1901] 1 K.B. 396; 70 L.J.K.B. 322; 84 L.T. 36; 65 J.P. 355; 49 W.R. 338; 17 T.L.R. 211; 45 Sol. Jo. 218, C.A.; 19 Digest 238, *197*.

(6) *Fuller* v. *Lane* (1825), 2 Add. 419; 162 E.R. 348; 19 Digest 464, *3121*.

(7) *Halliday* v. *Phillips* (1889), 23 Q.B.D. 48; 58 L.J.Q.B. 404; 37 W.R. 776; 53 J.P. 627; affirmed sub nom. *Phillips* v. *Halliday*, [1891] A.C. 228; 61 L.J.Q.B. 210; 64 L.T. 745; 55 J.P. 741, H.L.; 19 Digest 469, *3215*.

(8) *Anthony* v. *Seger* (1789), 1 Hag. Con. 9; 161 E.R. 457; 19 Digest 279, *644*.

Also referred to in argument:

R. v. *Harwood* (1725), 2 Ld. Raym. 1405; 8 Mod. Rep. 380; 92 E.R. 414; 16 Digest 340, *1613*.

Cox v. *Goodday* (1811), 2 Hag. Con. 138; 161 E.R. 694; 19 Digest 432, *2700*.

R. v. *Churchwardens of All Saints, Wigan* (1876), 1 App. Cas. 611; 35 L.T. 381; 41 J.P. 132; 25 W.R. 128, H.L.; 19 Digest 520, *3833*.

Stutter v. *Freston* (1717), 1 Stra. 52; 93 E.R. 379; 19 Digest 282, *697*.

R. v. *Harris* (1763), 1 Wm. Bl. 430; 3 Burr. 1420; 96 E.R. 245; 16 Digest 340, *1616*.

R. v. *Archdeacon of Lichfield and Coventry* (1835), 1 Har. & W. 463; 5 Nev. & M.K.B. 42; 3 Nev. & M.M.C. 201; 19 Digest 283, *724*.

Ex parte Lowe (1835), 4 Dowl. 15; 19 Digest 283, *721*.

Re Barlow (1861), 30 L.J.Q.B. 271; 5 L.T. 289; 25 J.P. 727; 19 Digest 282, *705*.

R. v. *Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131; 57 L.J.Q.B. 433; 59 L.T. 67; 52 J.P. 710; 36 W.R. 695; 4 T.L.R. 513, D.C.; 16 Digest 302, *1152*.

Rule Nisi to the Bishop of Salisbury to show cause why a writ of mandamus should not issue commanding him to admit Frank Oliver Kent to make his declaration under s. 9 of the Statutory Declarations Act, 1835, and to be a churchwarden of the parish of Melcombe Bingham, in the county of Dorset.

The facts are set out in the judgment of the court.

By s. 9 of the Statutory Declarations Act, 1835, it is provided:

"And whereas persons serving the office of churchwarden and sidesman are at present required to take an oath of office before entering upon the execution thereof, and also an oath on quitting such office, and it is expedient that a declaration shall be substituted for such oath of office, and that the oath on quitting the same shall be abolished; be it enacted that in future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would but for the passing of this Act be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly; provided always, that no churchwarden or sidesman shall in future be required to take any oath on quitting office, as has heretofore been practised."

Hansell showed cause.

Barrington-Ward in support of the rule.

Cur. adv. vult.

Dec. 15, 1915. **RIDLEY, J.,** read the following judgment of the court.—In this case, a rule nisi was obtained to show cause why a mandamus should not issue commanding the Bishop of Salisbury to admit one Frank Oliver Kent to make his declaration as a churchwarden under the Statutory Declarations Act, 1835, s. 9. It appears that Kent was elected as people's warden for the parish of Melcombe Bingham in 1914. During his year of office—namely, on Mar. 7, 1915—at the close of one of the church services and near to the chancel steps, he made use of filthy and indecent language to the rector in the presence of the rector's wife. At the Easter vestry meeting for 1915, Kent was again elected people's warden for the ensuing year. On April 27, 1915, he was summoned before the magistrates for violent and indecent conduct in church, and was convicted and bound over to keep the peace for six months. The year 1915 was the year of the visitation of the bishop, and not of the archdeacon, and the bishop appointed June 17 at Dorchester for taking the declaration required of the churchwardens. When Kent attended, the bishop refused to admit him to make his declaration.

If the bishop has a discretion to examine into character before admitting or refusing to admit a churchwarden, it can hardly be questioned that he made a reasonable use of that discretion in the present instance. But if the bishop in so doing has a merely ministerial duty to perform, then, it has been argued, a mandamus should go to order him to perform it. It was, however, contended in showing cause against the rule that this court has in all cases a discretion in issuing such a writ, and that, in all the circumstances of this case, they ought to decline to do so. On this point *R.* v. *Garland* (1) was quoted. In that case, there had been a devise of copyhold estate to trustees in trust for an heir. The trustees had not been admitted, but they applied on behalf of the heir for a mandamus to compel his admittance. They had the right to admittance, being the beneficiaries, as it is a mere form: see SCRIVEN ON COPYHOLD, p. 349. But the court discharged the rule on the ground that the application was not a bonâ fide one, but was made in order to avoid paying double fees for admittance, and on the ground that the court had no information as to the age of the heir or of the other circumstances relating to the estate. This decision appears to us not to be an authority for the argument in the present case. The trustees and the heir could have had admittance on paying the fees due, whereas here the applicant cannot do so by any means except that of making the declaration required. In other words, the right which the applicant there sought to enforce by mandamus was a private right, which could be in substance secured by another process. In the present case, the right to perform the duties, which are of a public character, cannot be secured at all if a mandamus is refused. We do not think that, in such a case as this, the issue of the writ is discretionary, assuming that the bishop's duties are only ministerial.

The main question in the case is not devoid of authority. In *R.* v. *Rice* (2), a mandamus was directed to the Archdeacon of St. Asaph to admit a churchwarden duly elected by the parish. On the return to the writ, it was set out that the churchwarden was not a fit and proper person, being a dairyman in poor circumstances. But it was held that the archdeacon could not refuse for such cause the churchwarden, who is an officer of the parish, and holds an office merely temporal, having the custody of and the property in the goods belonging to the church. To the same effect is *R.* v. *Simpson* (3). The archdeacon in effect was held to be in that case a ministerial officer. In *R.* v. *Williams* (4), it was held, on the other hand, that, where there was a mandamus to admit a churchwarden, a return that he had not been duly elected was a good one; and it was said by PARKE, J. (8 B. & C. at p. 683):

> "The commissary may deny any material allegation in the court. He cannot exercise any judicial authority, but he may inquire whether the party has been duly elected."

In *R.* v. *Sowter* (5), a question arose whether the bishop or the archdeacon could properly admit a churchwarden, the bishop having inhibited him during his triennial visitation from exercising any spiritual or ecclesiastical jurisdiction concerning the visitation of the clergy, the admission of churchwardens, and so forth. LORD ALVERSTONE, C.J., in making the rule absolute, gave judgment approving of the decision in *R.* v. *Simpson* (3), and said that a churchwarden had long been regarded as substantially a temporal officer, and that, as the act of the archdeacon in admitting him was merely ministerial, the bishop could not inhibit him from performing it. KENNEDY, J., agreed with this judgment. The Court of Appeal reversed this decision and held that, while the archdeacon was inhibited by the bishop, he could not exercise any jurisdiction at all, but they did not in any way differ from what had been said in the court below as to the character of the office of churchwarden or the duty of the archdeacon in admitting him.

It would not be correct to conclude from these authorities that there are no duties in the performance of which a churchwarden acts for the Ordinary and subject to

his control. Thus, in *Fuller* v. *Lane* (6) (2 Add. at p. 425), SIR JOHN NICHOLL, in the Arches Court of Canterbury, in dealing with pews in a parish church, said:

> "The distribution of seats rests with the churchwardens, as the officers, and subject to the control, of the Ordinary."

See also *Halliday* v. *Phillips* (7). There may be other such duties in the performance of which the churchwarden is not independent of the Ordinary, but we do not think that such a relationship in respect of one particular duty or of several particular duties can affect the general rule laid down in the authorities quoted above.

Reliance was, however, placed on words used by SIR WILLIAM SCOTT in *Anthony* v. *Seger* (8). That was a case decided in 1789 on a question relating to an election of churchwardens for the parish of Ealing. Three persons were nominated, and of these Le Corsa received thirty-eight votes on a poll, Wincuffe received thirty-five, and Anthony received none. On it being objected that Le Corsa was an alien, he admitted it and was declared ineligible, and the question was whether Anthony could be declared elected, although he had received no votes at the poll. The court ordered a re-election, but, in giving his judgment, SIR WILLIAM SCOTT said (1 Hag. Con. at p. 10):

> "An alien born has no right. . . . The fact therefore being admitted, that person was properly rejected. A contrary position has indeed been intimated, and it has been said that there would be ground for a mandamus,—but inaccurately, for offices the most ministerial leave a discretion not to join in an illegal act, and if a parish had returned a Papist, or a Jew, or a child of ten years of age, or a person convicted of felony, I conceive the Ordinary would be bound to reject."

It seems to be quite clear that the learned judge was dealing in this passage with statutory or common law disabilities only. He says that there is still discretion not to join in an illegal act, and quotes as instances of such an act only cases where the persons would be actually disqualified for the office. That is a very different thing from the contention raised in the present case that the Ordinary may reject a churchwarden because (however reasonably) he arrives at the conclusion that, from his known character or from his acts, words, or conduct, he is not a fit and proper person. We think that this is the proper meaning of the case itself. It may be further noted that it was decided in 1789 by a very great authority, and that it does not appear from later decisions ever to have been construed in the sense which it is now suggested it might bear. We think for these reasons that the rule should be made absolute. We think, however, that it should be made absolute without costs.

Rule absolute.

Solicitors: *Lee, Bolton & Lee; Rawle, Johnstone & Co.*, for *Trevor Davies*, Yeovil.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

A

HORWICH *v.* SYMOND

COURT OF APPEAL (Buckley, Pickford and Bankes, L.JJ.). February 5, 1915

B

[Reported 84 L.J.K.B. 1083; 112 L.T. 1011; 31 T.L.R. 212; [1915] H.B.R. 107]

Bankruptcy — Property available for distribution — "Goods" — Fixtures in shop — Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 44.

In considering whether articles are "goods" within the meaning of s. 44 of the Bankruptcy Act, 1883, the mere fact of some annexation of the articles to the freehold is not in itself sufficient to convert the articles into realty. The question is purely one of fact and the nature of the article must be looked at.

C

Notes. The Bankruptcy Act, 1883, s. 44, has been repealed by the Bankruptcy Act, 1914. See now s. 38 of the Act of 1914.

As to property available for distribution amongst a bankrupt's creditors, see 2 HALSBURY'S LAWS (3rd Edn.) 404 et seq.; and for cases see 5 DIGEST (Repl.) 679 et seq. For the Bankruptcy Act, 1914, s. 38, see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

D

Cases referred to in argument:

Re Gawan, Ex parte Barclay (1855), 5 De G.M. & G. 403; 25 L.J.Bcy. 1; 26 L.T.O.S. 97; 19 J.P. 804; 1 Jur. N.S. 1145; 43 E.R. 926; sub nom. *Gawan* v. *Barclay, Ex parte Barclay*, 4 W.R. 80, L.C. & L.JJ.; 5 Digest (Repl.) 805, *6810*.

E

Boyd v. *Shorrock* (1867), L.R. 5 Eq. 72; 37 L.J.Ch. 144; 17 L.T. 197; 32 J.P. 211; 16 W.R. 102; 31 Digest 207, *3386*.

Holland v. *Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990, Ex.Ch.; 31 Digest (Repl.) 206, *3376*.

F

Cross v. *Barnes* (1877), 46 L.J.Q.B. 479; 36 L.T. 693; 35 Digest 305, *539*.

Appeal by the plaintiff from a decision of ATKIN, J., in an action tried by him without a jury.

Walter Stuart Mitchell, who carried on business as a chemist in premises at Liscard and at Egremont, on Nov. 28, 1912, in consideration of money lent, granted a bill of sale to the plaintiff, a registered moneylender, under which the grantor separately assigned, together with certain furniture, the articles that were the subject-matter of this suit. The bill of sale was duly registered. On Feb. 10, 1913, Mitchell was in default under the bill of sale, and the plaintiff then took possession of the scheduled goods. On Feb. 18, a receiving order was made against Mitchell in respect of an act of bankruptcy prior to Feb. 1, and on Feb. 20 he was adjudicated bankrupt. The defendant was the official receiver and trustee in bankruptcy of Mitchell, and he claimed the articles in question under s. 44 of the Bankruptcy Act, 1883, as being goods in the reputed ownership of Mitchell in his trade or business. Mitchell was tenant of the two premises in question and had placed the articles in his respective shops for the purpose of his business. It was not disputed by the defendant that the articles passed to the plaintiff under the bill of sale, and it was not disputed by the plaintiff that, if they were not fixtures, they were within the apparent order and disposition of Mitchell so as to vest in the defendant on the bankruptcy. The goods had admittedly been disposed of by the defendant in the bankruptcy. The plaintiff sued the defendant for damages for conversion of the articles. ATKIN, J., divided the articles into three classes, and gave judgment for the plaintiff in respect of the third class which he found not to be chattels. There was no dispute as regards the goods in the first class.

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but the plaintiff appealed against the judge's findings about the second class, which he held to be chattels.

Ashton, K.C., and *Matthews, K.C.* (*Hartley* with them), for the plaintiff.
Greer, K.C., and *Lias* for the defendant.

BUCKLEY, L.J. This is a contest between the grantee of a bill of sale and the official receiver and trustee in bankruptcy of the grantor. The bill of sale was an assignment by way of security of certain things more particularly described in the schedule. ATKIN, J., at the trial divided the disputed articles into three classes, the first being things which, not being annexed at all to the premises, were clearly chattels and passed as such to the trustee in bankruptcy under the order and disposition clause. As to these, there is no appeal. The third class comprised articles which the learned judge held must be deemed not to be chattels, but to be fixtures. As to these, the grantee of the bill of sale is entitled, and in respect of these there is no appeal. But he appeals in respect of the second class, which the learned judge held to be chattels so that they would pass to the trustee in bankruptcy under s. 44 of the Bankruptcy Act, 1883. The items which constitute that class are four in number. The question to be ascertained is whether they were chattels at the relevant date—i.e., at the commencement of the bankruptcy—or fixtures capable of being converted into chattels. If they were the former, the trustee in bankruptcy would be entitled to them: if the latter, they would pass to the holder of the bill of sale.

The items in question are described by the learned judge as follows:

"No. 4, 13 ft. chemist fittings, &c. This was similarly a separate chattel; it was secured to the wall by two wire nails to keep it in position, and the nails could be withdrawn without any injury to the freehold."

If that is right, s. 44 applies. The question, however, is purely one of fact. This chattel stood on the floor, and two nails were used to keep it in position, so that there was only the slightest attachment. ATKIN, J., found that the degree of annexation was the slightest possible, and was only adopted for the more efficient use of the chattel as a chattel. Take the next following item, which the learned judge describes as follows:

"No. 6, counter and show case. This was a separate chattel, resting by its own weight on the ground, except that at the far end from the shop door two 1½ in. wire nails had been driven into the corner in order to secure it. Those nails came out as easily as carpet nails."

This chattel, therefore, stood on the floor, and, in order to keep it in position, two wire nails were used, so that there was only the slightest attachment. The learned judge found that the degree of annexation was only adopted for the more efficient use of the chattels as chattels. With regard to the third item, it is described as "Egremont, No. 3, 10 ft. bottle rack, and so on." The learned judge says:

"This was a separate chattel, but to put it in place it was fastened by a screw to two wall hooks which were fastened into the wall. On unscrewing the chattel from the wall hooks it came away completely, and, in my opinion, the wall hooks themselves could be withdrawn without any injury to the freehold."

It was only necessary to turn the screw to remove the article. The only remaining item was: "No. 9, cupboard hung on the wall, secured by a wall hook as above described." The learned judge says: "This was a separate chattel removable as in No. 3"; so that it was similar to the last described article, inasmuch as it did not rest on the floor, but depended on the attachment to the wall. As I have already said, this seems to me to be purely a question of fact—namely, were these articles so fixed that they were capable of being treated as annexed to the freehold, or were they merely chattels? I think it is plain that the mere fact of some annexation to the freehold is not in itself sufficient to convert a chattel into realty. Carpets

are a good instance of this; they cannot be said to be fixtures. So also shop counters resting on the floor which are affixed by nails to the floor; they are not there as fixtures, but as chattels with a certain amount of fixing in order to keep them steady. In my opinion, this is not a case in which we can interfere with the learned judge's findings of fact, and the appeal must, therefore, be dismissed.

PICKFORD, L.J. I agree. I think there is no question of principle involved: it is purely a question of fact. I am inclined to think that the three propositions enunciated by counsel for the plaintiff are quite correct, and that the learned judge applied them in the court below. He found that these particular articles in respect of which the appeal is brought never ceased to be chattels. There may be things with only a very slight method of attachment, but the mere slightness or strength of the attachment is not sufficient of itself to decide the question. The nature of the article must be looked at. I am not sure that I should have come to the same conclusion myself if I had been trying the case. It is difficult to see a distinction between a shop counter standing on the floor without nails and a shop counter standing on the floor and affixed with two nails. It was for the learned judge to consider the distinction, and he was in a better position to decide them than we are, and I am not inclined to differ from him as to the facts which he found.

BANKES, L.J.—I agree. The question is whether four articles which were in their nature chattels had for the time being changed their character and become fixtures. That seems to me to be a mixed question of law and fact. I think that if it could have been shown that the learned judge had misdirected himself or had gone wrong in law we might have interfered; but, in my opinion, the learned judge took the correct view and applied the proper test. He considered the character of the articles and the mode and circumstances of the attachment, and came to the conclusion that they were not fixtures. Whether I should on these facts have come to the same conclusion myself is quite immaterial. It must be shown that the learned judge arrived at a wrong conclusion of fact, and I am not satisfied that he did. That being so, in my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitor: *A. J. Evans*, for *E. Lorimer Wilson*, Manchester; *W. Boyle*, Liverpool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

THOMAS GABRIEL & SONS *v.* CHURCHILL AND SIM

[Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.), July 10, 14, 1914]

[Reported [1914] 3 K.B. 1272; 84 L.J.K.B. 233; 111 L.T. 933; 30 T.L.R. 658; 58 Sol. Jo. 740; 19 Com. Cas. 411]

Agent—Del credere agent—Sale of goods through agent—Obligation to litigate question arising out of contract—Debt due from buyer—Impossibility of recovery by seller—Liability of agent.

The obligation of a del credere agent on the sale of goods to an unknown buyer does not extend to constitute him a person whom the seller can call on to litigate any question that may arise out of the contract and determine what is due as between the buyer and seller. The obligation does not extend further than that, where there is an ascertained debt due from the buyer to the seller and the buyer fails to pay that amount, either through insolvency or some cause that makes it impossible for the seller to recover, the del credere agent has to answer for that default by reason of his del credere commission, and the obligation which the terms of the commission impose on him.

Dictum of Lord Mansfield, C.J., in *Grove* v. *Dubois* (1) (1786), 1 Term Rep. 112, considered.

Decision of Pickford, J., [1914] 1 K.B. 449, affirmed.

Notes. Considered: *Montagu Stanley & Co.* v. *J. C. Soloman, Ltd.*, [1932] 2 K.B. 287. Referred to: *Rusholme and Bolton and Roberts, Hadfield, Ltd.* v. *S. G. Read & Co. (London), Ltd.*, [1955] 1 All E.R. 180.

As to classes of agents, see 1 Halsbury's Laws (3rd Edn.) 150–152; and for cases see 1 Digest (Repl.) 324–327.

Cases referred to:

(1) *Grove* v. *Dubois* (1786), 1 Term Rep. 112; 99 E.R. 1002; 1 Digest (Repl.) 326, *124*.

(2) *Morris* v. *Cleasby* (1816), 4 M. & S. 566; 105 E.R. 943; 1 Digest (Repl.) 326, *126*.

(3) *Hornby* v. *Lacy* (1817), 6 M. & S. 166; 105 E.R. 1205; 1 Digest (Repl.) 326, *127*.

(4) *Couturier* v. *Hastie* (1852), 8 Exch. 40; 22 L.J.Ex. 97; 155 E.R. 1250; reversed sub nom. *Hastie* v. *Couturier* (1853), 9 Exch. 102; Ex.Ch.; affirmed sub nom. *Couturier* v. *Hastie* (1856), 5 H.L. Cas. 673; 25 L.J.Ex. 253; 28 L.T.O.S. 240; 2 Jur. N.S. 1241; 10 E.R. 1065, H.L.; 1 Digest (Repl.) 331, *157*.

Also referred to in argument:

Re Nevill, Ex parte White (1871), 6 Ch. App. 397; 40 L.J.Bcy. 73; 24 L.T. 45; 19 W.R. 488, C.A.; affirmed sub nom. *Towle & Co.* v. *White* (1873), 29 L.T. 78; 21 W.R. 465, H.L.; 1 Digest (Repl.) 310, *2*.

Thompson v. *Perkins* (1823), 3 Mason, 232.

Leverick v. *Meigs* (1824), 1 Cowen, N.Y. 645.

Lewis Bros. & Co. v. *Brehme* (1870), 33 Maryland Rep. 412.

Fleet v. *Murton* (1871), L.R. 7 Q.B. 126; 41 L.J.Q.B. 49; 26 L.T. 181; 20 W.R. 97; 1 Digest (Repl.) 736, *2781*.

Wickham v. *Wickham* (1855), 2 K. & J. 478; 69 E.R. 870; 1 Digest (Repl.) 331, *158*.

Appeal from a decision of Pickford, J.

The plaintiffs claimed to recover from the defendants, as del credere brokers, a sum of money reduced by subsequent payments to £170 odd. The matter arose out of a sale by the plaintiffs, who were timber merchants, through the defendants, who were wood brokers, to a firm not at that time disclosed, but who eventually

turned out to be Millars' Karri and Jarrah Co., Ltd., a company of considerable importance and unimpeachable solvency, but who were not known to the plaintiffs at the time the contract was made. The defendants gave to the plaintiffs the following sold note:

"Sold for account of Messrs. Thomas Gabriel & Sons to our principals about 380 loads Blackbutt scantlings as per specification at foot at 2s. 9d. per foot cube hundredweight and insurance to London. The scantlings to be of prime quality, straight in the grain, well and truly cut to allow sufficient for possible shrinking in seasoning according to width and thickness, free from least sap wood, reasonably free from gum, veins, stakes, knots, and other defects. Delivery as soon as possible, and to follow on after delivery of 2,000 sets contract of the 7th Feb. 1907. To be paid for by net cash on arrival of each shipment. Any question arising under this contract which cannot be settled by the brokers hereto shall then be submitted to arbitration in the usual manner, Churchill and Sims, brokers. The goods to be at buyers' risk in respect of fire directly they leave the ship's deck. Brokerage and guarantee, 2½ per cent."

The bought note was in these words: "Sold to Messrs. Millars' Karri and Jarrah Company (1902), Ltd., for account of our principals," and then followed the same description of the goods and the same terms, except that it said "Brokerage ½." The notes did not disclose to the plaintiffs the name of the buyers, nor did they disclose to Messrs. Millars' Karri and Jarrah Co. the name of the sellers. The defendants took the brokerage and guaranteed the del credere commission from the plaintiffs in respect of the transaction. The plaintiffs were in default in delivering under the contract, and it was arranged that they should pay a sum of £200 in respect of claims arising out of that delay, and it was also arranged that the plaintiffs would deliver, and the buyers would accept, the balance of the contract under a penalty to be paid by the plaintiffs if they did not deliver the balance on Mar. 1, 1911, the contract having been made in 1908. The contract was varied to that extent, and became a contract by which the plaintiffs agreed to deliver the balance of the goods and agreed to pay a penalty if they were not delivered by Mar. 1, 1911. All the goods were not delivered by Mar. 1, 1911, and the buyers declined to pay to the extent of £250 because, they said, they were entitled, as against the price that might be due for the goods, to set off £250 which was owing on the altered contract by the plaintiffs to them. That dispute having arisen, the names of the buyers were given to the plaintiffs or their solicitors, and the buyers were willing to have the matter settled either by arbitration, according to the contract, or by an agreement to submit a case for the opinion of counsel or some person of standing in the trade. The plaintiffs declined to have that done unless the brokers, the defendants, were made parties to the arbitration or the case. The defendants took up the position that they were not liable personally to the plaintiffs in respect of the performance of the contract.

PICKFORD, J., gave judgment for the defendants, and the plaintiffs appealed.

Schiller, K.C., and *D. M. Hogg* for the plaintiffs.
George Wallace, K.C., and *A. H. Chaytor* for the defendants.

BUCKLEY, L.J. I think that this appeal fails. For the determination of the case it is not necessary to decide what is the obligation of a del credere agent. It is only necessary to decide negatively that his obligation does not so exist as to constitute him a person with whom a seller may litigate any dispute that arises out of a contract, and determine what is the sum which is due in respect of the contract which is the subject of the del credere agency. The plaintiffs' contention, on the contrary, is raised on *Grove* v. *Dubois* (1), on which I will say a word in a moment. The facts are simple. [HIS LORDSHIP stated the facts and continued:] It will be noticed from the facts which I have stated that no ascertained sum has

been arrived at as between the vendors and vendees what was the amount due. There was a dispute pending as to what was the sum.

The contention before us really is that the vendor is entitled to sue the del credere agent, and to ascertain for the first time in that proceeding what is due, and settle in that proceeding matters in dispute between the vendor and vendee what the amount is. The contention to that effect is raised on what LORD MANSFIELD, C.J., said in *Grove* v. *Dubois* (1) (1 Term Rep. at p. 115). His language as to the nature of a del credere contract was:

> "It is an absolute engagement to the principal from the broker and makes him liable in the first instance. There is no occasion for the principal to communicate with the underwriter, though the law allows the principal for his benefit to resort to him as a collateral security. But the broker is liable at all events."

That was language that affirmed that the del credere agent was under an absolute engagement in respect of which he was liable in the first instance; that he was liable, I suppose, for the "performance" of the contract, a word which is found in some of the later cases; that his liability was not confined to a liability to make good the event of insolvency of the buyer or the impossibility of suing the buyer by reason of his being abroad or anything of that kind, but that he was liable as a principal in the matter. From that it would result, I suppose, that, if he were so liable, he would be a sub-seller to the ultimate buyer, and that he would be entitled to retain any profit made on the sub-sale. That, of course, it is inconsistent with the general idea as regards the engagements subsisting as between seller and del credere agent and buyer. LORD MANSFIELD'S language in *Grove* v. *Dubois* (1) has been criticised in *Morris* v. *Cleasby* (2), *Hornby* v. *Lacy* (3), and *Couturier* v. *Hastie* (4).

In the first case, *Morris* v. *Cleasby* (2), LORD ELLENBOROUGH, C.J., said this (4 M. & S. at p. 575), after reading what I have read from *Grove* v. *Dubois* (1):

> "With all the respect which is due to LORD MANSFIELD and those judges, we cannot accede to these propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor and to have a tendency to introduce uncertainty and confusion into the law on this subject."

LORD ELLENBOROUGH in *Hornby* v. *Lacy* (3) says (6 M. & S. at p. 171):

> "I own I cannot think that a commission del credere is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports, that if the vendee does not pay, the factor will: it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting between vendor and vendee. A somewhat different doctrine seems to have originated with *Grove* v. *Dubois* (1). A kind of magic effect was there given to a commission del credere, changing the relative position of the owner and buyer; and what is reported to have fallen from CHAMBRE, J., in a later case, is referable to the same authority; but this was set right, I think, in the judgment in *Morris* v. *Cleasby* (2), which was given after much consideration, and, I may add, with the concurrence of two of our learned brethren on this bench now, unhappily, no more."

I will not refer with particularity to the case of *Couturier* v. *Hastie* (4). The decision in *Grove* v. *Dubois* (1) is criticised in STORY ON AGENCY, in a note to s. 33, where the learned author says this:

> "It was laid down in *Grove* v. *Dubois* (1) that a commission del credere amounts to an absolute engagement to the principal from the factor, and makes him liable in the first instance. But the doctrine of that case on this point seems incorrect. A factor with a del credere commission is liable to the

principal, if the buyer fails to pay or is incapable of paying. But he is not primarily the debtor. On the contrary, the principal may sue the buyer in his own name notwithstanding the del credere commission; so that the latter amounts to no more than a guaranty."

I do not propose to travel through any more of the authorities. They have all been most carefully reviewed by PICKFORD, J., in the judgment from which this appeal is brought. The proposition which the learned judge affirms at the end of his judgment seems to me absolutely correct. After pointing out that it is not necessary for him to determine whether the obligation of a del credere agent extends beyond the case of insolvency to a case of inability, by reason of a debtor being beyond the seas or something of that kind, to obtain immediate payment, and that it is not necessary to decide what his obligations are as regards making payment in default of payment by the buyer, he goes on to say this ([1914] 1 K.B. at p. 461):

"I think it is quite clear that it [that is, the obligation of the del credere agent] does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. I think that, according to the authorities, it cannot extend further than that where there is an ascertained amount or certain sum due as a debt from the buyer to the seller, and the buyer fails to pay that amount either through insolvency or something that makes it impossible to recover as in the case of insolvency, the broker has to answer for that default by reason of his having received a del credere commission."

To that I assent. The liability of the del credere agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract, and it does not expose the del credere agent to an action to ascertain the sum due. On these grounds I think the judgment under appeal is right, and that this appeal should be dismissed.

KENNEDY, L.J.—I am entirely of the same opinion. I think, myself, that this is a novel effort, very gallantly made and supported with much care and learning, to put the position of a del credere agent where it has never been before. I think it has always been understood, both by men of commerce and men of law, to have been a liability to be called on to pay the sum when due under a contract to the other contracting party. The case that has been put here is summarised really in his judgment by PICKFORD, J., where he says ([1914] 1 K.B. at p. 454):

"The question which I have to decide is one of principle whether the seller is entitled to call upon the del credere broker to litigate any disputes that may have arisen between the seller and the buyer, and not only to pay an ascertained sum which the buyer has refused to pay, but also to ascertain by setting up the buyers' defences how much is to be paid."

That was what he had to decide, and, in my judgment, he decided it rightly on principle, and rightly on authority.

I cannot help thinking that it would not generally be correct to say that the del credere undertaking or guarantee relates to the solvency of the other contracting party, but I am not going, any more than PICKFORD, J., did, to tie the undertaking down, because I can conceive of a case in which it would be impossible to say that a man, though he was embarrassed, was not able to pay, and though in fact he did not pay a liquidated sum on a particular day, I think it could quite conceivably be right to say that recourse to the agent is within the intention and meaning of the term del credere agency. The seller may say, "You, who have taken the del credere commission, have given me a buyer who does not produce the cash which is unquestionably due to me on a certain day. You say, if I press it he can pay, but the process of squeezing is a difficult one and a troublesome one.

you have agreed that he shall pay that liquidated sum." I am prepared to hold my mind open whether that would not be a perfectly proper case to call on the del credere agent, and I think that that was what was perhaps in the minds of those judges who have not absolutely confined themselves to solvency as the question to be considered, but have also considered performance. At the same time, from such inference as I can draw from one's knowledge and experience of the legal world, I cannot help thinking that the popular view is not far wrong; certainly, if you asked nine people out of ten who were in a position to express an opinion, they would say that it was a guarantee of the solvency of the buyer. LORD ELLENBOROUGH, C.J., in *Hornby* v. *Lacy* (3), which has been much quoted, says this (6 M. & S. at p. 171):

> "I own I cannot think that a commission del credere is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports, that if the vendee does not pay, the factor will."

That, putting it in general terms, would include simply nonpayment, but what he goes on to say in the same sentence, and what I think is the general idea is, "It is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency." I do not think that so great a judge—who was then actually discussing a different theory from that from which he was differing, a theory which had the countenance of so great a judge as LORD MANSFIELD, C.J.—would have put that phrase, as he did, in that passage in the commencement of his judgment, if he had not thought as I, following him, think, that the central idea is that "I guarantee to give you a client who can pay when the time comes." But I am not prepared to say that the liability will not go a little further and be, when the sum is ascertained, an undertaking. "If he will not pay, then I am not called upon on my guarantee to pay."

The question that we have heard argued with so much care is a totally different one: Is the agent to be treated as the person who says, "I turn my face to the smiter when the other side, the contracting party, has a number of disputes with you about what is due and what are the terms of the contract; sue me; I take upon myself all the burden of these vexed questions, though I may not even know of the correspondence between you and him. I do not know even the rights of the parties. I cannot say whether he has a good answer to your claim by reason of prior contracts and dealings by set-off or counter-claim." It is impossible, I think, that a business man ordinarily would take such a view, and I do not think that is the view of the law. I am far from saying that you might not have in any given trade or market a custom by which a del credere agent may be made to take on himself a larger liability, and that you might not prove a custom under which the person who says "I am going to do business as the del credere agent" may be holding himself out as a person who undertakes a larger liability; but if I am to construe the term "del credere agent" apart from special custom, apart from usage in a particular market, I do not think that it includes anything like that which it must include in order to justify the success of the plaintiffs in this case.

PHILLIMORE, L.J.—I agree. It has been said that this point which the learned judge has decided, on which we have heard a good deal of argument, was not the point really raised on the pleadings, and that counsel for the plaintiffs only entered into it in the course of the trial. I am not quite sure how far the point was raised by the pleadings, but, looking to the course of the trial, looking to the correspondence which was put in without objection, I am sure that the point was open to PICKFORD, J., to decide, as he has now decided, namely, whether, on the particular facts of this case—and that is all I am going on—the del credere agent was liable to pay.

If the decision in *Grove* v. *Dubois* (1) really established what the position of a del credere agent was, the plaintiffs would be right. A great many people have thought that *Grove* v. *Dubois* (1) was right—apparently the current of American decisions is that way. I think, as far as we are concerned in this country, it is pretty well established that *Grove* v. *Dubois* (1) went too far. *Morris* v. *Cleasby* (2) and *Hornby* v. *Lacy* (3) were cited, as PICKFORD, J., said, without disapproval in *Couturier* v. *Hastie* (4). No case later in England has been brought to our notice in which any suggestion has been made that the doctrine in *Grove* v. *Dubois* (1) was the right view. When you come to consider the matter, if the doctrine of *Grove* v. *Dubois* (1) was right, the vendor can sue the del credere agent not merely for the price of the goods but for the refusal of the ultimate vendee to accept, and I find no case in which that view has been accepted. If *Grove* v. *Dubois* (1) was put out of the way, then the del credere agent is not responsible as a principal to his vendee; he is responsible only in virtue of the relation which arises between them, namely, that he is an agent for making a contract with some unknown vendor, and also that he guarantees something. What exactly he guarantees I do not propose to say. I think it is quite likely that he does more than guarantee solvency, but I do think that he does not guarantee the performance in such a case as this. He does not guarantee performance where, for instance, the vendee refuses to take delivery, or accept the goods. He does not guarantee performance where the vendee and the vendor have, no doubt through him (because the correspondence all passed through him, and not between the principals direct), made a fresh arrangement. Here the arrangement made was that the vendors were willing to pay a sum of money and that they should enter into a contract with regard to the promptitude of future delivery. The question of construction of that contract may be wrongly raised by the vendee, but from that moment forward the only thing which the vendors could possibly look to the del credere agent for was the assurance that the vendee, when the contract was ultimately fought out with him and these points on the subsequent contract had been raised and determined, would prove solvent. On these grounds, I think this appeal fails.

Appeal dismissed.

Solicitors: *Drake, Son & Parton; Coward & Hawksley, Sons & Chance.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re JACKSON

[KING'S BENCH DIVISION (Horridge and Rowlatt, JJ.), November 10, 12, 1914]

[Reported [1915] 1 K.B. 371; 84 L.J.K.B. 548; 112 L.T. 395; 31 T.L.R. 109; 59 Sol. Jo. 272]

Solicitor—Costs—Agreement—Appeal—Jurisdiction of Divisional Court—"Practice and procedure"—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict.*, *c.* 16), *s.* 1 (4).

Solicitor—Costs—Agreement—Agreement "respecting the amount and manner of payment"—Attorneys' and Solicitors' Act, 1870 (33 & 34 *Vict.*, *c.* 28), *s.* 4.

In June, 1912, C. retained a solicitor to defend him on a charge of embezzlement from his employers. By the retainer C. agreed that the solicitor should receive the proceeds of sale of his furniture to "cover" the charges of his defence. These proceeds were received by the solicitor. After the commencement of the criminal proceedings, a civil action was started against C. by his employers. In July, 1912, C. retained the solicitor to act for him in the civil action and, by this retainer, the solicitor was to receive an inclusive fee of 100 guineas. Some time previously, the solicitor had, with C.'s consent, collected £100 from a debtor of C. C. was convicted in the criminal proceedings and judgment was recovered against him in the civil proceedings. In October, 1912, C. assigned all his real and personal estate to the liquidator of his employers, who, in April, 1914, assigned the estate to the administrator of C.'s property who had been appointed in October, 1913, under the Forfeiture Act, 1870. The administrator sought to have the two retainers set aside under s. 8 of the Attorneys' and Solicitors' Act, 1870. The master made an order setting them aside and ordering the delivery of a bill of costs for taxation. This order was reversed by the judge at chambers. On appeal to the Divisional Court, the solicitor took a preliminary point that that court had no jurisdiction.

Held: (i) the appeal did not relate to "a matter of practice and procedure" within the Supreme Court of Judicature (Procedure) Act, 1894, s. 1 (4), and, therefore, the Divisional Court had jurisdiction; (ii) the retainer in the criminal proceedings was not an agreement "respecting the amount and manner of payment" of a solicitor's charges within the Attorneys' and Solicitors' Act, 1870, s. 4, and, therefore, the solicitor must deliver a bill of costs; (iii) the retainer in the civil action must be sent back to the master for inquiry whether there had been "payment"; (iv) although the administrator might not have had a good title to C.'s estates when the summons was issued, at the date of the master's order he had a good title by reason of the assignment to him by the liquidator, and, therefore, he was entitled to maintain the application.

Notes. The Attorneys' and Solicitors' Act, 1870, s. 4, has been repealed. See now the Solicitors Act, 1957, s. 59 (37 HALSBURY'S STATUTES (2nd Edn.) 1101). The Supreme Court of Judicature (Procedure) Act, 1894, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. As to appeals from a judge in chambers, see now R.S.C., Ord. 54, r. 23.

As to special agreements between solicitor and client as to costs, see 31 HALSBURY'S LAWS (2nd Edn.) 164 et seq.; and for cases see 42 DIGEST 126 et seq.

Cases referred to:

(1) *Re Marchant*, [1908] 1 K.B. 998; 77 L.J.K.B. 695; sub nom. *Re Marchant, Ex parte Fraser*, 98 L.T. 823; 24 T.L.R. 375; 52 Sol. Jo. 316, C.A.; Digest (Practice) 706, *3010*.

(2) *Re Herbert Reeves & Co.*, [1902] 1 Ch. 29; 71 L.J.Ch. 70; 85 L.T. 495; 50 W.R. 252; 46 Sol. Jo. 50, C.A.; 30 Digest (Repl.) 161, *145*.

(3) *Haxby* v. *Wood Advertising Agency*, [1913] W.N. 331; 109 L.T. 946, D.C.; Digest (Practice) 706, *3011*.

(4) *Re Oddy*, [1895] 1 Q.B. 392; 64 L.J.Q.B. 123; 71 L.T. 861; 43 W.R. 363; 39 Sol. Jo. 133; 14 R. 387, C.A.; Digest (Practice) 706, *3008*.

(5) *Watson* v. *Petts*, [1899] 1 Q.B. 54; 67 L.J.Q.B. 970; 79 L.T. 330; 47 W.R. 68; 15 T.L.R. 31; 43 Sol. Jo. 27, C.A.; Digest (Practice) 708, *3024*.

Also referred to in argument:

Yonge v. *Toynbee*, [1910] 1 K.B. 215; 79 L.J.K.B. 208; 102 L.T. 57; 26 T.L.R. 211, C.A.; Digest (Practice) 706, *3012*.

Re Roney & Co., [1914] 2 K.B. 529; 83 L.J.K.B. 451; 110 L.T. 411, C.A.; 42 Digest 256, *2896*.

Bozson v. *Altrincham U.D.C.*, [1903] 1 K.B. 547; 72 L.J.K.B. 271; 67 J.P. 397; 51 W.R. 337; 19 T.L.R. 266; 47 Sol. Jo. 316; 1 L.G.R. 639, C.A.; Digest (Pleading) 53, *421*.

Long v. *Great Northern and City Rail. Co.*, [1902] 1 K.B. 813; 71 L.J.K.B. 598; sub nom. *Re Great Northern and City Rail. Co.*, 86 L.T. 440; 50 W.R. 402; 18 T.L.R. 478, C.A.; Digest (Practice), 708, *3026*.

Appeal from an order made by ATKIN, J., at chambers, reversing an order made by MASTER ARCHIBALD.

In 1912, John Clark, who had been treasurer and cashier of Messrs. Procter & Co., Ltd., corn brokers, Liverpool, was heavily involved owing to speculating in futures on his own account with Messrs. Procter's money. On June 6, 1912, he was arrested and charged with the defalcation of Messrs. Procter's moneys, and at the Liverpool Police Court he instructed Thomas Henry Jackson, the respondent solicitor, to defend him before the Liverpool stipendiary. On June 14, 1912, Clark signed the following retainer to the respondent:

> "I retain and request you to defend me in the criminal proceedings instituted against me by Procter & Co., Ltd., and I agree that you shall receive the net proceeds of sale of my furniture to cover the law charges and disbursements of my defence."

On July 1, 1912, Procter & Co., Ltd., issued a writ against Clark for the recovery of over £89,000 for money had and received to their use; and thereupon Clark, on July 9, signed the following retainer to the respondent.

> "*Procters, Ltd.* v. *Myself.*—I request and retain you to act for me as my solicitor in the above action at the inclusive fee of one hundred guineas, such fee to cover all disbursements until final judgment."

At the foot of the retainer of July 9 the respondent signed the following statement: "I accept your retainer and undertake the above defence at the figure stated, which figure I acknowledge to have received." The respondent had, on June 21, collected a sum of £100, which was paid to him by a debtor of Clark's on Clark's authority. Messrs. Procter, after issue of the writ, went into liquidation, and William Harrison Alexander was appointed the liquidator. On Oct. 1, 1912, Clark, in pursuance of an order of BRAY, J., made in the civil proceedings, conveyed to the liquidator his real and personal estate. On Oct. 28, 1912, Clark was put on his trial on the criminal charge at Liverpool Assizes. He pleaded guilty and was sentenced to three years' penal servitude. The Secretary of State, by an order dated Oct. 1, 1913, and made under s. 9 of the Forfeiture Act, 1870, appointed the appellant, Thomas Robertson Derham, to be an administrator of the property of Clark. On Oct. 10, 1913, the appellant informed the respondent of his appointment as administrator of Clark's property, and requested him to deliver his bills of costs and statements of account in respect of the matters in which he was concerned in the civil and criminal proceedings. By an indenture made April 1, 1914, between Alexander of the one part and the appellant of the other part Alexander, in consideration of £10 then paid by the appellant to Alexander, assigned to

the appellant all the interest (if any) of Alexander in the sums of money in the hands of the respondent and received or collected by him. On April 4, 1914, MASTER ARCHIBALD, on a summons issued by the appellant, ordered that the two agreements of June 14, 1912, and July 9, 1912, should be set aside and cancelled under s. 8 of the Attorneys and Solicitors Act, 1870, and that the respondent should deliver to the appellant a bill of costs in respect of which such agreements were made. Against this order the respondent appealed to the judge in chambers, and, on April 23, 1914, ATKIN, J., ordered that the order made by MASTER ARCHIBALD should be reversed. The appellant appealed.

J. B. Matthews, K.C., and *F. Walter Frampton* for the administrator, the appellant.

J. H. Layton for the respondent solicitor.

HORRIDGE, J.—In this case, a summons was taken out to set aside two agreements entered into between a client and a solicitor under s. 8 of the Attorneys' and Solicitors' Act, 1870. An order setting aside the agreements was made by MASTER ARCHIBALD, which was reversed on appeal by the judge in chambers, ATKIN, J. There is now an appeal from the order of the learned judge. A preliminary objection has been taken before us that we have no jurisdiction to hear this appeal as this was a matter of practice and procedure under s. 1 (4) of the Supreme Court of Judicature (Procedure) Act, 1894. It seems to me that the appeal is properly brought here. In *Re Marchant* (1), the Court of Appeal held that, where an order had been made by a judge in chambers on an originating summons directing a solicitor to pay a sum of money specified in the summons on an undertaking given by him, the matter not being one of practice and procedure in the meaning of the Supreme Court of Judicature (Procedure) Act, 1894, an appeal lay to the Divisional Court and not directly to the Court of Appeal. Such an order, the court held, is a final and not an interlocutory order. VAUGHAN WILLIAMS, L.J., said ([1908] 1 K.B. at p. 1000):

> "The present proceeding was an originating summons, which raised the question whether an order ought to be made upon a solicitor to pay a sum of money. It is quite plain that the judgment on the originating summons is final, for it is a decision which puts an end to the whole question between the parties whichever way the decision may be; under those circumstances it is primâ facie not a matter of practice and procedure."

If you apply to the present case this judgment of VAUGHAN WILLIAMS, L.J., and the decision of the Court of Appeal in *Re Herbert Reeves & Co.* (2), the order now before us was a final order. In the latter case, it was held that the order made on a summons taken out by a client, asking for the common order for the delivery and taxation of a solicitor's bill of costs, is a final order. It does not prevent its being final, in VAUGHAN WILLIAMS, L.J.'s opinion, that there might be inquiries to be made after the judgment had been delivered, or that there would be taxation and a certificate and, possibly, a review of taxation. Therefore, returning to *Re Marchant* (1), I find that the order in the present case, being a final order, is not made on a matter of practice and procedure. The order now appealed from is made not in an action, but in virtue of the special jurisdiction of the court under the Attorneys' and Solicitors' Act, 1870. I think it is covered by the decision in *Re Marchant* (1) and also by *Harby* v. *Wood Advertising Agency, Ltd.* (3). In the latter case, a writ having been issued by a firm of solicitors without authority, one of the partners in the firm was ordered to pay the costs, and an order was made against him for a writ of attachment to issue for nonpayment. The court held, on the authority of *Re Marchant* (1), that the appeal was not on a matter of practice and procedure, but on a matter arising out of the jurisdiction of the court over solicitors.

My only difficulty has been *Re Oddy* (4), but that case arose in this way: There was a summons for a review of taxation taken out before a judge in chambers by way of appeal from the taxing master, and this summons was held to be a "matter of practice and procedure," and the appeal, therefore, was to the Court of Appeal. But I think the later cases are so clear that we must follow them, and we have jurisdiction to hear this appeal.

ROWLATT, J.—I am of the same opinion. It appears to me that the words "matter of practice and procedure" are now understood to refer to interlocutory matters which arise in a cause or matter in the High Court. It is a broad and sensible line of distinction, and most of the cases are consistent with it. *Re Marchant* (1) was an application to make a solicitor pay a sum of money on his undertaking, and the order of a judge at chambers on such application was held to be a final and not an interlocutory order, and, therefore, not a matter of practice and procedure. In *Watson* v. *Petts* (5), the application made to the judge in chambers was not in a cause or matter in the High Court to which it would relate, but had reference to a claim raised in an inferior court; and the decision was that the appeal, therefore, was not in a "matter of practice and procedure" and lay to a Divisional Court and not to the Court of Appeal. *Re Oddy* (4), looking at it closely, does not seem really inconsistent with the other cases. There was a discussion proceeding in the High Court as to the taxation of a solicitor's bill of costs, and a summons was taken out for a review of the taxation. It seems to me this may quite well be a matter of practice and procedure without in the least going back on the general principle which I think is the right one.

Preliminary objection overruled.

The court proceeded to hear the appeal.

HORRIDGE, J.—This is an appeal from an order of ATKIN, J., reversing a decision of MASTER ARCHIBALD by which he ordered that a bill of costs should be delivered by the solicitor for taxation in the ordinary way, and that the two agreements of June 14, 1912, and July 9, 1912, should be cancelled as if there had been no agreement in writing. The question arises with regard to these two agreements.

Before dealing with the actual facts I wish to refer to the Attorneys' and Solicitors' Act, 1870. Section 4 enables a solicitor to make an agreement with a client as to any costs for past or future services, but such an agreement must be in writing. Section 8 provides that no action shall be brought on such an agreement, but that every question respecting its effect or validity shall be determined and the agreement enforced or set aside by a court on motion or petition; and by s. 9, if it is set aside, the court or judge has power to order it to be cancelled, and to direct that the costs in respect of the matter included therein be taxed in the same manner as if the agreement had not been made.

In this case, a man named Clark embezzled his employers' money, and the respondent solicitor saw him and obtained from him the retainer dated June 14, 1912. [HIS LORDSHIP read the document and continued:] Is that "an agreement in writing . . . respecting the amount and manner of payment for the whole or any part of any past or future services," within s. 4 of the Attorneys' and Solicitors' Act, 1870? I do not think it is. It does not refer to the sum of £436 as the amount at which the respondent's charges were to be fixed. If they were more, he would have to pay more; and the £436 is really "cover," to use a well-known expression, and, therefore, no question arises at all under the Act. The result is that the respondent has to deliver a bill of costs. He stands in the position of a solicitor ordered under s. 37 of the Solicitors Act, 1843, to deliver a bill of costs, and, although the proceedings are not under that Act, strictly speaking, we can order the master's decision to stand as to that too. There is no ground whatever for

saying that the bill has been delivered or, therefore, that it has been paid. I think this portion of the master's order directed to the bill of costs must stand.

Proceedings were also taken against Clark in a civil action, and, before those proceedings were taken, a sum of money had been received by the respondent on June 21, 1912, from a Mr. Mathers, who had had dealings with Clark and who owed him £100, and this sum the respondent had collected on behalf of Clark. On July 9, after receiving this money, he got from Clark this document: [HIS LORDSHIP read the document of July 9, 1912]. Counsel for the appellant administrator has not contended that this is not an agreement under the Attorneys' and Solicitors' Act, 1870, and I think it is such an agreement. At the foot, there is this statement signed by the respondent: "I accept your retainer and undertake the above work at the figure stated, which figure I acknowledge to have received." In his affidavit, he says: "This money was given to me by the said John Clark under the terms of an agreement dated July 9, 1912. . . . I agreed to defend these proceedings, as appears from the said agreement, for the sum of £105, and as a matter of fact I received and accepted the said sum of £100." That allegation is not specifically denied in the affidavit filed by Clark and his wife in reply, but Clark says: "I did not pay the £100 to [the respondent] as he states. I had told him that a Mr. Mathers owed me over £100. Without my knowledge [the respondent] saw Mr. Mathers and got the money from him direct. [The respondent] afterwards told me he had received it." Clark was cross-examined on his affidavit before the master, and he said: "I did not agree to pay £105; it was only to protect him. Tuback, [the respondent's] managing clerk, said they would take the cost of the court proceedings out of the £100 (Mathers')." It may be said that he denied that he agreed to pay £100 for the costs in the civil proceedings, and that the respondent took £100 in settlement; but we think it well to give the respondent an opportunity of going before the master to say whether this is so. The master must inquire what this agreement means. The object is to show that it is relied on as proving that the man who made it brought to mind his prior agreement to pay a lump sum, and so he ratified this agreement by paying £100 in discharge of £105. I do not think it would do if he paid £100 on £105, which leaves a balance of £5, and does not say what portion of the bill was to be a matter of taxation. If there has been no payment in regard to the civil proceedings, the agreement of July 9 must be declared void, and a bill must be delivered for taxation.

A further point was taken on behalf of the respondent. After Clark had been arrested and before his trial, when these proceedings were commenced, the right in respect of s. 8 of the Act of 1870 had vested in Mr. Alexander, the liquidator of Messrs. Procters. Counsel for the appellant contended that the right of reviewing an agreement and obtaining a bill of costs for taxation is not a chose in action. I am not going to trouble about this, because, before the summons was heard—namely, on April 18, 1914—a re-assignment was made; and, therefore, whatever had been the case at the commencement of the action, the rights transferred by the original assignment had been re-transferred.

The order of the master must be restored as regards the criminal retainer of June 14, 1912, and the respondent must deliver a bill of costs for taxation. With regard to the civil retainer of July 9, 1912, it must be referred back to the master to find if there has been payment, and, if not, his order must be restored.

ROWLATT, J.—I am of the same opinion. The first answer made to this application by the respondent was that the rights of Clark were assigned to the liquidator between the commission of the offence and the conviction. If the right passed to the liquidator, it was assigned back before the date of the master's order. It seems to me that, if the court at the time it makes the order for taxation and repayment has before it the proper party to receive the fund, it can and ought to make the order. If counsel for the appellant is correct in suggesting that the right to take out the summons did not pass to the liquidator—and I do not think

this is absolutely clear—I am not prepared to say that it did not pass to the appellant under the Forfeiture Act, 1870. I am prepared to say that he is a "person chargeable" within the Solicitors Act, 1843, because he really has all the property of the client out of which the payment or charge has to be made, and in respect of which he has been charged.

As to the effect of the criminal retainer, it is no agreement at all. The civil retainer is not so clear, and it should go back to the master to find whether there was a "payment" in fact. The question then arises what "payment" means. It means that the transaction is closed, and that both parties agreed that £100 was to be the actual sum the respondent was to be paid under the retainer. If one of the parties "pays himself" with money in his hands, it must be by mutual agreement, and he must not, if he has money in his hands, simply perform a unilateral operation by deducting a sum of money without any such agreement. The master must find whether or not the £100 was paid and accepted with the intention of satisfying that sum of 100 guineas under the retainer.

Appeal allowed.

Solicitors: *Cartwright & Cunningham*, for *Donnison & Edwards*, Liverpool; *Bentley & Jones*, for *Louis E. Menzies & Co.*, Liverpool.

[*Reported by* G. H. KNOTT, ESQ., *Barrister-at-Law.*]

COBB *v.* SAXBY

[KING'S BENCH DIVISION (Rowlatt, J.), June 17, 1914]

[Reported [1914] 3 K.B. 822; 83 L.J.K.B. 1817; 111 L.T. 814]

Highway—Access—Premises abutting on highway—Advertisements on wall—Right of owner to access to repair wall and exhibit advertisements on it.

The plaintiff and the defendant occupied adjoining premises abutting on a public highway. The side wall of the defendant's premises protruded beyond the frontage of the plaintiff's premises, and the defendant used this wall for displaying advertisements. The plaintiff affixed advertisement boards to his premises in such a way as to conceal from the public view the defendant's advertisements and to obstruct his access to the wall from the highway for the purpose of repairing it. In an action by the plaintiff against the defendant for a trespass the plaintiff's claim was admitted, but the defendant counter claimed, inter alia, for an injunction to restrain the plaintiff from continuing the board, or otherwise obstructing his (the defendant's) access to his property.

Held: the owner of premises abutting on the highway had a private right of access to the wall of the premises and to display advertisements on the wall; the plaintiff had obstructed these rights of the defendant; and, therefore, the defendant was entitled to the injunction asked for.

Notes. As to right of access by adjoining owners, see 19 HALSBURY'S LAWS (3rd Edn.) 78 et seq.; and for cases see 26 DIGEST (Repl.) 347 et seq.

Cases referred to in argument:

Ramuz v. *Southend Local Board* (1892), 67 L.T. 169; 8 T.L.R. 700; 26 Digest (Repl.) 348, *646*.

Tottenham U.D.C. v. *Rowley*, [1912] 2 Ch. 633; 82 L.J.Ch. 83; 107 L.T. 419; 57 Sol. Jo. 11, C.A.; affirmed sub nom. *Rowley* v. *Tottenham U.D.C.*, [1914] A.C. 95; 83 L.J.Ch. 411; 110 L.T. 546; 78 J.P. 97; 30 T.L.R. 168; 58 Sol. Jo. 233; 12 L.G.R. 90, H.L.; 26 Digest (Repl.) 321, *404*.

Beckett v. *Midland Rail. Co.* (1867), L.R. 3 C.P. 82; 37 L.J.C.P. 11; 17 L.T. 499; 16 W.R. 221; 26 Digest (Repl.) 524, *2009*.

Moody v. *Steggles* (1879), 12 Ch.D. 261; 48 L.J.Ch. 639; 41 L.T. 25; 19 Digest 66, *381*.

Benjamin v. *Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 26 Digest (Repl.) 484, *1703*.

Lyon v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; 46 L.J.Ch. 68; 35 L.T. 569; 42 J.P. 163; 25 W.R. 165, H.L.; 26 Digest (Repl.) 347, *641*.

W. H. Chaplin & Co., Ltd. v. *Westminster Corpn.*, [1901] 2 Ch. 329; 70 L.J.Ch. 679; 85 L.T. 88; 65 J.P. 661; 49 W.R. 586; 17 T.L.R. 576; 45 Sol. Jo. 597; 26 Digest (Repl.) 350, *661*.

Action tried by ROWLATT, J., without a jury.

The plaintiff was the freehold owner in occupation of No. 33, King Street, Margate. The defendant was the leasehold tenant of No. 35, the premises being adjoining. There was a space of some inches between the adjacent side walls. The frontage line of No. 35 was set forward on the footway 18 in. in advance of the frontage line of No. 33. In consequence, the side wall of No. 35 adjacent to No. 33 protruded beyond the frontage line of No. 33 and at right angles to it for a like distance of 18 in. In 1897, the defendant entered into the employ of the then tenant of No. 35, one Philpott, who was in the habit of pasting bills advertising his goods on this portion of the side wall. In 1900, the defendant bought from Philpott the business and the lease of the premises. The defendant thereupon removed the bills and exhibited his own name which was painted up. In 1910, strained relations between the plaintiff and the defendant, which had been in existence for some time, culminated in a quarrel, and shortly afterwards the plaintiff caused to be fixed on the front of his premises an advertisement board which, standing out at right angles to his front, completely obscured from view the defendant's name on the protruding side wall. The defendant pasted bills higher up on the wall so as to be above the advertisement board, but within a few weeks the plaintiff had a second board affixed directly above the first, which had the effect of totally concealing these bills. In October, 1913, the plaintiff removed the boards for the purpose of repainting his premises, and the defendant immediately made use of the protruding side wall for advertising some goods, namely, fireworks, of which, owing to the time of year, he was making a special feature in his business. Some of the plaintiff's employees washed these bills off, but the plaintiff said that the men were acting without his authority and made some apology. The plaintiff replaced the boards in the same position as before, and the defendant pasted on the lower one bills similar to those which had been washed off the wall by the plaintiff's employees. The plaintiff commenced an action claiming an injunction to restrain the defendant from committing any trespass on the lower board and an order for the removal of the defendant's advertisements thereon. The defendant apologised for the trespass on the board, undertook not to repeat it, and paid a sum of money into court. This was accepted by the plaintiff who was given leave to sign judgment on the terms of the undertaking with costs, but the defendant was given time to deliver a counterclaim. By his counterclaim, the defendant claimed damages for trespass for the removal of his bills from the wall by the plaintiff's employees, a declaration that the boards constituted a nuisance, an injunction to restrain the plaintiff from continuing the boards or otherwise obstructing the defendant's access to his property, and an order for the removal of the boards.

Disturnal, *K.C.*, and *P. B. Morle* for the defendant.
W. W. Mackenzie for the plaintiff.

ROWLATT, J.—This case raises an interesting point on which I have heard very excellent argument. I do not feel any difficulty about it any longer. The

facts are these: [His Lordship stated the facts, and continued:] I shall assume for the purposes of my judgment that No. 33 carries the title to the sub-soil of the piece of pavement which runs into that corner, for, on the view of the locality, it looks as though the piece of pavement was substantially the frontage of No. 33 and not of No. 35. The plaintiff says that he is entitled to maintain the boards there, at any rate, subject to some qualifications. What is the right that he claimed at the time that the counter-claim was launched on Feb. 10? About that time his solicitor was writing to the defendant's solicitor in reference to a suggestion made by them that the defendant was about to alter his premises and make an entrance at the corner of his premises adjoining No. 33, and, therefore, would require the removal of the boards. The plaintiff's solicitor wrote on Feb. 9:

> "If the boards have to be removed, they cannot be down indefinitely unless, of course, their reinstatement would constitute a breach of some legal right of your client which at present they do not."

Therefore, on that occasion, the plaintiff was not saying: "If you do put the door there I will still prevent your going out of it"; but he was saying: "The boards will be reinstated if they do not constitute an infringement of your legal right which they do not at present. They will have to go back there unless they obstruct an entrance." Therefore, I do not deal with this action on the evidence that the plaintiff was threatening to obstruct egress from any door on these premises. It would be much easier if I could, because it is quite clear that he could not obstruct the defendant in that way. But what does he claim? He claims in the first place to maintain these boards there so that the defendant cannot display anything he likes on the wall. And, secondly, that he will only take the boards down at reasonable times and on reasonable notice that the defendant wants to come there to repair his wall or for any other purpose.

That raises the question what is the right of the plaintiff in respect of this wall adjacent to the highway. I am of opinion that counsel for the defendant has made out his case as regards this. He says that there is an invasion here of a right which belongs to the defendant, a private right in respect of his contiguity to the public road. It is well settled by many cases that the owner of land bordering on a highway has a private right of passing from his premises on to the highway, and that, if he sues for obstruction of that right, he is not in the position of a member of the public suing for an obstruction of the highway which specially affects him, but is simply suing for an obstruction of his private right. No authority has been produced to say so precisely, but I am of the opinion that the owner of premises abutting on the highway has precisely the same right in respect of a wall as he has of a door. Whether he wants to come to the wall to do anything to it, or whether he wants to display anything on the wall for the purpose of advertisement, I certainly hold he has a right to do both these things, and that, if either of these rights is invaded, an action by him lies. Take the case of a man who has a shop window in which his wares are displayed for sale or, what is practically the same thing, of a man who, instead of a window, has a wall on which pictures or advertisements of his wares which are for sale are displayed. In either case it is to his interest that the public on the road should be able to look into his window or on his wall, as the case may be. It seems to me that he has a right which is invaded if the public are prevented from so doing. To my mind it would be quite unthinkable to suppose that a person could come and hold up a screen in front of a man's shop window or advertisement hoarding so that the public could not look on it, and then say: "I have invaded no right of yours because I have not prevented you coming out of your house or anyone going into it." It seems to me that it is quite impossible that that could be the law, and I think that

the defendant is entitled to succeed on the counterclaim. I shall, therefore, enter judgment for the defendant on the counterclaim.

Judgment for defendant on counterclaim.

Solicitors: *Patersons, Snow & Co.*, for *K. & W. Daniel*, Margate; *Frank Daphne*, for *Leonard Hill*, Margate.

[*Reported by* G. F. L. BRIDGMAN, ESQ., *Barrister-at-Law.*]

WIFFEN *v.* BAILEY AND OTHERS

[COURT OF APPEAL (Buckley, Phillimore and Pickford, L.JJ.), November 17, 18, 1914]

[Reported [1915] 1 K.B. 600; 84 L.J.K.B. 688; 112 L.T. 274; 79 J.P. 145; 31 T.L.R. 64; 59 Sol. Jo. 176; 13 L.G.R. 121]

Malicious Prosecution—"Prosecution"—Complaint before justices—Public health —Nuisance—Failure to comply with abatement notice—Complaint by local authority against plaintiff—Dismissal by justices—Matters to be proved by plaintiff in action for malicious prosecution.

The plaintiff, occupier of a house, having made default in complying with a notice to abate a nuisance, was brought before justices on a complaint made by the sanitary inspector on the instructions of the local authority. The justices dismissed the complaint, and awarded the plaintiff 5 guineas costs. In fact the plaintiff had incurred further costs in connection with his defence as between solicitor and client. In an action for malicious prosecution brought by the plaintiff against the inspector and the local authority,

Held: the action would not lie because the plaintiff had not proved (i) that, owing to the nature of the proceedings taken against him, damage to his fame, as if the matter of which he had been accused was scandalous, had resulted, nor (ii) that his life, limb or liberty had been endangered, although, if he had been fined and failed to pay the fine, he might have been imprisoned, nor (iii) pecuniary damage, for the difference between solicitor and client costs and party and party costs was not legal damage.

Rayson v. *South London Tramways Co.* (1), [1893] 2 Q.B. 304, distinguished.

Notes. Applied: *Berry* v. *British Transport Commission*, [1960] 3 All E.R. 322. As to evidence in proceedings for malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 353 et seq., and for cases see 33 DIGEST 478 et seq.

Cases referred to:

(1) *Rayson* v. *South London Tramways Co.*, [1893] 2 Q.B. 304; 62 L.J.Q.B. 593; 69 L.T. 491; 58 J.P. 20; 42 W.R. 21; 9 T.L.R. 579; 37 Sol. Jo. 630; 4 R. 522, C.A.; 33 Digest 470, *36.*

(2) *Savile* v. *Roberts* (1698), Carth. 416; 1 Ld. Raym. 374; 1 Salk. 13; 3 Salk. 16; 5 Mod. Rep. 394; 12 Mod. Rep. 208; Holt. K.B. 150, 193; 91 E.R. 1147; sub nom. *Roberts* v. *Savill*, 5 Mod. Rep. 405; Holt, K.B. 8; 33 Digest 507, 510.

(3) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.T. 249; 31 W.R. 668, C.A.; 33 Digest 468, *21.*

(4) *Byne* v. *Moore* (1813), 5 Taunt. 187; 1 Marsh 12; 128 E.R. 658; 33 Digest 469, *26.*

(5) *R.* v. *Whitchurch* (1881), 7 Q.B.D. 534; sub nom. *Re Nottingham JJ., Ex parte Whitchurch*, 50 L.J.M.C. 99; sub nom. *Ex parte Whitchurch*, 45 L.T. 379; 46 J.P. 134; 29 W.R. 922; sub nom. *Re Whitchurch Ex parte Nottingham JJ.*, 45 J.P. 617, C.A.; 14 Digest (Repl.) 29, *11*.

(6) *Ogden* v. *Turner* (1704), 6 Mod. Rep. 104.

(7) *Hellwig* v. *Mitchell*, [1910] 1 K.B. 609; 70 L.J.K.B. 270; 102 L.T. 110; 26 T.L.R. 244; 32 Digest 48, *553*.

(8) *Freeman* v. *Arkell* (1824), 2 B. & C. 494; 3 Dow. & Ry. K.B. 669; 2 L.J.O.S.K.B. 64; 107 E.R. 467; 33 Digest 507, *501*.

(9) *Greenlands, Ltd.* v. *Wilmshurst and London Association for Protection of Trade*, [1913] 3 K.B. 507; 83 L.J.K.B. 1; 109 L.T. 487, C.A.; on appeal, sub nom. *London Association for Protection of Trade* v. *Greenlands, Ltd.* [1916-17] All E.R. Rep. 452; [1916] 2 A.C. 15; 85 L.J.K.B. 698; 114 L.T. 434; 32 T.L.R. 281; 60 Sol. Jo. 272, H.L.; 32 Digest 120, *1521*.

Also referred to in argument:

Henly v. *Burstall* (1669), 1 Vent. 23; T. Raym. 180.

Mellor v. *Denham* (1879), 4 Q.B.D. 241; 48 L.J.M.C. 113; 40 L.T. 395; 43 J.P. 381; 27 W.R. 505; 19 Digest 571, *109*.

A.-G. v. *Bradlaugh* (1885), 14 Q.B.D. 667; 54 L.J.Q.B. 205; 52 L.T. 589; 49 J.P. 500; 33 W.R. 673, C.A.; 14 Digest (Repl.) 29, *16*.

R. v. *Paget* (1881), 8 Q.B.D. 151; 51 L.J.M.C. 9; 45 L.T. 794; 46 J.P. 151; 30 W.R. 336, D.C.; 14 Digest (Repl.) 28, *7*.

Seaman v. *Burley*, [1896] 2 Q.B. 344; 65 L.J.M.C. 208; 75 L.T. 91; 60 J.P. 772; 45 W.R. 1; 12 T.L.R. 599; 40 Sol. Jo. 684; 18 Cox, C.C. 403, C.A.; 14 Digest (Repl.) 609, *6037*.

Appeal by defendants from a decision of HORRIDGE, J., on further consideration of an action tried by him with a jury, reported [1914] 2 K.B. 5.

An action for malicious prosecution was brought by the plaintiff against the defendants, who were respectively the sanitary inspector for the Romford Urban District Council, and the council. Some of the rooms of the house occupied by the plaintiff at Romford were in a dirty condition, and the plaintiff's wife wrote to the sanitary inspector inviting him to inspect the premises, and requesting his assistance in compelling the landlord to clean and repair them. The sanitary inspector accordingly came and viewed the premises, and, having done so, served on the plaintiff a notice under s. 94 of the Public Health Act, 1875 [see now s. 93 of Public Health Act, 1936], to the effect that the condition of the premises amounted to a nuisance, and requiring him to abate it. The plaintiff failed to comply with the notice, alleging that, if a nuisance existed, it was the duty of his landlord to abate it, and the sanitary inspector, upon the instructions of the Romford Urban District Council, preferred a complaint against the plaintiff, under s. 95 of the Public Health Act, 1875 [s. 94 of the Act of 1936], to compel him to abate the nuisance. The justices dismissed the complaint and awarded the plaintiff £5 5s. costs. In addition to this sum, the plaintiff had incurred further costs to the extent of £5 15s. as between solicitor and client in defending himself. The plaintiff brought the present action against the defendants, alleging that he had suffered damage by being injured in his reputation, and by having been put to expense in defending himself against the proceedings taken against him. The jury found (i) that the defendants did not take reasonable care to inform themselves of the true facts of the case; (ii) they did not believe the case as laid before the justices; (iii) they were induced by indirect motive in preferring the charge; (iv) the defendant Bailey was not acting bonâ fide under the directions of the defendant council for the purpose of executing the Act of Parliament; (v) the necessary and natural consequence of the prosecution was to damage the plaintiff's fair fame. They awarded the plaintiff £250 damages as against the defendant council only. HORRIDGE, J., ruled that the defendants had no reasonable and

probable cause for taking the proceedings, and gave judgment for the plaintiff against both defendants as joint tortfeasors. The defendants appealed.

By s. 95 of the Public Health Act, 1875:

"If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified . . . the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction."

By s. 96:

"If the court is satisfied that the alleged nuisance exists . . . the court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose. The court may by their order impose a penalty not exceeding £5 on the person on whom the order is made. . . ."

Compston, *K.C.*, and *H. Maddocks* for the defendants.—The action was not maintainable as the plaintiff has not suffered such damage as will support an action for malicious prosecution under the three heads laid down by HOLT, C.J., in *Savile* v. *Roberts* (2), for there is no damage to the plaintiff's reputation, or his liberty, or his property. It is true that an indictment will often, though not always, involve damages of this nature—but the charge must be such as is prejudicial to the reputation of the person charged. An action, it is submitted, would not be maintainable in respect of a false indictment for non-repair of a highway, or for an offence punishable, as here, only by fine, unless it involved some serious imputation on the plaintiff's fair fame. In *Rayson* v. *South London Tramways Co.* (1) it was held that proceedings taken under s. 51 of the Tramways Act, 1870, were proceedings in respect of a criminal offence, so that an action for malicious prosecution would lie against the persons taking them; but there, although the punishment was limited to a fine, the offence charged imputed grave dishonesty to the plaintiff. In *Quartz Hill Gold Mining Co.* v. *Eyre* (3) it was held that an action would lie for falsely and maliciously, and without reasonable and probable cause, presenting a petition under the Companies Acts, 1862 and 1867, to wind-up a trading company, even though no pecuniary loss or special damage resulted to the company, but there the presentation of the petition was specially calculated to injure the credit of the company. In the present case the prosecution threw no discredit on the fair fame of the plaintiff, for he was liable to be served with the notice merely as occupier, and the condition of the premises, if they had been insanitary, might well have been no fault of his. Secondly, the plaintiff's liberty was not endangered; it is true that he might eventually have been fined, and, in default of distress, been imprisoned, but the imprisonment would have been merely the consequence of the default of distress, and the danger to liberty was not of the nature contemplated by HOLT, C.J., in *Savile* v. *Roberts* (2). There was no evidence of malice or of an absence of reasonable and probable cause. Further, the finding of the jury was against the weight of the evidence, and the damages were excessive.

G. W. H. Jones and *A. Crew* for the plaintiff.—The offence charged was criminal in its nature. The charge also involved damage to the plaintiff's fair fame and liberty. An action for malicious prosecution lies for any charge that involves damage. Here the charge was criminal and involved damage, and that is all the plaintiff had to prove. It is immaterial that the damage to reputation might be insufficient to support an action for slander; it is sufficient that the charge was such as to hold the plaintiff up to hatred, contempt, or ridicule, and to say that a man is living in a house no decent man would live in, and that he is responsible

for that state of things, is an imputation on his fair name. Secondly, the plaintiff's liberty was endangered, for he might have been fined, and, in default of distress, have been imprisoned, and the imprisonment would have resulted from the charge. The offence charged here is criminal in its nature, and, although it is liable to be punished only by fine in the first place and not by imprisonment, yet the charge will support an action for malicious prosecution. There was evidence of malice, and of an absence of reasonable and probable cause, and the damages in the circumstances were reasonable.

BUCKLEY, L.J.—In this action the plaintiff sues for damages for malicious prosecution. The defendants in the action are two—George Randall Bailey, who was the inspector of nuisances of the Romford Urban District Council, and the Romford Urban District Council, who are his co-defendants. The origin of the action was this. The plaintiff and his wife—being occupiers of a house, No. 48, Western Road, Romford—the wife, on April 1, 1913, wrote a letter addressed to the sanitary inspector complaining that the sewerage had been through the larder of their house five times, that the larder was never repaired and was in a terrible state, and that one of the ceilings was going. She asked the inspector to come to their assistance. The result was that Mr. Bailey went within a couple of hours of the receipt of the letter, and examined the house. On April 3 he wrote a letter, and at the same time served a notice. The notice was under the Public Health Act, 1875, addressed to Ashby Wiffen, that is, the husband, the occupier of No. 48, Western Road, Romford, and stated that the council, being satisfied of the existence of a nuisance at the house, arising from the want of cleansing of the two front rooms, ground floor, the kitchen, passage, pantry, and bathroom, required that within twenty-one days from the service of the notice the same be abated. The works required are described as

> "to strip paper off walls of front rooms, kitchen, passage, and bathroom, and cleanse and distemper ceilings and walls of front rooms, kitchen, pantry, passages, and bathroom, and cleanse and distemper ceilings of front bedrooms."

I need only particularly refer to the one item of the pantry on which some question has arisen. When Mr. Bailey, the inspector of nuisances, gave that notice, he had not received from the council authority to give it. As a result of it certain repairs were done. The landlord instructed a Mr. Dowsing, who was a member of the council, and who was in the chair at the meeting I am going to mention presently, to do the repairs with regard to the pantry, and the pantry repairs were done some time before, I think, April 24 or 25.

In that state of facts on April 25 Mr. Bailey reported to the general purposes committee of the defendant council in these terms:

> "48, Western Road. In consequence of complaint I visited the above premises on the 1st inst., and on the 3rd inst. notice was served on the occupier requiring him within a period of twenty-one days to strip the paper off the walls of the two front rooms, kitchen, passage, and bathroom, and to cleanse and distemper the ceilings and walls of the said rooms, passage and kitchen, these being in a very dirty condition. The notice has not yet been complied with, and I ask you to confirm the notice and give instructions for the necessary proceedings to compel compliance."

This was the first moment at which the matter had come before the council, or the committee of the council, as distinguished from Bailey, the sanitary inspector. That being before them on April 25, this recommendation was made by the general purposes committee:

> "That the notice served upon the occupier of 48, Western Road to cleanse the premises in his occupation be confirmed, and that the necessary proceedings be taken to enforce such notice unless the same is duly complied with."

A On May 21 a summons was issued. It recited the notice at length, including the pantry, and then it says:

> "These are further to command you to appear at the police court before the justices to answer to the said information and to be further dealt with according to law."

B So that the summons set out the notice, including the pantry, and called upon the party to attend before the justices and answer to the information which said that he had not done the works which were required in the notice. On May 29 that summons was heard before the justices, and they dismissed it and ordered the payment of 5 guineas costs to the plaintiff.

C On June 18 the writ was issued in the present action for damages for malicious prosecution. The action was tried on Dec. 19 and resulted in certain findings of the jury, to which I will refer presently, and judgment for a sum of £250 damages given against both the council and Bailey. The questions which have been argued before us are three. First, was this action under the circumstances maintainable at all? That is the question which I propose first to discuss. An action for malicious prosecution will lie under circumstances which were stated by

D LORD HOLT in *Savile* v. *Roberts* (2). HOLT, C.J., there says (12 Mod. Rep. 208):

> "There are three sorts of damages, any one of which is sufficient to support this action. First, damage to his fame, as if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses."

E The principle upon which the action is maintainable is that it falls within some one of those three heads. An action for malicious prosecution is not confined to the case of criminal proceedings. It may extend to civil proceedings, but, as was pointed out by BOWEN, L.J., in *Quartz Hill Gold Mining Co.* v. *Eyre* (3), it is in very few cases that an action for malicious prosecution will lie where the matter be one in civil proceedings, and the lord justice gave this reason for it (11 Q.B.D.

F at pp. 689–690):

> "It is clear that HOLT, C.J., considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action,

G although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings

H in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared; if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action."

So the reason of the exception of civil proceedings is that in civil proceedings the

I poison and the antidote are presented simultaneously—the man is never injured because the publicity of the proceedings is accompanied by the refutation of the charge which is made against him. If there be no scandal, if there be no danger of imprisonment, if there be no damage, the action will not lie. I think MANSFIELD, C.J., said as much as that in *Byne* v. *Moore* (4), for he says this (5 Taunt. at p. 191):

> "I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any [damage]. I can understand the ground

upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it; this bill was a piece of mere waste paper."

So that what one has to examine for the purpose of seeing whether the action will lie is this: Is there, within the first head, scandal—damage to fame? Is there, within the second head, danger of imprisonment? Or is there, within the third head, damage? Now damage here is out of the question; there is no pecuniary damage whatever. There is no damage to the plaintiff; I need not say that although he only recovered 5 guineas for his costs, and his costs, no doubt, were larger, the difference between solicitor and client costs and party and party costs is not legal damage, so that there is no damage at all, and the action must fail under that head.

Does it fall under the second, damage to his person whereby he is imprisoned? Upon that the matter stands thus. The proceeding was under the Public Health Act, 1875. The result, if the summons had succeeded, would have been that a fine would have been imposed; if that fine had not been paid Jervis' Act would apply, a warrant of distress would be issued, and in default of assets found under the distress for satisfaction of the fine the man could be imprisoned, and in that sense the summons might have resulted in imprisonment; in no other sense could it result in imprisonment. It seems to me that that certainly does not satisfy the second head. Imprisonment is not any test of whether a matter is criminal or not. Almost any proceeding may result in imprisonment. A common action of debt resulting in a judgment or order for payment by instalments resulting in imprisonment under the Debtors Act does not. Because a proceeding may ultimately result in imprisonment, it does not mean that it is one to satisfy LORD HOLT'S second head of injury to the person whereby he is imprisoned, for he is not imprisoned by virtue of the proceedings. Imprisonment is only an ultimate result which may result from his not complying with the obligations upon him to pay the money. For these reasons it does not fall under LORD HOLT'S second head.

It remains for consideration whether it falls under the first head. Did the summons result in injury to the plaintiff's fame, as if the matter whereof he be accused be scandalous? It seems to me, referring to what BOWEN, L.J., says, that it is necessary to show that damage to his fair fame is the necessary and natural consequence of bringing the action. You must show that injury to his reputation necessarily and naturally results from the proceeding which has been taken. How does the matter stand with regard to that? It is said that this is a criminal proceeding. I agree in a sense it is a criminal proceeding. It is a proceeding to impose a fine for failure to comply with a statutory obligation; it might have been a common law obligation resulting in a common law liability, or it might be a statutory obligation resulting in a statutory liability. Whether it be either the one or the other, it is, in a sense, I agree, criminal, for instance, as was held in *R.* v. *Whitchurch* (5), it may be in a criminal cause or matter so as not to be appealable, but that does not determine it at all. In *Rayson* v. *South London Tramway Co.* (1) it was held that an action for malicious prosecution would lie. That case, in my opinion, is entirely distinguishable. What was imputed there by the prosecution was that the man was a cheat, that he had got into a tramcar with intent to avoid payment of his fare. That was a breach of a statutory obligation, but the imputation upon him there was that he was a common cheat, that his intention was to escape a liability, and ride in a tramcar without paying his fare. It appears to me that that is no authority in the present case. The matter, therefore, I agree, is, in a sense a criminal one.

That, however, does not conclude the question. I have to see whether the imputation which was conveyed by these proceedings was one which naturally and

A necessarily affected the plaintiff's fair fame. Of course, there are many proceedings, e.g., for obstructing a highway, or, as was put in one of the cases, for keeping a pig in an improper place, which may be made the subject of proceedings, and which, in the sense in which I have used the word, are criminal, but no one could say a man's fair fame is affected because he was summoned for keeping a pig in an improper place, or because he allowed his dog to leave his house after nightfall B without a muzzle. There is no imputation against fair fame at all in such a case; you have to look at the reason of the proceedings to see whether they necessarily or naturally impute misconduct, and affect the defendant's fair fame, and causes damage to his fair fame. What was it that was said here? It was said that these people were occupiers of a house, and that the house was, in certain respects, not in such repair as was necessary for the purpose of health under the Public Health C Act, and that notice was served on the occupier. Let us look at s. 94 of the Act, and see what it is:

> "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or con- D tinues, or if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises."

So a notice of this sort may be served upon a person who is not responsible in the smallest degree for the state of repairs in which the premises are found. He may have gone into occupation the day before, or the week before, and the circumstances may be such that he is properly served because the person by whose act, default, E or sufferance the nuisance arises, or continues, cannot be found. How can the serving of a notice in such circumstances affect his fair fame? There is no evidence to show that these proceedings, originating in the act of the plaintiffs themselves writing the letter of April 1 affected their fair fame in any respect. It seems to me that under these circumstances the plaintiffs have not succeeded in showing that the circumstances were such as that any one of LORD HOLT'S three heads F under which the action is maintainable is satisfied. For these reasons I think this action fails, and cannot be maintained.

At this point I might stop, because that disposes of the case, but I want to say that the jury have arrived at certain findings as to which, I think, there is very good reason to say they were against the weight of evidence, and, beyond that, it appears to me that they were quite inconsistent findings. What they found G was that neither of the defendants took reasonable care to inform themselves of the true state of the case. All that can be said about that is that when the general purposes committee met they acted upon the report of their sanitary inspector, Mr. Bailey, without any notice that his report was not a proper one, and that they did not ask for the notice and find that there had been this pantry included in the notice, and that the report did not go to show that H the pantry still wanted to be attended to. To my mind, there is nothing at all in that. The pantry had been done in the interval, and, therefore, the requirement to comply with the notice would have been met by showing that the pantry had already been done, and the obligation was to do what remained. Then the jury went on to find that the defendants did not, nor did either of them, honestly believe the case they laid before the magistrate. With very great respect I do not I find any evidence in support of that. There is nothing to impeach the honesty of the defendants in the matter. Bailey went and reported. He may have made a mistake, and, having regard to the result of the summons, I suppose I must say he did make a mistake, but there is nothing to attack his honesty, and the council themselves, acting upon Bailey's report, so far as it appears, were acting perfectly honestly. All that is said to the contrary of that is that Dowsing, who had done the repairs to the pantry, was in the chair on April 25. He was one of a very much larger body; a body who, with or without the assistance of Dowsing, had a right

to act in the matter. The jury then found that the defendants were, both of them, actuated by an indirect motive in preferring the charge. They found that Bailey, under the direction of the council, was not acting bonâ fide for the purpose of executing the Act, and then they went on to find that it was a necessary and natural consequence of the prosecution to damage the plaintiff's fair fame. Upon that I have said what I have to say, so that, even if I were not of opinion that the action was not maintainable, I should have thought that the verdict could not stand as it was against the weight of evidence.

The third point is in regard to the damages. The damages were assessed at £250, and I do not see anything to justify such a figure as that. Not only so, but the jury found damages against the defendant council, and not against Bailey—that is to say, they must, I suppose, have absolved Bailey from having taken any part in a proceeding wrongful towards the plaintiff which exposed him to damages, and yet they had found that Bailey was not acting bonâ fide for the purpose of executing the Act. How those answers can be reconciled I do not know. The result of the argument upon further consideration was that a judgment was given both against the council, against whom the jury had found a verdict, and against Bailey, against whom they said they did not find a verdict. That, again, I should have thought it was impossible to sustain. However, I rest my judgment on that on which I first expressed my opinion—the action is not maintainable at all. In the circumstances in my judgment the appeal must be allowed, and the action be dismissed with costs.

PHILLIMORE, L.J.—I agree. I take it that this was a criminal prosecution, or a prosecution in a criminal matter, but that is not sufficient to support an action for malicious prosecution. The three canons laid down by LORD HOLT in *Savile* v. *Roberts* (2) have been accepted. They were especially referred to by BOWEN, L.J., in *Quartz Hill Gold Mining Co.* v. *Eyre* (3), and the three canons, or conditions, of such an action are that there must be damage to the plaintiff's fame as if the matter whereof he is accused be scandalous; damage to his person as where a man is put in danger to lose his life or limb or liberty; and damage to his property as when he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. That was held to be the case in *Savile* v. *Roberts* (2) and, therefore, in that case the action was held to lie. Dealing with the last point, the only charges here are the difference between the costs allowed the plaintiff by the magistrate and his possible additional costs in defending this action, and, at any rate, as far as this court is concerned, we are bound to hold, and I see no reason to differ from it, that those are not legal damages.

Then was this a case where the plaintiff was put in danger to lose his life or limb or liberty? In my view, it was not. It is quite true that if, upon the hearing of the summons, an order had been made against him, and if he had been fined and ordered to pay costs, or ordered to pay costs, and did not pay, in the absence of sufficient distress found upon his premises he might have been sent to prison, but that very remote consequence of prison is not the kind of danger to life or limb or liberty to which LORD HOLT was referring in *Savile* v. *Roberts* (2). Many civil actions even now, and most civil actions before the Act for the abolition of imprisonment for debt, might end in restraint of a man's liberty if he either could not, or would not, pay damages, or the amount of the debt and the costs awarded against him. That has never been considered as sufficient to support a suggestion that the man's liberty is put in peril. Every case where an injunction is obtained against an individual might lead to a motion for committal for contempt, and to the defendant being sent to prison. The analogy of actions for slander is, BOWEN, L.J., says in the case I have referred to, very close. I do not say that *Ogden* v. *Turner* (6) and *Hellwig* v. *Mitchell* (7) show that, though an action for slander will lie where the words are such as to impute a crime, that word "crime" must be specially defined and restricted, and mean the kind of crime which will end in

A imprisonment, and not the kind of crime which will only end in a fine, though that fine can, like every debt to the King, be enforced by restraint of the person. Therefore I think that condition is not satisfied. Then comes the remaining cause, damage to a man's fame as if the matter whereof he is accused is scandalous. In the report of *Savile* v. *Roberts* (2) at 1 LORD RAYMOND 374 the same, in substance, appears. LORD HOLT says there is no scandal in the crime for which the B plaintiff in the original action was indicted. He was indicted on two indictments for having, on two separate days, with a number of other persons, riotously assembled and stopped with posts, fences, and bars a road which belonged to the prosecutor Savile, and which he used for carrying his tithes of grain and hay. I do not know exactly what facts were proved under that case, but LORD HOLT says, very summarily, that there was no scandal in the crime for which he was C indicted. It seems to me that what one must look at is not what might be proved in the course of a prosecution, but what is enough to support a conviction upon the information or indictment laid, and if it will be enough to support a conviction upon the information and indictment that the defendant has done something which does not injure his fair fame, no scandal is involved in the prosecution.

In this case the only complaint is, that being the occupier of premises, and D having had a notice served upon him to strip off paper, and cleanse in other ways those premises, he has not, within twenty-one days complied. It does not follow that he is responsible for the condition of dirt in the premises; nor that he has been responsible for any appreciable time. It is merely that, in the absence of any other person obviously responsible, he has, under s. 94 of the Public Health Act, been served, as being the occupier. It seems to me it would be going far too far to E say that that kind of prosecution involves a scandal. In this connection I would refer to two cases which have been cited, *Byne* v. *Moore* (4) and *Freeman* v. *Arkell* (8). I am aware that probably in both those cases the matter on which the case was finally tried was the presentment of a bill of indictment which the grand jury ignored, so that it never ripened into an indictment. I do not think that makes any difference. In some way it operates more favourably for the person com- F plaining of malicious prosecution, because the antidote which BOWEN, L.J., speaks of can never be applied because the defendant to the indictment is never put upon his defence, his bill having been thrown out by the grand jury. Be that as it may, in those cases, though the procedure had reached a much earlier stage, and never gone further, the courts treated the rule about scandal as equally apply- G ing, and they said that the charges in those cases, one of which was a charge of assault, were not such as necessarily to involve scandal.

No doubt in this connection one has to consider *Rayson* v. *South London Tramway Co.* (1). I quite agree that there is a general language in the course of the judgment delivered on behalf of the court by the Master of the Rolls which seems to eliminate the question of scandal altogether, but one must remember what was H the point to which the court was addressing itself, and what was the only point to which the argument of the unsuccessful appellants was addressed. It was not contended, and, of course, could not be contended, that the prosecution did not involve the fair fame of the defendant, because it was a charge of cheating. The only successful point that could be taken was that it was not a criminal prosecution, and it is to that to which the argument addressed itself, and it is to that to I which the judgment applied. It may be unfortunate that it did not occur to some member of the court that a cautela should be inserted with regard to the special circumstances of the case. When one reads the report one sees that the point of scandal was not present to the mind of the court, because it was a point of no importance in that case. If it was a criminal prosecution, then it was a scandalous criminal prosecution. I think it is extremely likely that the word "scandal," at any rate at the time of LORD HOLT, had a very technical meaning. It was during the days of the action or proceeding which appears to be criminal as well as civil, called scandalum magnatum, and during the time when I have

the authority of LORD ELDON for saying (it is as old as TYTHERIDGE's reports) that exceptions for scandal in an answer was a known proceeding in the Court of Chancery. Be that as it may, either the word "scandal" meant a technical scandal which was then known to the law, in which case this Case does not come within it, or it meant, as, I think, the later cases show, something derogatory to the fair fame of the person prosecuting, as to which, guided by the decisions and applying one's own common sense, I should say that there was no imputation in this case.

I do not think it necessary to refer at greater length to the decision in *Quartz Hill Gold Mining Co.* v. *Eyre* (3). That, no doubt, shows that there are not only criminal prosecutions, but also forms of civil procedure—very narrow ones, in which, as the court says, the bane comes before the antidote, and mischief may be done which will be too late to overtake afterwards—to which the principles of malicious prosecution will apply. I think that SIR HERBERT STEPHEN is right when in his book on malicious prosecution he treats that class of case, with actions for improperly making a person bankrupt, and some other similar ones, as not cases of malicious prosecution, but as being analogous to cases of malicious prosecution.

Upon the whole I come to the conclusion that this was not the kind of case to which the law with respect to malicious prosecution applied. I cannot help thinking that the element of costs bulked very largely in the action of malicious prosecution. If the subject when prosecuted by the Crown could have recovered his costs for defending himself—as he can now, at any rate, in certain cases—I doubt very much whether the action for malicious prosecution would ever have been allowed to flourish. Be that as it may, the element of cost not coming in here, and the element of imprisonment not coming in here in any direct way, I think there is not that element of scandal which is sufficient to support an action in this case, and, therefore, I agree that there should be judgment for the defendants.

I want to add something as to the other part of the case. After the argument of counsel for the plaintiff I am not prepared to say that there was no evidence to go to the jury of an absence of reasonable and probable cause, but I cannot say that I think the trial and its result are satisfactory. I think it is quite possible that a much undue prominence was given to the double position of Mr. Dowsing. I think there was a misconception as to which Act of Parliament was referred to by the wife of the plaintiff and Bailey in their conversation, and to my mind it is clear that the surveyor was explaining that he could not treat that house as he did another one, because the Housing and Town Planning Act did not apply, as the rent was too large, and that, unfortunately, it got into the head, I think, of the judge—and, at any rate, it was presented in such a way as to get into the head of the jury—that the surveyor was saying that he could not use the Public Health Act because the premises were not dirty, while all the time he was using it to compel the premises being cleaned. I do not say that that would be enough to make me say that the trial was unsatisfactory, but the jury by their verdict show that they did not understand, and pains were not taken to make them understand the real nature of the case; that they should at one moment say that Bailey had been guilty of want of bonâ fides and had taken a part in this prosecution, and at another moment say that he was to pay no damages because they thought the real truth was that he had not been properly supervised, or because they thought that his masters were really responsible, is enough to show that they were prepared to find a verdict against the public body at the suit of a private individual, and not allow any private individual to suffer. I think that is sufficient indication that this verdict could not stand. Another reason is, and I quite agree with what has been said, that the damages were obviously excessive.

Lastly, the judgment could not stand, and possibly the verdict could not stand by reason of the fact that separate damages were assessed by the jury in respect of the urban district council and in respect of Bailey. As to that I think the plaintiff was in a dilemma. Either it is a joint tort, and then the ruling which his counsel

quoted in the decision of *Greenlands, Ltd.* v. *Wilmshurst* (9) applied, and the damages ought to be the same, and there must be a new trial because the damages are not the same, or it is a separate tort in each case, and then they ought not to have been the subject of one action; and, at any rate, Bailey having done no damage, and the gist of this action being damage, he ought to have had a verdict entered for him and judgment given for him. It was suggested that the jury might make a distinction between the damages against Bailey and the damages against the urban district council in this manner. They might say: "The damages that the plaintiff is entitled to are £250, and we say that one particular defendant ought to pay them." If that could be said, it seems to me that that would fall within the decision of *Greenlands* v. *Wilmshurst* (9) and would be wrong, but you cannot say that in an action of this kind. Full damages of the plaintiff in an action for malicious prosecution are not necessarily his out-of-pocket expenses, or things which can be measured by a figure. They are compounded of his loss, and the defendants' conduct and either all the defendants are equally tortious, in which case the damages must be paid equally by all of them, or they are not equally tortious, and then one of them ought to be dismissed from the action. Therefore for all these reasons I agree that the appeal should be allowed.

PICKFORD, L.J.—I am of the same opinion. The only ground for the maintenance of this action which I think it is necessary to consider, is that the prosecution, as a necessary and natural consequence, would impair the fair fame of the plaintiff in this case. The learned judge has decided that it would, and I must say that, looking at the authorities, I think it would have been very difficult for him to have decided anything else. I do not say that he might not perhaps technically have escaped from the reasoning of the Master of the Rolls in *Rayson* v. *South London Tramway Co.* (1), because the decision did not go anything like so far as the reasoning, but I doubt whether the learned judge, sitting in a court of first instance, could very well disregard the reasoning of the Master of the Rolls in that case. That reasoning does in fact amount to this, that if there be a prosecution for something that is a breach of a statutory obligation, and, therefore, if it were not for a special penalty, a misdemeanour at common law, then in spite of there being a special penalty imposed by the particular Act that prosecution does reflect on the fair fame of the person who is prosecuted. That seems to me to have been LORD ESHER'S reasoning. As I say, I doubt very much if it were possible, or at any rate reasonably and practically possible, to escape following it, but I think that in this court we are entitled to look to see whether we approve of the reasoning as well as of the decision in that case.

The decision in that case may be quite right, that the prosecution of a man for attempting to evade payment of his fare in a tramcar is a prosecution for a thing which does reflect upon his character, and is a prosecution for an act of dishonesty. The decision, therefore, is perfectly correct, but the statement that wherever there has been a breach of a statutory duty a prosecution for that necessarily reflects upon the fair fame of the person prosecuted is a proposition which, in my opinion, cannot be maintained although, as I have said, the learned judge was probably bound to follow the decision.

Considering the matter apart from that state of things it seems to me that what you have to look at is this—not the facts that might be proved in order to support the prosecution, but at the charge itself that is made by the prosecution, and see whether that charge of itself as a necessary and natural consequence impairs the fair fame of the person against whom it is made. It has been pointed out and admitted that everything which is punishable by a fine does not necessarily reflect upon the fair fame of the person prosecuted. There are prosecutions for not carrying a light on a bicycle, for keeping a pig in the wrong place, and for many things of that kind which would not be said by anybody of common sense to reflect

upon the fair fame of the person prosecuted. It is possible in every one of those cases that there might be evidence given which would raise some imputation against the person charged, but that is not what you have to look at. You have to look at the charge itself. In this case the charge is that the plaintiffs were duly served with a notice by the urban sanitary authority as occupiers of certain premises within twenty-one days of service of the notice

> "to strip paper off walls of front rooms, kitchen, passage, and bathroom, and cleanse and distemper ceilings and walls of front rooms, kitchen, pantry, passage, and bathroom, and cleanse and distemper ceilings of front bedrooms."

Does that necessarily impute anything against the fair fame of the plaintiff? It seems to me that it does not. As has been already pointed out, if a man is served as occupier it does not necessarily mean that the state of the house was due to his act or default at all. He may have only just come into possession. There may have been, I think it was suggested, a strike of workmen, and there may have been a number of things which would cause him to fail to comply with the notice, but which would not impute anything against his fair fame. That is what we have to look at. Perhaps it was intended—I do not know that it was—but perhaps it was intended by the prosecution to prove it at the trial that it was the plaintiff's fault, and that he had allowed this to remain in an insanitary condition for years. They may have intended to prove that, or they may not. We have to look at the summons, and the summons does not seem to me as a necessary and natural consequences to impute anything against his fair fame. Therefore I think that this action cannot be maintained.

With regard to the question of a new trial, if it were necessary to consider it, I should be of opinion that there should be a new trial, not because I think there was any misdirection of any sort in law to the jury, and not because I think the confusion about which Act the sanitary inspector was referring to really had any substantial effect upon the verdict of the jury, but because I think the jury went so wrong. The jury found that both these defendants, the sanitary inspector and the urban district council, were responsible. When I say the jury went so wrong, I am not saying that as meaning necessarily that their verdict was so perverse that it must be set aside as being against the weight of evidence, but I mean they went so wrong in their inconsistent and almost unintelligible findings. They found that, as I have said, both the defendants were responsible. They found that the defendant Bailey had not acted bonâ fide in the matter. They then proceeded to award £250 damages against the defendant council and nothing at all against Bailey. If the defendants were engaged in a joint tort the jury could not do that, and it looks, if there were nothing more, inconsistent with their finding that he did not act bonâ fide, because if he had been acting mala fide he ought to pay the £250 just as much as anybody else, but they put it beyond a shadow of doubt when they were asked very naturally by the judge to explain what they meant by such a verdict. They said: "We think the council were negligent and that Bailey had not sufficient supervision." That is wholly inconsistent with any finding of mala fides upon Bailey's part. If they found no damages against him because it was the other people's fault in being negligent, and that Bailey was not properly supervised, they cannot have understood what they were saying when they said he was not acting bonâ fide. They seemed to have arrived at such inconsistent findings, although, as I say, I do not offer any opinion whether I should say their verdict was so much against the weight of evidence as to upset it on that ground, that I think their verdict cannot stand. I also think the damages were excessive. A sum of £250 for a statement of this kind: "I thought that your house was dirty, and that you have not complied with a notice to cleanse it and paper," seems to me to be too much altogether, and on that ground I should have thought that the verdict was

wrong, but as I am of opinion that the action will not lie at all, it is unnecessary to consider the question of the new trial. I agree that judgment should be entered for the defendants.

Appeal allowed.

Solicitors: *Hunt & Hunt; Lloyd, Richardson & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

NEVILLE *v.* DOMINION OF CANADA NEWS CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.) July 6, 7, 1915]

[Reported [1915] 3 K.B. 556; 84 L.J.K.B. 2105; 113 L.T. 979; 31 T.L.R. 542]

Contract—Illegality—Public policy—Restraint of trade—Newspaper—Agreement to abstain from publishing comments—Release of portion of debt in consideration of abstention.

The plaintiff, who was a director of a land company engaged in selling land in Canada, agreed to accept a certain sum of money in satisfaction of a larger sum which was owing to him by the defendants, who were the proprietors of a newspaper, in consideration, inter alia, of the defendants agreeing not to publish any comment in the newspaper on the plaintiff's land company, its directors, or business, or on any company with which the defendants had notice that the plaintiff's land company was connected or concerned.

Held: the agreement was unenforceable, the consideration in question being void as against public policy, and as being in restraint of trade and wider than was reasonably necessary for the plaintiff's protection.

Notes. Referred to: *Kemp* v. *Glasgow Corpn.*, [1920] A.C. 836.

As to illegal agreements, see 8 HALSBURY'S LAWS (3rd Edn.) 128 et seq.; and for cases see 12 DIGEST (Repl.) 266 et seq.

Cases referred to in argument:

Wilkinson v. *Wilkinson* (1871), L.R. 12 Eq. 604; 40 L.J.Ch. 242; 24 L.T. 314; 19 W.R. 558; 44 Digest 454, *2762*.

Herbert Morris, Ltd. v. *Saxelby*, [1915] 2 Ch. 57; 84 L.J.Ch. 521; 112 L.T. 354; 31 T.L.R. 370; 59 Sol. Jo. 412, C.A.; affirmed [1916–17] All E.R. Rep. 305; [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, *154*.

Janson v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 12 Digest (Repl.) 271, *2084*.

W. H. Smith & Son v. *Clinton and Harris* (1908), 99 L.T. 840; 25 T.L.R. 34; 12 Digest (Repl.) 299, *2307*.

Mitchel v. *Reynolds* (1711), 1 P. Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, *59*.

Eastes v. *Russ*, [1914] 1 Ch. 468; 83 L.J.Ch. 329; 110 L.T. 296; 30 T.L.R. 237; 58 Sol. Jo. 234, C.A.; 43 Digest 43, *432*.

Appeal by the plaintiff from a decision of ATKIN, J.

The plaintiff, a director of Canadian Capital Investments, Ltd., which was engaged in the sale of land in Canada, brought an action against the defendant company seeking to recover the sum of £940, balance of money advanced by him to the defendant company and another. The defendant company were the proprietors

of a weekly magazine, the "Canadian News." The plaintiff had at various times advanced £1,490 to the defendant company, but on Jan. 24, 1913, an agreement was entered into between the parties whereby the defendant company agreed not to publish in the "Canadian News" any comment on Canadian Capital Investments, Ltd., in which company the plaintiff was interested as director, or in regard to land owned by that company, nor upon any company in which the defendant company should have notice that the Canadian Capital Investments, Ltd., was interested. Of the sum of £1,490, £750 was to be paid back by the defendant company by instalments and was to be accepted by the plaintiff in full discharge of the loans if there was no breach of the agreement by the defendant company. The defendant company had paid back £550 out of the £750. But it was alleged that they had committed breaches of the agreement by publishing comments on two companies in which the plaintiff was interested. The plaintiff thereupon claimed that by the terms of the agreement, as a breach had been committed by the defendant company, the whole of the original debt of £1,490 was payable, less £550, the sum paid on account, leaving £940, the sum sued for. On Nov. 27, 1914, the action came on for trial before ATKIN, J., when his Lordship decided (112 L.T. 309) that the stipulation contained in the agreement was invalid as being contrary to public policy and could not be enforced in a court of law; and, that being so, there had been no breach of contract by the defendants, and the event had not happened upon which the £940 sued for was repayable. The plaintiff appealed.

Disturnal, K.C., and *Harry Dobb* for the plaintiff.
Schiller, K.C., and *H. A. McCardie* for the defendants.

LORD COZENS-HARDY, M.R.—This is an appeal from a decision of ATKIN, J., who has given judgment for the defendants, without costs, in an action in which the plaintiff sued for a sum of £1,490, on the footing of an agreement of Jan. 24, 1913. The point raised is that the agreement itself is one which, in the particular clause in question, is tainted in the sense that no action can be brought upon the agreement. Who is the plaintiff here? The plaintiff is interested in, and a director of, Canadian Capital Investments, Ltd.—what is called a land company—that company being interested in land in Canada. Who are the defendants? The defendants are, as their title plainly indicates, a Canadian newspaper company. Their title is "The Dominion of Canada News Co., Ltd." The defendants publish a weekly magazine called the "Canadian News." It appears from what has been said in opening, and from what the learned judge said in his judgment—I have no doubt it was proved in evidence—that the defendants, in publishing the "Canadian News," profess to give—and I dare say they do give—information to members of the public who want to invest in Canadian land as to the places where, and conditions under which, favourable purchases can be made. If they profess to do that, they are bound to do it honestly. The plaintiff's land company had been issuing certain advertisements which had been adversely criticised by some reputable newspapers which had gone so far as to refuse those advertisements. It is not for me to say whether the attacks on the plaintiff's land company were well founded or not. For the present purposes, I will assume that they were not well founded.

The agreement which was executed on Jan. 24, 1913, was made between the defendants of the first part, the plaintiff of the second part, and Alexis Maria de Beck of the third part, and it contained a recital that the plaintiff had advanced to the defendants a sum of £1,490. The agreement contained various clauses, one of which was that the terms of the agreement put an end to all other contracts between the parties. It provided that the defendants should pay £750 by instalments of not less than £10 a week, and then came this clause: That the defendants should not publish in the "Canadian News"—that is, their own newspaper—or in any other newspaper or periodical published by the defendants, "any comment upon the land company, or its directors, or its business, or in regard to the land owned by

Canadian Capital Investments, Ltd. in or near Regina, or any comment upon any company with which the defendants should have notice that the land company was connected or concerned." What is the effect of that? The defendants were carrying on the business of newspaper proprietors. It is the business of newspaper proprietors dealing specially with Canada, and dealing plainly with land purchase in Canada, to comment upon Canadian matters. But this clause provides that this trading company is not to publish

> "in 'Canadian News' or in any other newspaper or periodical published by the company, any comment upon Canadian Capital Investments, Ltd., or its directors, or its business, or in regard to the land owned by Canadian Capital Investments, Ltd., in or near Regina, Saskatchewan, or any comment upon any company with which the company gave notice that Canadian Capital Investments, Ltd. are connected or concerned."

That seems to my mind to be a covenant in restraint of trade. But that alone is not enough to enable us to say whether it is contrary to public policy. I have not heard a word to suggest that it is a "reasonable restraint of trade" in the manner in which those words are used in the authorities. It is surely wider than is reasonably necessary for any protection to which the plaintiff could possibly be entitled. It is not limited to any attacks on the plaintiff. But it is limited to any comments on any land company with which the plaintiff might have anything to do. It seems to me to be plainly a covenant in restraint of trade in this sense: that it is far wider than was reasonably necessary for the protection of the plaintiff. Needless to say, it is perfectly settled that it is for the court, and not for a jury, to decide as to the reasonableness of such a covenant. It is for the court, and the court alone—we are the persons who have to say whether it is reasonable, in the sense in which I have used the word, and I have no hesitation in saying that it was not reasonable. That being so, it is, perhaps, not strictly necessary for me to consider the point, but, if it were necessary for me to consider it, I should hesitate a good deal before I came to the conclusion that what I regard as a bribe paid by the plaintiff to secure complete absence of comment on any land near Regina with which the land company was concerned was a transaction which could be regarded as otherwise than against public policy. But, as I said, I base my judgment, as the learned judge, I think, did, on the ground of restraint of trade. Whichever way you look at it, in my opinion, the learned judge was right in saying that no action could be maintained on this agreement, one of the considerations for which was this illegal clause. That being so, I think the appeal fails and must be dismissed with costs.

PICKFORD, L.J.—I agree. The action is brought on the agreement, and on the agreement alone. I cannot assent to counsel for the plaintiff's proposition that it is also an action brought on what would have been an ordinary account for money lent. It is based on the agreement, and on the agreement only. It is on the question whether there is a right to recover on the agreement, and only on that, that I intend to give judgment. There might have been possible reasons for saying that, if any amendment were necessary in the court below, it might have been made, and the parties might have been left to settle their disputes on the basis of whether the defendants owed anything apart from the agreement; I think that is not a matter with which we have anything to do. The learned judge—no doubt for good reasons—I will not say refused, because he was not asked, but said he would not allow any amendment, and he said he should not allow any action to be supported on anything except the agreement, if it could be supported on that. Therefore, it seems to me that the judgment does not interfere with any rights that the parties may have apart from the agreement.

First of all, was this agreement a valid one? In my opinion, it was not. The defendants carried on a newspaper. It was not, I think, what is ordinarily called

a financial newspaper, but it was a newspaper relating to companies which dealt with Canadian affairs generally, and which advised people as to investments in the Dominion. The plaintiff was concerned with a company which was dealing with land in the Dominion of Canada, and certain not very favourable comments had been made on that company and its dealings. Whether they were justified or not I do not know; I will assume they were not. But they had been made, and some newspapers had refused to publish any more advertisements of that company. The defendants owed the plaintiff somewhere about £1,500, and this agreement was come to in consideration of the defendants only paying about one-half of that sum, and paying it by instalments. Therefore, there was a large money consideration to them. I do not think it is necessary to read at length the clause of the agreement which is in question. In my opinion, it is a clause by which they undertake not to make any comments at all under any circumstances so long as the business is being carried on honestly and fairly in their opinion. They agreed not to make any comments. Whether they contemplated it or not is not for me to say, but their agreement was such that, if it was sound, it prevented them from making any comments on any dealings of this company, although those dealings might seem to be dishonest and fraudulent and prejudicial to the interests of the readers of the newspaper. It seems to me to be a very strong thing to say that such an agreement as that was a proper one.

I suppose that one of the defendants was the editor or the proprietor of the paper. But he stated what his intention was in carrying on the paper so far as advice with regard to investments went. In effect he said this: "I am not going to be deterred from my duty by jealous critics, and by unfair and unjust remarks. I am not going to be deterred from doing my duty. I intend to walk straight along that path which I laid down for myself when I started this paper. I intend to expose fearlessly, without favour, every fraudulent concern, every doubtful reality, and to protect and assist all those firms that deal fairly and honestly with real estate and first-class investments. I have an ideal before me, and I intend to follow that ideal." The ideal set out there is a very proper one, I should think, and a very good one for all persons who write in financial newspapers to follow. But he was going to carry out that ideal by commenting on all other companies except those with which the plaintiff was connected, and refrain from commenting on the plaintiff's companies, even although they ought to be recommended to the public as good, or, which is more important, although they seemed to be dishonestly and fraudulently carried on, and the public ought to be warned against them.

How that is consistent with his ideal is a matter which it is very difficult to reconcile. However, the question for us is whether such an agreement is consistent with the proper conduct of the paper in the public interest. I agree with all that has been said as to a newspaper having no more right to comment than any other member of the public. I think that it is a principle which it is very essential to maintain that a newspaper has no more right to say anything about a concern than an ordinary individual has. The contrary is very often contended, and I think it is very essential that it should be kept quite clear that a newspaper has no such right. But it is not quite the same thing as saying that you must apply the same considerations to a paper which is carrying on the business of advising the public as you must to the conscience of a private individual who is not doing that. I cannot put this matter in any better words than are used by ATKIN, J., in his judgment:

> "To my mind, for a newspaper to stipulate for a consideration that it will refrain from exercising its right of commenting upon fraudulent schemes when it is the ordinary business of the company [that means the newspaper company] to comment upon fraudulent schemes is in itself a stipulation which is quite contrary to public policy, and it cannot be enforced in a court of law."

I do not think I could express it better than ATKIN, J., has expressed it in that sentence. I entirely agree with it, and I rather prefer to put my judgment on this footing, although I do not in the least disagree—in fact, I agree—with what the Master of the Rolls has said with regard to restraint of trade.

WARRINGTON, L.J.—I agree. The defendants are the proprietors of a newspaper. They have taken on themselves to advise the public on certain land and financial schemes. They have a particular column in their paper which is called the "Gold and Glitter" column, and their editor has made a great parade of this column and of the mode in which in that respect he proposes to conduct the affairs of his newspaper. They have taken on themselves, therefore, the position of advising people, and advising people honestly, as to the merits of certain schemes, and, in particular, schemes referring to land in Canada. The plaintiff was a person who was interested in a company engaged in land speculations in Regina, Saskatchewan. I infer from the agreement which is the subject of the present proceedings that up to the time of the agreement, the plaintiff and the persons acting with him had more or less controlled the defendants' newspaper. One object of the agreement appears to have been a change in the directorate which would have eliminated the element of the plaintiff's control of the paper. That being so, and the plaintiff severing his connection with the paper, and being a creditor to a large amount of the defendants, the plaintiff gave up something like half his debt in consideration, among other things, of a stipulation that the newspaper would make no comment whatever on the conduct of the land company in which the plaintiff was interested, or its directors, or its business, or in regard to the land owned in Regina, Saskatchewan, or any comment on any company with which the company was concerned and connected, and with which the newspaper had notice that it was so concerned or connected.

That was the nature of the stipulation. But just see what that might land this newspaper in. The newspaper has assumed a position of giving honest advice to persons concerned in such matters. Let us assume that the land company in which the plaintiff is concerned, or some company with which that company is connected, propounds some fraudulent scheme, and the editor of the paper knows it. By the stipulation he is bound to refrain from making any comment on that fraudulent scheme, and it seems to me that, by so abstaining, he may actually and actively mislead his public into supposing that there is nothing in the suggestion that the particular scheme is a fraudulent scheme. In other words, he has, I think, accepted a bribe, the tendency of which is to prevent him from doing that which, under certain circumstances and having regard to his own conduct, it may be his duty to do.

I prefer to put my judgment on that ground. But, like PICKFORD, L.J., I agree also that the contract into which the defendants have entered is a contract in restraint of trade. It is their business to make comments on these companies. They have undertaken that they will not carry out a certain part of that business by commenting on this particular company or group of companies. That seems to me to be a contract which is in restraint of the trade which they are carrying on, and it is not suggested that the covenant does not go farther than is reasonably required for the proper protection of the plaintiff, because it goes so far that it might prevent—as, if obeyed, it would prevent—the defendants from commenting on the fraudulent conduct of the plaintiff in the conduct of his business. It cannot be reasonably necessary to prevent that, and, therefore, in my judgment, on both grounds this agreement would be invalid.

Appeal dismissed.

Solicitors: *Reginald Vaughan; Sewell, Edwards & Nevill.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HANLEY *v.* PEASE AND PARTNERS, LTD.

[KING'S BENCH DIVISION (Lush, Rowlatt and Atkin, JJ.), December 16, 1914]

[Reported [1915] 1 K.B. 698; 84 L.J.K.B. 532; 112 L.T. 823; 79 J.P. 230]

Master and Servant—Misconduct—Right of master to suspend servant—Contract of service treated as continuing—Right of servant to damages for preventing him from working.

The appellant, a workman in the employ of the respondents, absented himself from work on a certain day without the leave of his employers. On the following day his employers suspended him from working on that day, but did not dismiss him, and thereby prevented him from earning the wages which he would have earned if he had been allowed to work. The appellant thereupon took out a summons under the Employers and Workmen Act, 1875, claiming damages for wrongful dismissal, the amount of damages claimed being the sum which he would have earned if he had worked.

Held: although technically the claim should have been for damages for breach of contract for refusing to allow him to perform his contract of service, the justices had jurisdiction under the Act to adjudicate upon the real claim of the appellant against the respondents without any amendment, and to award him such damages as he would have been entitled to upon a claim properly put forward in the first instance or upon a claim properly amended; although the respondents might have had a right to dismiss the respondent for misconduct, and so to terminate the contract of service, they had no right, when they elected to treat the contract of service as a continuing one, to suspend the appellant for one day and so prevent him from earning his wages for that period.

Notes. Considered: *Wallwork* v. *Fielding*, [1922] All E.R. Rep. 298. Distinguished: *Browning* v. *Crumlin Valley Collieries*, [1926] All E.R. Rep. 132. Referred: *Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Marshall* v. *English Electric Co.* (1944), 61 T.L.R. 186; *Bird* v. *British Celanese, Ltd.*, [1945] 1 All E.R. 488.

As to duties of a servant, see 25 HALSBURY'S LAWS (3rd Edn.), 462–465, as to breach of contract by a servant, see ibid., pp. 516–519, and as to summary jurisdiction under Employers and Workmen Act, 1875, see ibid., pp. 524–528. For cases see 34 DIGEST 117 et seq., 80 et seq., and 110 et seq.

Cases referred to in argument:

Pearce v. *Foster* (1886), 17 Q.B.D. 536; 55 L.J.Q.B. 306; 54 L.T. 664; 51 J.P. 213; 34 W.R. 602; 2 T.L.R. 534, C.A.; 34 Digest 74, *507*.

Baster v. *London and County Printing Works*, [1899] 1 Q.B. 901; 68 L.J.Q.B. 622; 80 L.T. 757; 63 J.P. 439; 47 W.R. 639; 15 T.L.R. 331; 43 Sol. Jo. 438, D.C.; 34 Digest 79, *563*.

Case Stated by justices for the county of Durham.

The appellant, Thomas Hanley, was a workman in the employ of the respondents, Messrs. Pease and Partners Limited, and on June 23, 1914, a summons was preferred by him against the respondents under the Employers and Workmen Act, 1875, for that he, being a servant to the respondents, and having entered into a contract of service determinable by fourteen days' notice on either side, was wrongfully dismissed by his employers on June 15, 1914, without having given or received such notice, and he claimed the sum of 6s. 2d. as damages in respect thereof.

On the hearing of the summons the following facts were proved or admitted: The appellant was a cokeman in the employment of the respondents as a quencherman at the by-product works in the coke-yard of the respondents at Bowden Close Colliery, in the county of Durham. The appellant worked under certain rules or

customs agreed upon between the associations representing the owners and workmen respectively with regard to by-product and other similar works, which formed part of the contract of service and employment between the parties. The appellant had been employed at these works for some years, and had previously never objected to work his Sunday "shift." The appellant did not present himself for work on Sunday, June 14, 1914. The cokemen at the respondents' coke-yard had been told by their foreman (acting under the manager's instructions) that if they were ten minutes late on coming to work they would not be allowed to start work. The appellant gave as his reason for absenting himself from work on the Sunday that he had overslept, and he believed that the order forbidding him to work if he was ten minutes late would be enforced. The appellant was not dismissed by the respondents, but only suspended for the Monday, June 15. The work which was required to be performed by the workmen on the Sunday was, under the special circumstances, a work of necessity, having regard to the danger attached to the working of the works in question, and the workmen were paid a higher rate of wages for the same.

On behalf of the appellant it was contended: (a) That the appellant was wrongfully dismissed or suspended. (b) That the order of the respondents as to their workmen not being allowed to start work if they arrived ten minutes late was a wrongful order. (c) That the condition thereby imposed formed no part of, and was in contravention of, the actual contract of service under which the appellant and his fellow-workmen were employed. (d) That it was in consequence of such order that the appellant did not go to work on the Sunday. (e) That being dismissed or refused work on the Monday, without notice, appellant suffered damages to the extent of 6s. 2d., the amount of wages which he would otherwise have earned on that day. On behalf of the respondents it was contended (inter alia): (a) That they had the right to dismiss or to suspend a workman who failed, without any valid excuse, to come to work. (b) That if the by-product oven plant at which the appellant only worked for six days a week was allowed to cool down on the seventh day, the restarting would be attended with great danger to life and property. (c) That the appellant had not made out his case.

The justices were of opinion that this was a dispute between the employers and the workman arising out of or incidental to their relations as such, and found as a fact (i) that the work was one of necessity, the stoppage of which for a day would be attended with great danger to the lives of the workmen employed; (ii) that the appellant had agreed to work on the Sunday and had failed to do so; (iii) that the respondents were justified in suspending the appellant; and (iv) that the appellant had made out no claim for damages.

Lowenthal for the appellant.
McCardie for the respondents.

LUSH, J.—When the present case came before the justices, the dispute took the form of a claim on the part of the appellant for damages for wrongful dismissal, and it was so considered by them. Other questions arose on the hearing; but counsel for the appellant confined the question to the decision of the justices, who dismissed the claim for damages for wrongful dismissal. Counsel for the respondents has taken the point—that the real claim of the appellant was one for damages for breach of contract, since the appellant never was dismissed. It was a claim for damages by the appellant because the employers had no right to refuse to pay him wages for that one day's work without dismissing him. The justices found that the respondents did not dismiss him, and it is therefore contended on their behalf that the justices were right in dismissing his claim because it was not properly a claim for wrongful dismissal. It is said that as there was no power on the part of the justices to amend the claim, as originally put forward, the justices could not deal with it at all. The clear intention of the legislature, as appears by ss. 3 and 4 of the Employers and Workmen Act, 1875, was to give the widest powers to a

court of summary jurisdiction, when a dispute between workmen and employers comes before it, to deal with all claims which in the course of the hearing it may turn out have been made by both sides. One has only got to read s. 4 of the Act to be convinced of this. The Legislature intended that the justices should deal with all disputes which might appear in the course of the hearing to have arisen. There was no necessity to amend, and as regards that point I think that the justices had full power to adjudicate upon this claim, treating it as a claim for damages for breach of contract and not as one for damages for wrongful dismissal.

The really substantial question is whether the appellant had any claim in law for damages for breach of contract. Whether you treat the right of the master to dismiss the servant as a right to put an end to the contract, where there has been a repudiation of that contract on the part of the servant, or as a right to consider the misconduct of the servant as a breach of a condition of the contract is immaterial, because in either view the right of the master is merely the exercise of an option. The contract has become a voidable one. The master may determine it, if he pleases, if there has been such misconduct on the part of the servant as entitles him to do so. But he is not bound to do so. And if he chooses not to exercise his strictly legal right, but to treat the contract as continuing, notwithstanding the misconduct or the breach of duty on the part of the servant, then the contract is for all purposes a continuing one, subject, of course, to the master's right in that case to claim damages against the servant for his breach of contract. In the present case, however, the employers, after declining to dismiss the workman and after electing to treat the contract as a continuing one, took it upon themselves to suspend him for one day. In other words, they deprived him of his wages for one day, and by so doing they assessed their own damages for the servant's misconduct at the sum which he would have earned on that day if he had been working. There was no possible right for the employers to act in such a manner. They elected to treat the contract of service as a continuing one, and, having so elected, the contract remained a continuing one. They might have had a right to claim damages against the appellant, but they could not justify their action in suspending him as they did, and so depriving him of his power to work and to earn his wages. That being so, the justices were, in my opinion, clearly wrong in saying that the appellant had failed to substantiate his claim, whether the claim was for wages or for damages represented by wages. It is immaterial which way one puts it. In my view the appellant did most clearly substantiate his claim. This case must, therefore, be remitted to the justices with a direction to award to the appellant, whether as wages or as damages, the sum of 6s. 2d. which he claimed.

ROWLATT, J.—I am of the same opinion. With regard to the first point, which is certainly one of the highest technicality, the claim of the appellant was really one for unliquidated damages on the ground that the respondents had refused to allow him to earn his day's wages by doing his day's work. If a workman brings a claim for wrongful dismissal after he has returned to work, and has only failed to work for a day and makes a claim for one day's wages, the court has full power to entertain such a claim as one for damages for the employer's refusal to allow him to earn the one day's wages. As regards the point of substance, it is obvious that the respondents, as employers, had no implied power to punish the appellant, their workman, by suspending him for a certain period, since the contract was subsisting the whole time. They had the power to dismiss him, if the facts justified them in doing so, and then to propose a fresh employment to commence on any subsequent date which the appellant might or might not have accepted. In the present case, however, there is no finding on the part of the justices that the facts justified the respondents in dismissing the appellant, and the question of dismissal and reinstatement does not arise upon the case stated. For the reasons which I have given I am of opinion that the appeal should be allowed.

ATKIN, J.—I agree. As to the technical point which has been raised, I think that by s. 4 of the Act of 1875, coupled with the rules, the justices had ample power to deal with what was in fact the real dispute between the parties, whatever it was styled in the claim as originally put forward. As to the other part of the case, I quite agree that, upon the facts as put before us, the respondents had no power to suspend the appellant in the sense which really means the fining of the workman by his employers in the sum of one day's wages on the ground of his default. If the employers had such a power by the contract of service or otherwise, I think that it would have to be very carefully considered in the light of the more recent Truck Acts. The appeal must be allowed.

Appeal allowed.

Solicitors: *Stanley Evans & Co.*, for *Dix & Harle*, Newcastle-on-Tyne; *Rawle, Johnstone & Co.*, for *Cooper & Goodger*, Newcastle-on-Tyne.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

TRANSVAAL LANDS CO., LTD. *v.* NEW BELGIUM (TRANSVAAL LAND AND DEVELOPMENT CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.JJ.), July 24, 31, 1914]

[Reported [1914] 2 Ch. 488; 84 L.J.Ch. 94; 112 L.T. 965; 31 T.L.R. 1; 59 Sol. Jo. 27; 21 Mans. 364]

Company—Director—Duty of director—Director shareholder in or in fiduciary position towards another company—Contract between companies—Director precluded from dealing with other company—Rescission of contract.

Where a director of a company has an interest as a shareholder—whether beneficially or as trustee for others—in another company, or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is precluded, independently of the extent of his holding, from dealing on behalf of the company of which he is a director with the other company, unless and so far only as he is authorised so to do by articles of association. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. If the other company has notice of the irregularity, rescission of the contract so entered into may be obtained even after completion, if rescission is still possible.

North-West Transportation Co. v. *Beatty* (1) (1887), 12 App. Cas. at p. 593, and *Aberdeen Rail. Co.* v. *Blaikie Bros.* (2) (1854), 1 Macq. 461, applied.

Notes. As to the duties of directors, see 6 HALSBURY'S LAWS (3rd Edn.) 293 et seq., and for cases see 9 DIGEST (Repl.) 497 et seq.

Cases referred to:

(1) *North-West Transportation Co.* v. *Beatty* (1887), 12 App. Cas. 589; 56 L.J.P.C. 102; 57 L.T. 426; 36 W.R. 647; 3 T.L.R. 789, P.C.; 9 Digest (Repl.) 506, *3336*.

(2) *Aberdeen Rail. Co.* v. *Blaikie Bros.* (1854), 2 Eq. Rep. 1281; 23 L.T.O.S. 315; 1 Macq. 461, H.L.; 10 Digest (Repl.) 1267, *8948*.

(3) *Foster* v. *Orford, Worcester and Wolverhampton Rail. Co.* (1853), 13 C.B. 200; 22 L.J.C.P. 99; 20 L.T.O.S. 224; 17 Jur. 167; 1 W.R. 151; 138 E.R. 1174; 10 Digest (Repl.) 1239, *8724*.

(4) *Todd* v. *Robinson* (1884), 14 Q.B.D. 739; 54 L.J.Q.B. 47; 52 L.T. 120; 49 J.P. 278; 1 T.L.R. 44, C.A.; 33 Digest 16, *57*.

(5) *Costa Rica Rail. Co., Ltd.* v. *Forwood*, [1900] 1 Ch. 756; 69 L.J.Ch. 408; 83 L.T. 19; 48 W.R. 553; affirmed [1901] 1 Ch. 746; 70 L.J.Ch. 385; 84 L.T. 279; 49 W.R. 337; 17 T.L.R. 297; 45 Sol. Jo. 424; 8 Mans. 374, C.A.; 9 Digest (Repl.) 518, *3422*.

(6) *Benson* v. *Heathorn* (1842), 1 Y. & C. Ch. 326; 9 L.T. 118; 62 E.R. 909; 9 Digest (Repl.) 518, *3424*.

(7) *Imperial Mercantile Credit Association* (*Liquidators*) v. *Coleman* (1871), 6 Ch. App. 558; 40 L.J.Ch. 262; 24 L.T. 290; 19 W.R. 481, L.C.; reversed (1873), L.R. 6 H.L. 189; 42 L.J.Ch. 644; 29 L.T. 1; 21 W.R. 696, H.L.; 9 Digest (Repl.) 516, *3399*.

Appeal by the defendants from the decision of ASTBURY, J.

Frank Russell, K.C., and *Ashton Cross* for the defendants.
Gore-Browne, K.C., and *Maurice Beachcroft* for the plaintiffs.

Cur. adv. vult.

July 31, 1914. **SWINFEN EADY, L.J.**, read the following judgment of the court. —The first question raised by this appeal is whether the purchase by the plaintiffs from the defendants of a block of 3,333 ordinary shares of the Lydenberg (Transvaal) Gold Exploration Co., Ltd., for £999 18s., was voidable at the plaintiffs' option.

On Feb. 1, 1911, there was a board meeting of the plaintiff company, at which there were present Sir Frederick Young, in the chair (a gentleman upwards of ninety years of age and since deceased), Mr. William James Harvey, since deceased, and Mr. Henry Samuel. At this board meeting a suggestion was made by Samuel that the company should buy shares in the Lydenberg company, and the matter was adjourned to a special board meeting on Feb. 8. Harvey appears to have known very little, if anything, about this company, as the next day he wrote to Crake, the secretary of the plaintiff company, asking for particulars about it and referring to Samuel's proposal that the company should purchase £1,000 worth of shares. Crake, in reply, sent certain particulars taken from the Stock Exchange Official Intelligence, from which it appeared that the company was registered in October, 1894, but had never yet paid any dividend. On Feb. 6 Harvey wrote again to Crake, the secretary, saying that he did not understand why Samuel proposed the purchase of the Lydenberg shares. It afterwards, however, transpired that Samuel was pecuniarily interested in the transaction, and that one-half of the shares which he proposed that the plaintiff company should purchase really belonged to himself. On Feb. 8 the board meeting was held, at which the purchase was resolved upon. Sir Frederick Young was in the chair, and there were also present Messrs. Harvey and Samuel. At this time the plaintiffs' cash resources were small, and the plaintiffs had to mortgage their uncalled capital to their bankers to raise the funds required to pay for these Lydenberg shares—£1,000. It appears from the evidence that Samuel did not disclose on Feb. 8 that he had any interest in the proposed purchase by the plaintiffs of these Lydenberg shares. He merely abstained from voting, on the ground that he was a director of the selling company, and the two directors forming the quorum who voted were Sir Frederick Young and Harvey. Harvey, however, held 1,000 shares in the selling company, and was thus also interested in the sale of the Lydenberg shares, which, as confidential agent to the plaintiffs, he was instrumental in buying for them. We should mention that Harvey held the 1,000 shares of the defendant company as trustee under his father-in-law's will, and that Harvey's wife was beneficially interested in one-tenth of the shares, subject to her mother's life interest therein.

A The question thus arises: Can a director of a company, on behalf of the company, buy shares or other property from himself, or from a company in which he is pecuniarily interested? In our opinion, it is not material whether the interest which Harvey had in the 1,000 shares was as trustee or whether the shares belonged to him beneficially. As trustee it was his duty to do his best and make the most of the trust estate for his cestuis que trust, and as beneficiary his interest was to B do the best he could for himself. But in either case his duty or interest, as the case might be, would conflict with the duty which he owed to the company of which he was director. The law was thus stated by SIR RICHARD BAGGALLAY in the Privy Council, in *North-West Transportation Co.* v. *Beatty* (1) (12 App. Cas. at p. 593):

> "A director of a company is precluded from dealing, on behalf of the company, C with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director."

This was, in substance, the language of LORD CRANWORTH in the House of Lords in *Aberdeen Rail. Co.* v. *Blaikie Bros.* (2). It was there decided that directors of D a company have duties to discharge of a fiduciary nature towards their principal, and that it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect; and that so strictly is this principle adhered to E that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It was accordingly held that a director of a railway company was precluded from dealing on behalf of the company with himself, or with a firm of which he was a partner, and that it made no difference whether the contract related to real estate, or personalty, or mercantile transactions, the disability arising, not from the subject-matter of the contract, but from the fiduciary character F of the contracting party. That was a Scottish case, but it was held that there was no difference between the law of Scotland and the law of England in this respect, both coming from the Roman law, and that the doctrine rested on such obvious principles of good sense that it was difficult to suppose there could be any system of law in which it would not be found. It was further contended in that case that, whatever might be the general principle applicable to contracts of G that nature, the legislature had in the case of corporate companies, like the railway company, modified the rule by the Companies Clauses Consolidation Act, ss. 88 and 89 of the Scottish statute being the same as ss. 85 and 86 of the English Companies Clauses Consolidation Act, 1845. But LORD CRANWORTH pointed out that those sections merely vacated the office of a director, and did not validate a contract otherwise invalid. He added that the decision of the Common Pleas in *Foster* v. H *Oxford, Worcester and Wolverhampton Rail. Co.* (3) merely decided that a contract good at law was not affected at law by an enactment that its effect should be to deprive one of the contracting parties of an office; but that the decision would not help the respondents—Messrs. Blaikie—unless they could go further and show that the statute had had the effect of making valid a contract which was bad on general principles—that is to say, principles enforceable only in equity, being not I then recognised by courts of common law. He added that he could discover no grounds whatever for attributing to the statute any such effect; but that its provisions would still be applicable to the case of directors who became interested in contracts as representatives or otherwise, and not by virtue of contracts made by themselves.

Where a director of a company has an interest as a shareholder in another company, or is in a fiduciary position towards and owes a duty to another company, which is proposing to enter into engagements with the company of which he is a

director, he is, in our opinion, within this rule. He has a personal interest within this rule, or owes a duty, which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his cestuis que trust as he would do for himself. Again, the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent, any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the cestuis que trust, upon which subject no inquiry is permitted. *Todd* v. *Robinson* (4) is an instance of a very small interest as shareholder of a company being held to make a person "interested" in a contract. By s. 193 of the Public Health Act, 1875, it was enacted that officers or servants employed under the Act by the local authority should not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of the Act under a penalty of £50. The defendant Robinson was clerk to the local board at a time when a contract was made with the local gas company in which he was a shareholder increasing the price for street lamps from 45s. to 46s. per lamp. The benefit accruing to the defendant as shareholder from the contract for the supply of gas was merely nominal; but he was held liable for the penalty by the Court of Appeal.

It is in consequence of the general law being as we have stated that from time to time provision is made by statute, or by the articles of association or other instruments regulating the organisation, management, and control of particular companies, modifying what would otherwise be the rule applicable. Thus, with regard to statutory companies, the Companies Clauses Consolidation Act, 1845, s. 87, provides that a director of a statutory company being a member of a joint stock company shall not thereby be disqualified from acting as such director, but he shall not vote on any question as to any contract with the joint stock company. So cl. 77 of Table A of the Companies (Consolidation) Act, 1908 [see reg. 84 of Table A of Companies Act, 1948] provides that the office of a director shall be vacated if he is concerned with or participates in the profits of any contract with the company, with a proviso that no director shall vacate his office by reason only of being a member of a contracting company, but he is not to vote in respect of any such contract, and, if he does so, his vote is not to be counted. *Costa Rica Rail. Co.* v. *Forwood* (5) shows the extent to which a director may be protected by articles of this kind, but the same case emphasised the general rule. VAUGHAN WILLIAMS, L.J., referred to the stringency of the rule which does not allow directors, trustees, agents, or others standing in a fiduciary relation to enter into engagements conflicting, or which may possibly conflict, with the interests of those whom they are bound to protect: see also *Benson* v. *Heathorn* (6) and *Imperial Mercantile Credit Association* v. *Coleman* (7) (6 Ch. App. at p. 567).

With regard to the plaintiff company, this matter is regulated by art. 98. This is the only provision in the plaintiff company's articles modifying what would otherwise be the rule of law applicable, and enabling a director of the plaintiff company to be interested as a member of a company with which the plaintiff company is contracting. But it requires that the director shall disclose the nature of his interest, and shall not vote in respect of any contract in which he is concerned. The provisions of this article were not observed when the resolution to purchase the Lydenberg shares was carried, as Harvey voted in favour of it, and without his vote being counted there was no quorum, whereof the defendants, the other contracting party, had full notice. The result is that the contract was voidable, and has been duly avoided, and the plaintiffs are accordingly entitled to have the purchase money repaid, but they must return the Lydenberg shares. It was not disputed by the defendants that if the first transaction in Lydenberg shares is voidable, by reason of Harvey's vote having carried it, the second transaction in the partly paid shares of the plaintiff company stands in no better position

and is voidable also, and the like result must follow. In our opinion, the judgment appealed from was right, and the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Thompsons, Quarrell & Jones; Herbert Reeves & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

GRESHAM LIFE ASSURANCE SOCIETY *v.* CROWTHER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), November 23, 1914]

[Reported [1915] 1 Ch. 214; 84 L.J.Ch. 312; 111 L.T. 887; 59 Sol. Jo. 103]

Equity—Real property—Theoretical conversion into money—Land settled on trust for sale—Power of postponement—Assignment of interest in proceeds of sale in Yorkshire—Assignment of personalty—Registration of assignment—Effect on prior unregistered assignment of same property with notice to trustees—Yorkshire Registry Act, 1884 (47 & 48 *Vict.*, *c.* 54), *ss.* 4, 14.

Where real estate is settled subject to what amounts to an imperative trust for the sale of the same, although there may be power to postpone the sale in the widest terms, and although the consent thereto of someone may be required, the real estate is to be regarded as converted notionally into personalty.

Wheldale v. *Partridge* (1), 5 Ves. 388; on appeal, 8 Ves. 227, considered and distinguished.

An assignment of a share or interest of or in the proceeds of sale of real estate in Yorkshire which is subject to an imperative trust for sale is an assignment of personalty only, and does not affect the real estate within the meaning of the Yorkshire Registry Act, 1884. The registration of such an assignment, therefore, does not postpone a prior unregistered assignment of the same property of which notice has been given to the trustees.

Malcolm v. *Charlesworth* (2), 1 Keen 63, and *Arden* v. *Arden* (3), 29 Ch.D. 702, applied.

Notes. As to registration of deeds in Yorkshire, see 23 HALSBURY'S LAWS (3rd Edn.) 356–362, and for cases see 38 DIGEST (Repl.) 878–879. As to theoretical conversion of land into money, see 14 HALSBURY'S LAWS (3rd Edn.) 576 et seq., and for cases see 20 DIGEST 335 et seq.

Cases referred to:

(1) *Wheldale* v. *Partridge* (1800), 5 Ves. 388; 31 E.R. 643; affirmed (1803), 8 Ves. 227; 32 E.R. 341; 20 Digest 397, *1359*.

(2) *Malcolm* v. *Charlesworth* (1836), 1 Keen, 63; Donnelly, 20; 48 E.R. 230; sub nom. *Wilkinson* v. *Charlesworth*, 5 L.J.Ch. 172; 38 Digest (Repl.) 876, *888*.

(3) *Arden* v. *Arden* (1885), 29 Ch.D. 702; 54 L.J.Ch. 655; 52 L.T. 610; 33 W.R. 593; 38 Digest (Repl.) 876, *889*.

Also referred to in argument:

Re Hotchkys, Freke v. *Calmady* (1886), 32 Ch.D. 408; 55 L.J.Ch. 546; 55 L.T. 110; 34 W.R. 569, C.A.; 40 Digest (Repl.) 699, *1954*.

Re Newbould, Carter v. *Newbould* (1913), 110 L.T. 6, C.A.; 20 Digest 347, *862*.

Re Raw, Morris v. *Griffiths* (1884), 26 Ch.D. 601; 53 L.J.Ch. 1051; 51 L.T. 283; 32 W.R. 986; 20 Digest 347, *868*.

Rodger v. *Harrison*, [1893] 1 Q.B. 161; 62 L.J.Q.B. 213; 68 L.T. 66; 41 W.R. 291; 9 T.L.R. 120; 37 Sol. Jo. 99; 4 R. 171, C.A.; 40 Digest (Repl.) 324, *2660*.

A.-G. v. *Harley* (1821), 5 Madd. 321; 56 E.R. 918; 8 Digest (Repl.) 362, *410*.
Brook v. *Badley* (1868), 3 Ch. App. 672; 37 L.J.Ch. 884; 16 L.T. 762; 33 J.P. 3; 16 W.R. 947, L.C.; 8 Digest (Repl.) 363, *426*.
Re Fox, Brooks v. *Marston*, [1913] 2 Ch. 75; 82 L.J.Ch. 393; 108 L.T. 948; 32 Digest 429, *1035*.
Re Thomas, Thomas v. *Howell* (1886), 34 Ch.D. 166; 56 L.J.Ch. 9; 55 L.T. 629; 20 Digest 355, *936*.
Lacey v. *Hill, Leney* v. *Hill* (1875), L.R. 19 Eq. 346; 44 L.J.Ch. 215; 32 L.T. 48; 23 W.R. 285.

Appeal from a decision of ASTBURY, J., in an action brought by the plaintiff society against four defendants which raised a question of priority of security, and a further question of construction as to whether a clause in a settlement amounted to a trust for sale so as to cause or effect a conversion of land into personalty.

The plaintiff society claimed an account of what was due to them under a mortgage dated Jan. 11, 1892, made between the defendant E. Crowther of the one part and the plaintiff society of the other part, being a mortgage of the defendants' reversionary interest under a settlement, dated Sept. 9, 1885, made between Martha Baxandall of the first part, the defendant E. Crowther of the second part, and T. H. Crowther and S. Lund of the third part, and that the mortgage might be enforced by foreclosure or sale. They also claimed a declaration that their security took priority over a mortgage dated Mar. 13, 1913, of certain premises, No. 122, City Road, Bradford, claimed to be held by the defendants A. B. Fox and J. R. Bradley. Further, a declaration that their security upon No. 2, Plevna Terrace, Bingley, in the county of York (being part of the property comprised in the settlement of 1885) or the proceeds of sale thereof had priority over the claim of the defendant Sarah Lister to the messuage or the proceeds of sale thereof. And, finally, a declaration that a transfer of 150 shares in Threlfill's Brewery, Ltd. (being part of the property comprised in the settlement of 1885) taken by the defendants A. B. Fox and J. R. Bradley was taken with notice that such shares were subject to the plaintiffs society's security.

The sections of the Yorkshire Registry Act, 1884, which are material, are as follows:

"Section 4. From and after the commencement of this Act, and subject to the provisions of this Act, and any rules under this Act, all assurances executed or made after the commencement of this Act, and all wills of any testators dying after the commencement of this Act, by which any lands within any of the three Ridings are affected, may be registered under this Act. . . . Section 14. Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances or of the execution thereof, and every will registered under this Act shall have priority according to the date of the death of the testator if the date of registration thereof be within a period of six months after the death of the testator, or according to the date of registration thereof, if such date of registration be not within or under this Act to be deemed to be within such period of six months. Provided that nothing in this Act shall interfere with the priorities as between themselves of any assurances or wills the dates or registration of which may be identical. All priorities given by the Act shall have full effect in all courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than

would belong to the person under whom he claims; and any disposition of land or charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

Under the Middlesex Registry Act (7 Anne, c. 20), s. 1, the words were:

"All deeds and conveyances whereby any hereditaments in the said county may be any way affected in law or equity."

John Baxandall died on April 23, 1885, intestate, leaving him surviving Martha Baxandall, his widow, and the defendant Emily Crowther his only child. By a settlement made Sept. 9, 1855, between Martha Baxandall, the defendant, Emily Crowther, and T. H. Crowther and S. Lund (thereinafter called the trustees), they conveyed and assigned all the real and personal estate to which J. Baxandall was seised or entitled at the time of his death to the trustees, to hold as to real estate free from the widow's rights of dower, and as to so much as consisted of personal estate to the trustees, their executors, administrators, and assigns upon trust that they should absolutely sell so much of the premises as consisted of real estate, and it was thereby declared, that on the sale thereof by any person who should not be seised of the legal estate in the property sold the person in whom such legal estate should be for the time vested should do and execute all such acts and assurances for effectuating such sale as the persons by whom such sale should be made should direct, and upon trust after making certain payment to hold the residue of the moneys to arise by such sale and conversion upon trust to pay the income thereof to M. Baxandall for her life, and after her death as to the capital and income upon trust for the defendant E. Crowther absolutely. And it was declared that the trustees should have power to postpone the sale, and that whilst any such real estate should continue unsold the same should be held upon such trusts as would, as nearly as the nature of the property admitted, correspond with the trusts thereinbefore declared concerning the trust funds. On Oct. 24, 1885, a memorial of this settlement was registered at Wakefield under the Yorkshire Registry Act, 1884. J. Baxandall on his death was seised in fee of freehold premises No. 2, Plevna Terrace, Bingley, but had no interest in No. 122, City Road, Bradford. The plaintiff society, having made inquiries in writing of the trustees of the settlement of 1885 who stated the property settled consisted of No. 122, City Road, Bradford, No. 2, Plevna Terrace, Bingley, and £600 lent to Sarah Lister. On Jan. 11, 1892, a mortgage was executed by the defendant E. Crowther in favour of the plaintiff society on all her reversionary interest under the settlement of 1885. The plaintiff society, relying on the representation of the defendant E. Crowther as to what was the property included in the settlement of 1885, lent her the sum of £300 on such security. The defendant E. Crowther at the same time made a statutory declaration that she had not incumbered. The plaintiff society gave notice of this mortgage to the trustees of the settlement of 1885 immediately after the same was executed. S. Lund, one of the trustees, died in 1895. The interest on the mortgage of Jan. 11, 1892, was paid until January, 1893. On Oct. 21, 1912, M. Baxandall died intestate, and T. H. Crowther, the surviving trustee of the settlement of 1885 died on Dec. 21, 1912. On Jan. 1, 1895, the defendant E. Crowther conveyed No. 2, Plevna Terrace, Bingley, to one Bradley by way of mortgage, who transferred the same in 1897 to David Lister, who in turn in 1903, under the power of sale contained in the mortgage deed, conveyed the premises as mortgagee to Sarah Lister, one of the defendants. This mortgage, transfer, and conveyance of the freehold premises No. 2, Plevna Terrace, Bingley, were all three registered in the Yorkshire Registry under the Yorkshire Registry Act, 1884, and notices of such indentures were at the same time given to the trustees of the settlement of 1885. The mortgage of the plaintiff society of Jan. 11, 1892, was not registered by them under the Yorkshire Registry Act, 1884, and the question arose whether the plaintiff society under their unregistered mortgage, which included the reversionary interest of the defendant E. Crowther in No. 2,

Plevna Terrace, and of which mortgage the plaintiff society had given notice to the trustees of the settlement of 1885, had priority over the conveyance to the defendant Sarah Lister, whose title was registered under the Yorkshire Registry Act, 1884. On Feb. 20, 1913, with notice of plaintiff's mortgage of Jan. 11, 1892, new trustees were appointed of the settlement of 1885.

On learning of the death of Mr. Baxandall, the plaintiff society made inquiries as to the then state of the property subject to the trusts of the settlement of 1885, and in the course of such inquiries came into communication with the defendant E. Crowther, and with the defendants A. B. Fox and J. R. Bradley, who were solicitors practising at Liverpool, and were acting as solicitors for the defendant E. Crowther. As a result of the inquiries by the plaintiff society they alleged they were informed by the defendants E. Crowther, A. B. Fox, and J. R. Bradley that the house and shop, No. 122, City Road, Bradford, never formed part of the property subject to the trusts of the settlement of 1885, but was the private property of Mr. Baxandall, to whom it was conveyed on Nov. 1, 1887, and on whose death intestate the premises devolved upon the defendant E. Crowther as her administratrix and heir-at-law. The plaintiff society further discovered the existence of the mortgage transfer and conveyance to the defendant S. Lister, of No. 2, Plevna Terrace, Bingley. On Mar. 13, 1913, the defendant E. Crowther conveyed the house and shop, No. 122, City Road, Bradford, by way of mortgage to A. B. Fox and J. R. Bradley to secure a pre-existing debt of £100 due to them for professional services. The sum of £600 lent to Sarah Lister of Keighley on mortgage, which formed part of the property subject to the trusts of the settlement of 1885, was repaid to the trustees of that settlement, and was invested by them in the purchase of 150 shares of £1 each in Threlfall's Brewery, Ltd., which shares stood partly in the name of Mr. Baxandall and partly in the name of the defendant E. Crowther. The defendants A. B. Fox and J. R. Bradley on Mar. 5, 1913, procured a transfer to themselves of the 150 shares in Threlfall's Brewery, Ltd. In their defence the defendants A. B. Fox and J. R. Bradley admitted they knew that these shares were subject to the trusts of the settlement of 1885, and that they did not claim that such shares were not subject to the trusts of such settlement, but held the shares to the order of the trustees of the settlement, whose claim had priority to the mortgage to them of Mar. 5, 1913. There was owing to the plaintiff society under the mortgage to them of Jan. 11, 1892, the sum of £287 10s., being the balance due of the principal sum of £300 together with interest at five per cent. per annum as from Jan. 11, 1893.

In May, 1914, the action came on for trial before ASTBURY, J., who held (a) the contention that the plaintiffs ought to have searched the register and not relied solely on the representation was unfounded; (b) the settlement contained a trust to sell the real estate and, therefore, converted the latter into personalty; (c) the mortgage to the plaintiff society was a charge on the proceeds of sale of the real estate and not registrable under the Yorkshire Registry Act, 1884; and (d) by their prior notice to the trustees the mortgage of the plaintiffs was entitled to priority against the defendant, Sarah Lister. From this decision the defendant, Sarah Lister, appealed.

The first question argued was whether there was an imperative trust for the sale of the real estate.

Percy Wheeler for the appellant.

Frank Russell, K.C., and *O. R. A. Simpkin* for the plaintiff society.

LORD COZENS-HARDY, M.R.—The general principle applicable to the present case is not open to doubt. You must look at the whole instrument in question, not at one clause only, and see whether there is that which amounts to an imperative direction to sell although there may be power to postpone the sale in the widest terms and although it may require the consent of someone. Counsel for the appellant in his argument very fairly concedes that but for the final clause in this

deed he could not resist the contention that there was an imperative trust for sale.

The deed is a deed between a widow and her only child, the widow being entitled to dower and the child being entitled as heiress-at-law. Between them they are entitled to the personal estate, and they convey all the real estate of the intestate and the personalty, too, upon trust to two trustees to sell and dispose of it by public sale or auction. Then there is an unintelligible direction followed by a clear declaration of trust as to what is to be done with the proceeds of sale. It is to be invested to pay the debts and funeral expenses and expenses of administration and to invest the residue in certain securities which are there mentioned, and the trustees are to hold the residue of the money to arise by such a sale upon trust to pay the interest, dividends, and annual produce thereof to the widow for life, and after her decease as to the capital and income of the trust fund upon trust for the daughter absolutely. It is quite plain that thus far there was an imperative direction for sale. Then comes a common form to authorise postponement of the sale. It was also declared that the trustees might postpone the sale of so much of the premises as consisted of real estate for so long a period as they should think fit. That postponement clause would not prevent the trust for sale being absolute. Then the settlement goes on to provide that whilst the real estate should continue unsold it should be held by the trustees upon such trusts as should, as nearly as the nature of the property would admit, correspond with the trusts thereinbefore declared concerning the trust fund. There is power to manage the unsold real estate.

The argument for the appellant really turns upon the words

> "upon such trusts as should, as nearly as the nature of the property would admit, correspond with the trusts thereinbefore declared concerning the trust fund."

He says that that contemplates that there may be unsold real estate at the death of two beneficiaries—certainly at the death of the widow and possibly of the daughter also—and that that is in effect a declaration that it shall be held as real estate upon trusts corresponding with the personal estate. I think that that is a very slender scaffold upon which to build such an argument. No authority which counsel for the appellant has cited seems to me to bear that out. The case of *Wheldale* v. *Partridge* (1), which is a decision of LORD ELDON, is very far from bearing out any such contention. In the event of the property being held under the trust for sale, the proceeds were to go in a different direction. It was therefore very difficult to say that that could be an imperative trust for sale, because the deed contemplated in one way if there was a trust for sale and in another way if there was not. That being so, it seems to follow that there was not an imperative trust for sale. Taking the scope of the whole instrument, I think that the learned judge in the court below was right in saying that there was an imperative trust for sale in the present case.

KENNEDY, L.J.—I agree.

SWINFEN EADY, L.J.—I am of the same opinion. The whole question is whether there is an imperative trust for sale. A direction to convert money into land, or land into money, must be express and imperative to work a conversion. If the conversion be merely optional, then the property will be considered as real or personal according to the actual condition in which it is found. So that the whole question here is, Is the direction to convert imperative? It is conceded that but for the last clause in the settlement there would be nothing to argue. The trustees are to absolutely sell, with a power to postpone. If that were all, it would be unarguable. In my opinion the subsequent direction as to what is to happen whilst the estate shall continue unsold, which is directory, does not in any way cut down the imperative nature of the trust. For these reasons I am of opinion that, according to the true construction of this settlement, it must be treated as an absolute trust for sale, an imperative direction to convert.

The second question, whether the plaintiffs' mortgage had obtained priority over the defendant's mortgage by their notice to the trustees of the settlement, was then argued.

Percy Wheeler for the appellant.
Frank Russell, K.C., and *O. R. A. Simpkin* for the society.

LORD COZENS-HARDY, M.R.—We have held that under the settlement in question there was an imperative trust for sale, and that the property was converted notionally into personalty. The beneficiaries were the widow, who was tenant for life, and the daughter, who was absolutely entitled on her mother's death. During the lifetime of the widow a mortgage was executed by the daughter in favour of the plaintiffs. What had the lady to mortgage? All she had to mortgage was her interest in the proceeds of sale. What is the method approved by the law of the land for protecting the interests of a mortgage with such a person? To give notice to the trustees. That was done by the plaintiffs here, and a good title was undoubtedly acquired by the plaintiffs, unless it be true that a mortgage of that character requires to be put upon the registry. The present appellant is subsequent in time to the plaintiffs. She took a mortgage. Notice thereof was not given to the trustees of the settlement, but the deed was entered upon the registry. The question under those circumstances is, Who is entitled to priority?

Looking at the matter apart from authority the daughter could not in any way interfere with the positive trust for sale vested in the trustees. The transaction in question took place in the lifetime of the mother, the tenant for life. It seems to me, an ingenious argument, that the deed ought to have been registered because at some future time, after the mother's death, the daughter might have elected to take the land as land. She could not do it alone. I think that it would be contrary to the policy of the Act to say that trustees who have an absolute trust for sale have anything to do as to dealings with the beneficial interest of persons under the trust for sale. It is not within the mischief of the Act, and, apart from authority, I should have come to the same conclusion, but I cannot approach the matter in that view.

Nearly eighty years ago, LORD LANGDALE, M.R., in the case of *Malcolm* v. *Charlesworth* (2) laid down a principle which seems to me possibly to go further than the present case. He says (1 Keen at pp. 72, 73):

> "The only question is whether the land situate in the county of York—for the argument cannot possibly be extended to the land in Leicestershire—is to be considered as affected by an assignment of a legacy charged upon the land. It appears to me that the deed under which the plaintiff claims is not a deed which affects the land; it is an assignment of the money charged upon the land, and of the money only; and if I were to hold that an instrument assigning money charged upon land situate in a register county required registration, I should lay down a rule which certainly has not hitherto been adopted."

It may be said that that was a bold decision. I am disposed to think that it is not quite clear that the concurrence of the plaintiff there might have been required to make a title. In the present case it is quite clear that the concurrence of the plaintiffs, the mortgagees, was not required to make a title and would not be required to make a title. They would not have been properly inserted on the abstract of title. That authority came before KAY, J., in 1885 in *Arden* v. *Arden* (3)—that is to say, thirty years ago. He discussed the matter fully. He expressed his approval of *Malcolm* v. *Charlesworth* (2) in dealing with that case, the facts of the which are identical with the present one—namely, an interest in a share of the proceeds of sale of the property directed to be sold—and he held that that was not within the terms of the Act or within the mischief of the Act. It is true that that was the Middlesex Registry, but I do not think that anything turns upon the language of one statute rather than upon that of another. Therefore in substance I am asked

A to overrule the decision of LORD LANGDALE, which is eighty years old, and the decision of KAY, J., which is thirty years old, decisions which, though some slight doubt was expressed by very cautious conveyancers, have never been impugned by any judge, I think that we ought to hesitate long before we give a decision which might have the effect of destroying the titles and the securities which have been accepted and dealt with on the footing of the registration of deeds of this kind, B unless it was absolutely necessary to do so. In my opinion, the decision of the learned judge in the court below on this point was right, and the appeal must be dismissed with the usual consequences.

KENNEDY, L.J.—I am of the same opinion. With regard to the cases cited, in *Arden* v. *Arden* (3) KAY, J. followed the decision in *Malcolm* v. *Charlesworth* (2), C a decision which was an authority for him in deciding as he did. In *Malcolm* v. *Charlesworth* (2) the legacy was charged upon land being in Yorkshire. KAY, J. in *Arden* v. *Arden* (3) is dealing with the case of an interest in a share of the proceeds of sale of real estate in Middlesex. He there was of opinion that there was not a difference between the Acts, although the forms are not identical, which in any way prevented his treating the decision on the Yorkshire Registry Act at that time as a D good authority in construing the language of the Act relating to the Middlesex Registry. The words of the Act are:

> "All deeds and conveyances whereby any hereditaments in the said county 'may be in any way affected in law or equity'."

E It seems to me that both these two decisions, as to the meaning of the terms used in those two cases, are right, and that the learned judge here, not only was entitled, but as it seems to me, was practically bound, to hold as he did, that this case on the Yorkshire Registry Act was applicable.

SWINFEN EADY, L.J.—The question is whether a dealing with a share or F interest in the proceeds of sale of land in Yorkshire, conveyed upon an absolute trust for sale, requires registration under the Yorkshire Registry Act, 1884. Under that Act, by s. 4, all assurances by which any lands within any of the three Ridings of the county are affected may be registered under this Act, and then by s. 14 all assurances entitled to be registered are to have priority according to the date of registration. It is clear from the rest of s. 14 that assurances of equitable, as well G as legal, interests are within the Act. The question is whether an assurance of a share of the proceeds of sale of the land is within the Act. Land is defined thus:

> "The expression 'land' includes land and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, and also an undivided share in land [and] the expression 'conveyance' includes any assignment [and so on, by which] any interest in such land is thereby conveyed."

H The question is whether a share or interest in the proceeds of sale of land is an interest in land within the meaning of the Act. It is quite clear that it may be and is for many statutes and for many purposes an interest in land. For instance, money to arise from the sale of real estate so far partakes of the nature of realty—that is to say, it is so far an interest in land—that under the old I law it would not be the subject of a bequest to a charity which was within the Mortmain Acts. So, again, it might be an interest in land within the Dower Acts or within the Statute of Limitations. The question is whether it is an interest in land within the meaning of the Yorkshire Registry Act, 1884. In my opinion that Act is intended to apply to dealings both at law and in equity with the land itself, those which affect the land itself. In the present case the trustees for sale could make a good title quite independently of and without the concurrence of the persons interested in the proceeds or entitled to any share in the proceeds or their mortgagees, and the person entitled to a share in the proceeds of the land had,

in my opinion, no interest in the land itself within the meaning of this statute. Counsel for the appellant urged that it was within the mischief of the statute. I do not think it is; it is not within the mischief of the statute. Where persons are entitled to an interest in the proceeds of sale of land, the land is vested in trustees for sale and the trustees for sale hold the proceeds after the sale in trust for the cestuis que trust, and if any cestui que trust chooses to assign or mortgage or incumber the interest there is a well-known method—that is, by giving notice to the trustees—by which priority is secured, by which the position is secured, and by which, if due inquiry is made of the trustees before the sale or mortgage, the position is ascertained, and information can be gained as to whether the vendor or incumbrancer has previously sold or dealt with the interest which the trustees hold in trust. To guard against the mischief of fraudulent dealings where money is held by trustees, there always may be inquiry of the trustees. Where you are dealing with simple interests in land the same observations do not apply, and, in the case of the first mortgage, the first mortgagee would take the deeds. After the first mortgage, when it is a question of affecting subsequent incumbrancers, in the absence of any registry there is a difficulty in ascertaining whether or not prior incumbrances exist, and opportunity for committing frauds arises in the absence of the registry. Those observations only apply to the dealings with the land itself and not to any proceeds which are held on trust by trustees. The interest in question in this proceeding is not an interest in land within the meaning of the Act, nor is it within the mischief of the Act, and no entry on the registry could secure for it any priority over a prior incumbrancer who has given notice to the trustees.

Appeal dismissed.

Solicitors: *Jaques & Co.*, for *Massey & Co., Bradford; Devonshire, Monkland & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re DEMPSTER. BORTHWICK *v.* LOVELL

[CHANCERY DIVISION (Sargant, J.), February 10, 1915]

[Reported [1915] 1 Ch. 795; 84 L.J.Ch. 597; 112 L.T. 1124]

Annuity—Power to set aside fund—Defeasible annuity—Duty of trustee to purchase defeasible annuity for annuitant—Right of annuitant to fund.

A testator gave pecuniary legacies and two annuities, and directed that her trustees should provide for the annuities by setting aside and appropriating a portion of her estate sufficient to answer the annuities by the income thereof and that until such appropriation the annuities should be paid out of the residuary estate, and that upon cesser of either of the annuities the proportion of the capital so set aside and appropriated should sink into and form part of her residuary estate. The testator also declared that neither of the annuitants should be allowed to have the value of the annuity in lieu thereof, and that, if the annuitant should do or suffer any act or thing whereby the annuity should be assigned, charged, or encumbered, the annuity should thenceforth cease to be payable. The testator gave his residuary estate in trust for other persons. The estate was sufficient to pay all the pecuniary legacies in full and to provide sums sufficient to purchase annuities of the amounts given by the will, but was not sufficient to pay the legacies in full and to provide a sum sufficient by the income thereof to pay the annuities in full.

Held: the declaration as to cesser of the annuities on assignment, charge, or encumbrance was a good gift over to the residuary legatees on such an event

happening; sums sufficient to buy annuities of the amounts specified in the will must be set side; but the annuitants, having regard to the fact that their annuities were determinable, were not entitled to payment of the sums set aside which must be invested by the trustees in the purchase of annuities to be paid to the annuitants until they should assign, charge, or encumber.

Carr v. *Ingleby* (1) (1831), 1 De G. & Sm. 362, *Re Ross*, *Ashton* v. *Ross* (2), [1900] 1 Ch. 162, and *Re Cottrell*, *Buckland* v. *Bedingfield* (3), [1910] 1 Ch. 402, applied.

Re Sinclair, *Allen* v. *Sinclair*, *Hodgkins* v. *Sinclair* (4), [1897] 1 Ch. 921, distinguished and explained.

Notes. Considered: *Re Beecham's Settlement*, *Johnson* v. *Beecham*, [1933] All E.R. Rep. 938. Referred: *Re Ellis*, *Nettleton* v. *Crimmins*, [1934] All E.R. Rep. 58; *Re Cox*, *Public Trustee* v. *Eve*, [1938] 1 All E.R. 661.

As to abatement of defeasible annuities, see 16 HALSBURY'S LAWS (3rd Edn.) 331, and for cases see 23 DIGEST (Repl.) 427, 428. As to creation of annuities by will, see 32 HALSBURY'S LAWS (3rd Edn.) 546–551, and for cases see 39 DIGEST 124–130.

Cases referred to:

(1) *Carr* v. *Ingleby* (1831), 1 Re G. & Sm. 362; 63 E.R. 1105; 23 Digest (Repl.) 426, *4975*.

(2) *Re Ross*, *Ashton* v. *Ross*, [1900] 1 Ch. 162; 69 L.J.Ch. 192; 81 L.T. 578; 48 W.R. 264; 23 Digest (Repl.) 428, *4987*.

(3) *Re Cottrell*, *Buckland* v. *Bedingfield*, [1910] 1 Ch. 402; 79 L.J.Ch. 189; 102 L.T. 157; 23 Digest (Repl.) 428, *4988*.

(4) *Re Sinclair*, *Allen* v. *Sinclair*, *Hodgkins* v. *Sinclair*, [1897] 1 Ch. 921; 66 L.J.Ch. 514; 76 L.T. 452; 45 W.R. 596; 23 Digest (Repl.) 427, *4981*.

Also referred to in argument:

Wright v. *Callender* (1852), 2 De G.M. & G. 652; 21 L.J.Ch. 787; 19 L.T.O.S. 308; 16 Jur. 647; 42 E.R. 1027, L.JJ.; 23 Digest (Repl.) 428, *4986*.

Stokes v. *Cheek* (1860), 28 Beav. 620; 29 L.J.Ch. 922; 54 E.R. 504; 39 Digest 129, *223*.

Hunt-Foulston v. *Furber* (1876), 3 Ch.D. 285; 24 W.R. 756; 39 Digest (Repl.) 129, *226*.

Originating Summons by the trustees and executors of the will of Charlotte Louisa Hawkins Dempster asking (i) in what manner the trustees ought to apportion and deal with the estate in respect of and as between the legacies and annuities given by the will; and (ii) how they ought to deal with and apply the amounts to be set apart or paid out of the estate in respect of the annuities given to H. Lovell and G. Pittaluga.

Charlotte Louisa Hawkins Dempster by her will, dated June 11, 1912, appointed the plaintiffs, and another person who renounced probate, executors and trustees of her will and gave certain legacies (including a legacy of £6,000 to the defendant, the Hon. Eileen O'Brien). The will then contained the following clause:

"I bequeath the following annuities videlicet to my excellent cook-housekeeper Harriet Lovell an annuity of £40 whether she is in my service at the date of my death or not; to my old coachman Giovanni Pittaluga (called Lavona), of No. 3, Rue Cabris, Cannes, an annuity of £40, the said annuities to be paid quarterly, the first payment to be made three months after the date of my death. And I direct my trustees or trustee to make provision for the said annuities by setting apart and appropriating a portion of the investments comprised in my estate at the date of my death which shall be sufficient in their opinion to answer the said annuities by the income thereof, and that until such appropriation I declare that the said annuities shall be paid out of my residuary estate, and that upon the cesser of either of the said annuities

the proportion of the capital so set apart and appropriated shall sink into and form part of my residuary estate. And I declare that the said Harriet Lovell and Giovanni Pittaluga shall not be allowed to have the value of the said annuity given to them in lieu thereof, and I further declare that in case either of the said annuitants shall do or suffer any act or thing whereby the said annuity or any part thereof shall be assigned, charged, or encumbered the said annuity shall cease to be payable to the said annuitant and shall thenceforth cease to be payable."

The testatrix gave, devised, and bequeathed her residuary estate and effects to her trustees upon trust to convert the same into money, and, after paying thereout her funeral and testamentary expenses and debts and the legacies and annuities bequeathed by the will to stand possessed of the residue upon trust for such of the unmarried daughters of the late Major the Honourable Charles James Keith-Falconer as should be living at the time of her death in equal shares. The testatrix died on May 8, 1913. There were then three unmarried daughters of Major Keith-Falconer, one of whom was the defendant Miss Ida Madeleine Keith-Falconer. After paying debts, funeral and testamentary expenses, and duties, the estate was sufficient to pay the legacies in full and provide for the purchase of government or other annuities of the amounts of those given to the defendants Harriet Lovell and G. Pittaluga, but the estate was not sufficient to pay the legacies in full and also to allow of setting apart and appropriating sums sufficient to pay the annuities out of the income of the sums set apart. It was stated that the government would not grant an annuity to a foreigner who was permanently resident abroad.

Bryan Farrer for the trustees.

A. L. Ellis (for *P. M. Walters*, serving with His Majesty's forces) for the defendant Keith-Falconer the residuary legatee.

Alfred F. Topham for the annuitants.

J. W. Manning for the defendant O'Brien, a legatee.

SARGANT, J. (after reading the will).—There is a clear gift to each of the annuitants until she or he does or suffers something whereby the annuity is assigned, charged, or encumbered. Then the annuity is to cease to be payable, and in that event there is a gift over in trust for the residuary legatees. In my opinion, that is a perfectly good gift in favour of the residuary legatees if either annuitant attempts to assign, charge, or encumber the annuity. The estate is sufficient to pay all the legacies in full and to provide sums sufficient to purchase annuities of the amounts given by the will; but it is not sufficient to pay the legacies in full and also to set aside two funds the income of which will be enough to pay the annuities in full. Then what ought to be done? It seems to me that *Re Cottrell* (3) precisely applies to the present case except for the fact that here the annuities are determinable annuities, and I propose to follow the principles laid down in *Re Cottrell* (3) as being applicable here, and I may add that they appear to me to be perfectly right.

Then comes the further question whether the annuitants, in view of the fact that the annuities are not absolute annuities to them but are determinable annuities, are entitled, in lieu of having the annuities purchased and held by the trustees upon trusts corresponding with or analagous to those declared by the will to have the amount required to purchase the annuities paid to them. It was clearly laid down in *Carr* v. *Ingleby* (1) that where the annuity was determinable by an event occurring in the lifetime of the annuitant, the annuitant was not entitled to have the value of the annuity paid to her, but that the amount was to be applied in the purchase of an annuity to be paid to her for life or until the occurrence of such event, and the same principle in effect was followed by NORTH, J., in *Re Ross* (2) in which he recognised that where an annuity was given to a married lady without power of anticipation for her separate use she was not entitled to

receive the capital of the annuity but was only entitled to the income of it from time to time. However, it is said that those decisions have been qualified by or are inconsistent with a case, before KEKEWICH, J., *Re Sinclair* (4). When, however, I come to look at *Re Sinclair* (4), it appears to me that it is not analagous, because there the annuity in question was not given under the will at all, but was subsisting quite independently of the will and was an obligation binding on the testator's estate under some deed. There the annuitant, coming from outside, had, under the process familiar in bankruptcy, been admitted to prove for the value of his determinable annuity, and it was shown that the amount required to purchase a determinable annuity really was the same as the amount required to purchase an absolute annuity; it does not appear to me that *Re Sinclair* (4) really throws any light upon the case now before the court. It seems to me that, on principle, if an annuitant who has a determinable annuity or is restrained from anticipation is compelled to take a smaller annuity, that cannot alter the character of the annuity itself. The annuitant has, in common with other legatees, to take, say, 19s. in the pound instead of 20s. in the pound, but I can see no reason why the 19s. in the pound should not be paid on precisely the same conditions on which the 20s. in the pound has been directed to be paid. Here fortunately 20s. in the pound is going to be paid to each of the annuitants, and the only change which is made in the directions given by the testatrix is this, that, in lieu of a capital fund being set aside, the income of which would have been payable, pending assignment, charge, or encumbrance, to the annuitants, arrangements will be made either for a government annuity in one case, or for an annuity from a first-class insurance office in the other case. The mere substitution of that for a capital fund does not seem to me to involve any change in the destination or character of the annual payment itself. As to one of the annuitants there is a difficulty about purchasing a government annuity, because he is a foreigner residing permanently abroad, but with regard to him counsel for the annuitants was prepared, if I was against him on his contention as to this annuitant being entitled to receive the value of the annuity, to have an annuity purchased in the name of some first-class insurance office to be approved by the annuitant. That being so, I think I ought to direct that the trustees should purchase in their own names a government annuity for the first annuitant and an annuity from a first-class insurance office approved by the second annuitant for the second annuitant, and that they should pay the income of the annuities to the annuitants during their lives or until they should respectively assign, charge, or encumber them. In each case the amount of the annuity must be paid down to date, and the purchase must be made of an annuity to accrue henceforth.

Solicitors: *Hemsley & Co.; Keith-Falconer, Walters & Co.; Hasties.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

HONG KONG AND CHINA GAS CO., LTD. *v.* GLEN

[CHANCERY DIVISION (Sargant, J.), February 12, 13, 20, 1914]

[Reported [1914] 1 Ch. 527; 83 L.J.Ch. 561; 110 L.T. 859; 30 T.L.R. 339; 58 Sol. Jo. 380; 21 Mans. 242]

Company—Shares—Allotment—Consideration—Transfer of property to company by allottee—Discrepancy between value of property and value of shares allotted.

By a contract in writing between the plaintiff company and one G., G. agreed to sell to the company a concession and the company agreed to allot to G. 400 of its shares forthwith and also, by cl. 8 of the contract, one-fifth of any future increase of capital, the company in every case providing G. with the money required to pay for the shares.

Held: a shareholder might discharge his obligation on his shares by the transfer of property or the rendering of services to the company, and it mattered not that the value of the property transferred or the services rendered did not amount to the full amount of the cash liability, but that rule did not apply where the contract showed on its face that the property or services were widely less in value than the shares allotted; in the present case the liability to be discharged on one-fifth of all future increases of capital obviously and necessarily had no connexion with or relation to the value of the concession; and, therefore, the agreement was bad in so far as it purported to relieve G. from his liability to pay up all or any part of the increased capital of the company from time to time allotted to him.

Notes. As to consideration to be given for shares see 6 HALSBURY'S LAWS (3rd Edn.) 137, and for cases see 9 DIGEST (Repl.) 239 et seq.

Cases referred to:

(1) *Ooregum Gold Mining Co. of India* v. *Roper*, [1892], A.C. 125; 61 L.J.Ch. 337; 66 L.T. 427; 41 W.R. 90; 8 T.L.R. 436; 36 Sol. Jo. 344, H.L.; 9 Digest (Repl.) 304, *1913*.

(2) *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66; 60 L.J.Ch. 93; 63 L.T. 686; 39 W.R. 49; 7 T.L.R. 67; 2 Meg. 366, C.A.; 9 Digest (Repl.) 307, *1930*.

(3) *Re Wragg, Ltd.*, [1897] 1 Ch. 796; 66 L.J.Ch. 419; 76 L.T. 397; 45 W.R. 557; 13 T.L.R. 302; 41 Sol. Jo. 385; 4 Mans. 179, C.A.; 9 Digest (Repl.) 321, *2022*.

(4) *Re Almada and Tirito Co.* (1888), 38 Ch.D. 415; 57 L.J.Ch. 706; sub nom. *Re Almado and Tirito Co., Allen's Case*, 59 L.T. 159; 36 W.R. 593; 4 T.L.R. 534; 1 Meg. 28, C.A.; 9 Digest (Repl.) 324, *2035*.

(5) *Hilder* v. *Dexter*, [1902] A.C. 474; 71 L.J.Ch. 781; 87 L.T. 311; 51 W.R. 225; 18 T.L.R. 800; 7 Com. Cas. 258; 9 Mans. 378, H.L.; 9 Digest (Repl.) 239, *1545*.

Also referred to in argument:

North Eastern Rail. Co. v. *Lord Hastings*, [1900] A.C. 260; 69 L.J.Ch. 516; 82 L.T. 429; 16 T.L.R. 325, H.L.; 17 Digest (Repl.) 275, *806*.

Re Theatrical Trust, Ltd., Chapman's Case, [1895] 1 Ch. 771; 64 L.J.Ch. 488; 72 L.T. 461; 43 W.R. 553; 11 T.L.R. 310; 39 Sol. Jo. 364; 2 Mans. 304; 13 R. 462; 9 Digest (Repl.) 321, *2018*.

Bury v. *Famatina Development Corpn., Ltd.*, [1909] 1 Ch. 754; 78 L.J.Ch. 508; 100 L.T. 723; 16 Mans. 138, C.A.; on appeal, sub nom. *Famatina Development Corpn., Ltd.* v. *Bury*, [1910] A.C. 439; 79 L.J.Ch. 597; 102 L.T. 866; 26 T.L.R. 540; 54 Sol. Jo. 616, H.L.; 9 Digest (Repl.) 312, *1954*.

Mosely v. *Koffyfontein Mines, Ltd.*, [1904] 2 Ch. 108; 73 L.J.Ch. 569; 91 L.T. 266; 53 W.R. 140; 20 T.L.R. 557; 48 Sol. Jo. 507; 11 Mans. 294, C.A.; 9 Digest (Repl.) 306, *1924*.

Re Eddystone Marine Insurance Co., [1893] 3 Ch. 9; 62 L.J.Ch. 742; 69 L.T. 363; 41 W.R. 642; 9 T.L.R. 501; 37 Sol. Jo. 559; 2 R. 516, C.A.; 9 Digest (Repl.) 321, *2017*.

Re Harmony and Montague Tin and Copper Mining Co., Spargo's Case (1873), 8 Ch. App. 407; 42 L.J.Ch. 488; 28 L.T. 153; 21 W.R. 306, L.JJ.; 9 Digest (Repl.) 314, *1965*.

Larocque v. *Beauchemin* (1897), A.C. 358; 66 L.J.P.C. 59; 76 L.T. 473; 45 W.R. 639; 4 Mans. 263, P.C.; 9 Digest (Repl.) 314, **788*.

Bloomenthal v. *Ford*, [1897] A.C. 156; 66 L.J.Ch. 253; 76 L.T. 205; 45 W.R. 449; 13 T.L.R. 240; 4 Mans. 156, H.L.; 9 Digest (Repl.) 325, *2043*.

Re Barangah Oil Refining Co., Arnot's Case (1887), 36 Ch.D. 702; 57 L.J.Ch. 195; 57 L.T. 353; 3 T.L.R. 727, C.A.; 9 Digest (Repl.) 281, *1757*.

Re Innes & Co., Ltd., [1903] 2 Ch. 254; 72 L.J.Ch. 643; 89 L.T. 142; 51 W.R. 514; 19 T.L.R. 477; 47 Sol. Jo. 513; 10 Mans. 402, C.A.; 9 Digest (Repl.) 321, *2020*.

Action tried by SARGANT, J., brought by the plaintiff company against the executors of Thomas Glen, who died in 1900, claiming (i) a declaration that the provisions contained in cll. 8, 9, and 10 of an agreement made between the company, Thomas Glen and William Glen, and dated July 14, 1862, were ultra vires the plaintiff company and invalid and void; alternatively (ii) a declaration that, according to the true construction of the agreement, the provisions of cll. 8, 9, and 10 thereof ceased to operate after the issued capital of the company amounted to £50,000; and in the further alternative that any further shares to be allotted on any future increase of the company's capital to the defendants or their nominees in pursuance of the agreement would, notwithstanding anything therein contained, be held by the nominees subject to the liability to pay the full nominal amount thereof in cash to the company without any liability on the company to provide such cash or any part thereof.

The plaintiff company was incorporated under the Joint Stock Companies Act, 1856, as amended by the Joint Stock Companies Act, 1857, and the Joint Stock Companies Act, 1857, and the Joint Stock Companies Act, 1858, in the year 1862 with a capital of £35,000, divided into 3,500 shares of £10 each. The objects of the company were to manufacture, supply, and sell gas to cities in Hong Kong and elsewhere in China, and other like purposes. The articles of association of the company empowered the company to increase its capital, and there was a special clause dealing with and especially authorising the company to make and enter into the contract with William Glen and Thomas Glen, the subject-matter of the present action. By that agreement it was recited that William Glen had obtained a concession for supplying gas to Victoria City, Hong Kong, that this concession had been transferred to Thomas Glen, that the latter would sell it to the company, and, in the event of acquiring like concessions, would give the company ample opportunity of acquiring them on the same terms, and that the plaintiff company would within three months of the sale allot to Thomas Glen or his nominees 400 shares of £10 each of the company's capital (not exceeding £20,000), and would provide £4,000 to be immediately applied in paying up the 400 shares in full. By art. 8 of the contract the company agreed that if and whenever the amount of the company's paid-up capital should be increased above the sum of £20,000 the company would allot to Thomas Glen, his executors, administrators, or assigns, such further number of shares as should be equal to one-fifth part of the increased capital so from time to time actually paid up beyond the said sum of £20,000 and would pay to him or them, or to the nominees of him or them, a sum equal to the nominal amount of the shares so allotted to him or them, which

sum or sums so paid should from time to time be immediately applied in paying up in full the shares so allotted. By art. 10, the company agreed to issue gratis proper certificates specifying that the shares had been fully paid up and would do all things necessary for vesting the shares legally and effectually in Thomas Glen, his executors, administrators, assigns, or nominees. Another article stipulated that the company were to provide such capital not exceeding £50,000 and were to do such things as should be necessary to carry out the concession in accordance with its terms. Shortly after the date of the agreement the concession was transferred to the plaintiff company, and further issues of shares were made in 1863 and 1873, when the claim of Thomas Glen to receive one-fifth of the increased capital was recognised. The company was very prosperous. In order to escape from the onerous provisions of the agreement as far as possible, the company had raised an unusual amount of the capital required for their undertaking in the form of debentures rather than as share capital. The shares of the company stood at a large premium, and the company came to the court to endeavour to get relief from this onerous contract, which they contended was ultra vires and void in forcing them for a fixed consideration to keep on issuing from time to time an indefinite amount of future share capital on the terms that all liability thereon should be discharged by the company without any payment being made by the allottees.

Younger, K.C., *Martelli, K.C.*, and *R. Hodge* for the plaintiff company.
Gore-Browne, K.C., and *Gordon Brown* for the defendants.

Cur. adv. vult.

Feb. 20, 1914. **SARGANT, J.,** read the following judgment.—In this action the plaintiffs contend first that cll. 8, 9, and 10 of an agreement dated July 14, 1862, are on their true construction no longer applicable; and, secondly, that, if and so far as they are applicable, they are bad and unenforceable either in whole or in part. The second contention is the only one of any general legal interest and in brief raises the question whether the company could, for a fixed present consideration, validly contract that an indefinite amount of future share capital should from time to time be issued upon the terms that all liability thereon for calls should be at once extinguished without any contemporaneous payment by the allottees.

The plaintiff company (hereinafter called the company) were incorporated under the Joint Stock Companies Act, 1856, 1857, and 1858, in June, 1862, with a capital of £35,000, divided into 3,500 shares of £10 each, and the contract is contained in certain articles of agreement which were dated July 14, 1862, and were made between William Glen, of the first part, Thomas Glen, of the second part, and the company, of the third part. By that agreement, after recitals which showed that William Glen had obtained a concession for supplying the city of Victoria, Hong Kong, with gas, that this concession had been transferred to Thomas Glen, and that the latter was prepared to sell it to the company, it was agreed (cll. 1, 2, 3, and 4) that the concession should be effectually sold and transferred to the company, who should be free from any competition by the vendors; (cll. 5 and 6), that in the event of either of the vendors acquiring any like concessions for any other place or places in China, they would not dispose thereof to any other party on any terms without first giving the company an ample opportunity of acquiring them upon the same terms; (cl. 7), that the company would, within three months, allot to Thomas Glen or his nominees 400 shares of £10 each of the company's capital (not exceeding £20,000) and would provide £4,000 to be immediately applied in paying up the 400 shares in full; and (cl. 8), which is the important article here, and which accordingly I quote in its exact terms, that:

"If and whenever the amount of the company's paid-up capital shall be increased above the sum of £20,000, the company will allot to the said Thomas

A Glen, his executors, administrators, or assigns, such further number of shares as shall be equal to one-fifth part of the increased capital so from time to time actually paid up beyond the said sum of £20,000, and will pay to him, or them, or to the said Henry Parkinson Sharp and William Matthew Mills Whitehouse, as the nominees of him or them, a sum equal to the nominal amount of the shares so allotted to him or them, which sum or sums so paid shall from time B to time be immediately applied in paying up in full the shares so allotted."

Clause 11 stipulated that the company were to provide a capital of at least £50,000 and were to carry out the concession in accordance with its terms. Soon after the date of the agreement the concession was duly transferred to the company, a first issue of 2,000 shares of £10 was made, and 400 of these shares (less 177 shares by which the price was reduced by agreement under particular circumstances) were C allotted to Thomas Glen or his nominees and were credited as fully paid up in accordance with cl. 7 of the agreement. Further issues of shares, up to 7,000 in all, were made in 1863 and 1873, the capital of the company being increased for the purpose on the two last occasions. On all these issues the claim of Thomas Glen to receive one-fifth of the increased capital was duly recognised, though it is said that on at least one occasion he waived or compromised his right to a full D fifth of the extra capital so as to enable the issue of the remainder to be effectually carried out. The operations of the company have been successful and it is common ground that at the present day their shares stand at a large premium.

I have mentioned all these facts by way of giving a short history of the matter, and also in view of certain suggestions that have been advanced on either side that some interpretation has been mutually put on the agreement or even some E estoppel created. But no serious argument has been or could, in my judgment, be founded on the conduct of the parties subsequent to the agreement. It is clear that continuing rights with regard to the subject-matter under discussion have not been modified, and remain the same as they were on the original completion of the transaction. Thomas Glen died in 1900, and the company have now brought this action against his executors to determine how far they are bound, as regards F future issues of share capital, by the obligation of cl. 8 of the agreement. They do not propose to disturb in any way any issue to Thomas Glen that has been made in the past.

I will deal first with the question of construction. It has been argued, on behalf of the company, that there are various indications in the agreement that the G parties were really only contracting with reference to the capital of the company as originally authorised, or at most with reference to the capital of £50,000 mentioned in cl. 11 of the agreement. And it may be that, if the terms of cl. 8 were at all ambiguous or doubtful, these arguments might be of some force and even prevail. But, in my judgment, the terms of cl. 8 are clear and unambiguous, and apply to any increase whatever of the company's capital, whether beyond the H originally authorised amount of £35,000 or the larger amount of £50,000 mentioned in cl. 11. This being so, I am bound to give effect to these clear and unambiguous terms, and cannot resort to any other part of the document. This construction renders it necessary to deal with the general question of law above mentioned.

Now, here I shall premise that though the incorporation of the company took place under the Act of 1856 and its amending Acts, and the language of the material I provisions of the Act of 1856 differs slightly from that of the corresponding provisions of the Companies Act, 1862, no material distinction for the present purpose has been pointed out between the meaning and effect of the two sets of provisions. It was practically conceded on both sides that *Ooregum Gold Mining Co. of India v. Roper* (1) and the other like decisions under the Act of 1862 apply equally to companies incorporated under the Act of 1856. Indeed, the point is to some extent at least governed by authority: see *Re Weymouth and Channel Islands Steam Packet Co.* (2).

Next, the precise meaning and effect of the language of cl. 8 should be examined. This does not in terms provide that the shares should be issued at a discount or as fully paid up, and counsel for the defendants uttered a warning against the use of catch words in deciding this case. When, however, the clause is carefully examined, I cannot think that it tends less to contravene the statutory provisions as to the capital of companies than if it were a clause providing in terms for the issue of fully paid shares. For, while the first part of the article contains an obligation to allot to Thomas Glen or his nominees one-fifth of all increased share capital, the second part of the article provides that, contemporaneously with such allotment, the company shall furnish cash equal to the full nominal value of the shares, and earmarks and dedicates that cash, so that it has immediately to return to the company's coffers for the purpose of paying up the very shares in full. It is impossible, in my view, to hold that the second part of cl. 8 does not amount to a contract for the contemporaneous absolution and discharge of the allottee from his primâ facie statutory liability to provide the nominal value of his shares in money. But it is, of course, clear that a shareholder may effectually contract to discharge his liability on his shares by (inter alia) the transfer of property in lieu of the payment of cash, and that it is not essential that for this purpose the real value of the property transferred should be ascertained as being, or should be in fact, the full equivalent of the cash liability: *Re Wragg, Ltd.* (3). Accordingly it is argued, and this is the real pinch of the case, that the transfer of the concession, though made once and for all in 1862, was a sufficient equivalent in kind, not only for the discharge of the liability on the first 400 shares to be issued to the concessionaire, but also for the discharge of the liability on a fifth of any increased capital that might at any future time be issued to the concessionaire by the company.

This argument, however, seems to me to go far beyond the decision in *Re Wragg* (3), and, indeed, to be in conflict with the views expressed both in that case and in the numerous cases there cited and examined, particularly *Re Almada and Tirito Co.* (4) and the *Ooregum Case* (1). These cases clearly show that although a value put on purchased property by the contract and not fixed dishonestly or colourably would be accepted as conclusive for this purpose while the contract still stands, yet the contrary would be the case where the contract shows on its face that the property is not an equivalent for the amount of the capital which it is proposed to exempt from liability. For instance, if shares were contracted to be issued as paid up to the extent of £20,000, as against property which might be shown outside the contract to be worth only £15,000, the arrangement would probably hold water as in *Wragg's Case* (3) itself, where the discrepancy was one between a total of £35,000 and a total of £46,000. But if the agreement were that the property to be purchased should be valued, and that against this property shares should be issued as fully paid to an extent exceeding the amount of the valuation by one-third, the arrangement would, in my judgment, be bad as to this excess of one-third. It would to this extent be apparent on the fact of the contract that the attempted discharge of a part of the liability was illusory.

In the present case the liability to be discharged on one-fifth of all future increases of capital obviously and necessarily has no connection with or relation to the value of the concession. The case is far stronger in this respect than if cl. 8 related only to share capital issued for the purpose of exploiting the concession in question, for it applies to the whole increased capital of the company whatever the purpose for which it may be required. Indeed, the absurdity becomes specially obvious if the event is considered of a gas concession for any other place in China being transferred by the Glens to the company. In that case the company would, on the face of the agreement, have to pay the Glens the full value of the new concession, for the company are only to have the first refusal and are not to be entitled to any better terms than any other purchaser, and yet after paying the full price they would still be bound, in respect of any share capital raised to complete the

purchase, to issue a further twenty-five per cent. to the Glens, and pay up or credit as paid up the whole of this twenty-five per cent. in full. It is true that an individual may contract to pay for property on any terms, and may find it convenient and choose to pay a price which shall be little or almost nothing in any ordinary event, but shall be increased tenfold or a hundredfold in certain improbable events altogether unconnected with any increase in the value of the property purchased. But I do not see how a limited company can speculate in this way consistently with the principles laid down in the cases to which I have referred. As I understand the legislation in question, as interpreted by the cases, the liability of a shareholder may be discharged either by the meal of cash or by the malt of property, services or the like; but this discharge will not take place if it is apparent that the malt bears no relation to the meal, and cannot, therefore, be estimated as being an equivalent for it. Can it be held here that the definite quantity of malt represented once and for all by the transfer of the concession is to be taken as the equivalent for ever of the obligation to render at any future time or times a wholly indefinite and unlimited quantity of meal? It seems to me that this question must be answered in the negative, and, indeed, that such a clause as cl. 8 could hardly have been introduced into the agreement of 1862 had the law on the subject been as fully ascertained at that date as it has since been.

I may add that I altogether dissent from the general principle contended for by junior counsel for the defendants that the agreement of 1862 must either be given effect to in full or set aside altogether. In numerous cases where a continuing clause in an agreement has been found to be bad after the main part of the agreement has been carried out, the offending clause is struck out without the result of the agreement being affected. A familiar instance is a purchase agreement containing restrictions in restraint of trade which are ultimately held to be contrary to public policy, as going beyond the reasonable protection of the covenantee. So far I have come to the conclusion that the provisions of cl. 8 for crediting as fully paid up the fifth of any future share capital issued to the representatives of Mr. Thomas Glen is unenforceable and void as being contrary to the requirements of the Act of 1856 as to capital. Does it follow that the whole of cl. 8 is bad? I think not. It appears to me, as I have already indicated, that the article divides itself into two portions, and no argument has been put before me to show that there is any objection to the earlier portion consisting in the obligation to allot to the concessionnaire one-fifth of the share capital from time to time issued: see *Hilder* v. *Dexter* (5). I propose, therefore, to declare that cl. 8 of this agreement in question is good so far as it creates an obligation to allot to Thomas Glen, his executors, administrators, or assigns, one-fifth of the increased capital from time to time of the company, but bad so far as it purports to relieve the allottee or allottees from liability to pay up all or any part of the nominal amount of such share capital. The points involved are difficult points of law, and each party has partly succeeded and partly failed. In my judgment, no order should be made as to costs.

Solicitors: *Gush, Phillips, Walters & Williams; Lyell & Betenson.*

[Reported by L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* ALLEN AND ANOTHER

[COURT OF APPEAL (Buckley, Kennedy, L.JJ., and Scrutton, J.), May 18, 19, 20, 28, 1914]

[Reported [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 12 L.G.R. 1003]

Sale of Land—Restrictive covenant—Covenantee holding no adjoining land—Sale of land to purchaser taking with notice of the covenant—Enforcement of covenant.

An owner of land in the county of London having obtained the sanction of the London County Council to lay out a new street under s. 7 of the London Building Act, 1894, entered into a covenant with them in reference to a plot of land at the end of the proposed street, whereby he covenanted for himself, his heirs or assigns, and other the persons claiming under him, and so far as practicable, to bind the land into whosoever hands the same might come, not to "erect, or cause or permit to be erected, any building, structure, or other erection on the land . . . without the previous consent in writing of the council." The council did not own any land adjoining that for the protection of which the covenant was imposed. The plot of land was subsequently sold to the defendant, who had notice of the restrictive covenant, and she built houses on the land without having previously obtained the council's consent.

Held: where the covenantee had no adjoining land nor land affected by the covenant, i.e., no land capable of enjoyment, as against the land of the covenantor, of the benefit of the covenant, the derivative owner claiming under the covenantor was not bound by the covenant, and, therefore, the council was not entitled to enforce the covenant against the defendant.

Tulk v. *Moxhay* (3) (1848), 2 Ph. 774, discussed.

Notes. Applied: *Chambers* v. *Randall*, [1922] All E.R. Rep. 565. Considered: *Re Union of London and Smith's Bank, Ltd.'s Conveyance, Miles* v. *Easter*, [1933] All E.R. Rep. 355. Referred to: *Northbourne* v. *Johnston & Sons*, [1922] All E.R. Rep. 144; *The Lord Strathcona*, [1925] P. 143; *Lord Strathcona Steamship Co., Ltd.* v. *Dominion Coal Co., Ltd.*, [1925] All E.R. Rep. 87; *Newton Abbott Co-operative Society, Ltd.* v. *Williamson and Treadgold, Ltd.*, [1952] 1 All E.R. 279.

As to rights and liabilities in relation to restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 559 et seq.; and for cases see 40 DIGEST (Repl.) 328 et seq.

Cases referred to:

(1) *Austerberry* v. *Oldham Corpn.* (1885), 29 Ch.D. 750; 55 L.J.Ch. 633; 53 L.T. 543; 49 J.P. 532; 33 W.R. 807; 1 T.L.R. 473, C.A.; 40 Digest (Repl.) 331, *2717.*

(2) *Spencer's Case* (1583), 5 Rep. 169; 77 E.R. 72; 31 Digest (Repl.) 153, *2007.*

(3) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774.*

(4) *Haywood* v. *Brunswick Building Society* (1881), 8 Q.B.D. 403; 51 L.J.Q.B. 73; 45 L.T. 699; 46 J.P. 356; 30 W.R. 299, C.A.; 40 Digest (Repl.) 331, *2714.*

(5) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 40 Digest (Repl.) 331, *2716.*

(6) *Re Nesbet and Potts' Contract*, [1905] 1 Ch. 391; 74 L.J.Ch. 310; 21 T.L.R. 261; sub nom. *Re Nesbitt and Potts' Contract*, 92 L.T. 448; 53 W.R. 297; affirmed sub nom. *Re Nesbet and Potts' Contract*, [1906] 1 Ch. 386; 75 L.J.Ch. 238; 22 T.L.R. 233; 50 Sol. Jo. 191; sub nom. *Re Nesbitt and Potts' Contract*, 94 L.T. 297; 54 W.R. 286, C.A.; 19 Digest 20, *58.*

(7) *Formby* v. *Barker*, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 51 W.R. 646; 47 Sol. Jo. 690, C.A.; 40 Digest (Repl.) 333, *2727*.

(8) *Milbourn* v. *Lyons*, [1914] 1 Ch. 34; 83 L.J.Ch. 260; 109 L.T. 797; 58 Sol. Jo. 154; affirmed, [1914] 2 Ch. 231; 83 L.J.Ch. 737; 111 L.T. 388; 58 Sol. Jo. 578, C.A.; 40 Digest (Repl.) 356, *2856*.

(9) *Stokes* v. *Russell* (1790), 3 Term Rep. 678; affirmed sub nom. *Russell* v. *Stokes* (1791), 1 Hy. Bl. 562; 126 E.R. 323, Ex.Ch.; 31 Digest (Repl.) 477, *6027*.

(10) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, *2769*.

(11) *Catt* v. *Tourle* (1869), 4 Ch. App. 654; 38 L.J.Ch. 665; 21 L.T. 188; 33 J.P. 659; 17 W.R. 939, L.JJ.; 40 Digest (Repl.) 359, *2879*.

(12) *Luker* v. *Dennis* (1877), 7 Ch.D. 227; 47 L.J.Ch. 174; 37 L.T. 827; 26 W.R. 167; 31 Digest (Repl.) 115, *2558*.

(13) *Wilson* v. *Hart* (1866), 1 Ch. App. 463; 35 L.J.Ch. 569; 14 L.T. 499; 30 J.P. 582; 12 Jur. N.S. 460; 14 W.R. 748, L.JJ.; 40 Digest (Repl.) 355, *2845*.

(14) *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276; 28 L.J.Ch. 498; 33 L.T.O.S. 193; 5 Jur. N.S. 555; 7 W.R 514; 45 E.R. 108, L.C.; 35 Digest 506, *2377*.

(15) *Taddy & Co.* v. *Sterious & Co.*, [1904] 1 Ch. 354; 73 L.J.Ch. 191; 89 L.T. 628; 52 W.R. 152; 20 T.L.R. 102; 48 Sol. Jo. 117; 39 Digest 526, *1406*.

(16) *McGruther* v. *Pitcher*, [1904] 2 Ch. 306; 73 L.J.Ch. 653; 91 L.T. 678; 53 W.R. 138; 20 T.L.R. 652; 48 Sol. Jo. 639, C.A.; 39 Digest 526, *1407*.

(17) *Keppell* v. *Bailey* (1834), 2 My. & K. 517; Coop. temp. Brough. 298; 39 E.R. 1042, L.C.; 31 Digest (Repl.) 240, *3746*.

(18) *Clegg* v. *Hands* (1890), 44 Ch.D. 503; 59 L.J.Ch. 477; 62 L.T. 502; 55 J.P. 180; 38 W.R. 433; 6 T.L.R. 233, C.A.; 31 Digest (Repl.) 113, *2544*.

(19) *Renals* v. *Cowlishaw* (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, *2796*.

(20) *Child* v. *Douglas* (1854), Kay, 560; 23 L.T.O.S. 140; 2 W.R. 461; 69 E.R. 237; on appeal 5 De G.M. & G. 739; 23 L.T.O.S. 283; 2 W.R. 701, L.JJ.; 40 Digest (Repl.) 339, *2766*.

(21) *Earl of Zetland* v. *Hislop* (1882), 7 App. Cas. 427, H.L.; 31 Digest (Repl.) 172, *3061*.

(22) *Noakes & Co., Ltd.* v. *Rice*, [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136, H.L.; 35 Digest 241, *19*.

Also referred to in argument:

National Phonograph Co. of Australia, Ltd. v. *Menck*, [1911] A.C. 336; 80 L.J.P.C. 105; 104 L.T. 5; 27 T.L.R. 239; 28 R.P.C. 229, P.C.; 39 Digest 524, *1389*.

Rangeley v. *Midland Rail. Co.* (1868), 3 Ch. App. 306; 37 L.J.Ch. 313; 18 L.T. 69; 16 W.R. 547, L.JJ.; 19 Digest 13, *25*.

Ackroyd v. *Smith* (1850), 10 C.B. 164; 19 L.J.C.P. 315; 15 L.T.O.S. 395; 14 Jur. 1047; 138 E.R. 68; 19 Digest 12, *20*.

Wilkes v. *Spooner*, [1911] 2 K.B. 473; 80 L.J.K.B. 1107; 104 L.T. 911; 27 T.L.R. 426; 55 Sol. Jo. 479, C.A.; 40 Digest (Repl.) 165, *1281*.

Fairclough v. *Marshall* (1878), 4 Ex.D. 37; 48 L.J.Q.B. 146; 39 L.T. 389; 27 W.R. 145, C.A.; 40 Digest (Repl.) 355, *2848*.

A.-G. v. *Biphosphated Guano Co.* (1879), 11 Ch.D. 327; 49 L.J.Ch. 68; 40 L.T. 201; 27 W.R. 621, C.A.; 26 Digest (Repl.) 291, *157*.

Osborne v. *Bradley*, [1903] 2 Ch. 446; 73 L.J.Ch. 49; 89 L.T. 11; 40 Digest (Repl.) 362, *2897*.

Appeal from a decision of AVORY, J., in an action brought by the plaintiffs against the defendants, M. J. Allen, Emily Allen, Willcocks and Norris upon

an indenture made between M. J. Allen and the plaintiffs, claiming certain mandatory injunctions and damages for breach of a covenant contained in that indenture. The covenant provided:

> "The applicant doth hereby for himself, his heirs and assigns, and other the persons claiming under him and so far as practicable to bind the land and hereditaments herein mentioned into whosoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shown by green colour on the said plan, without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected."

The land shown in green consisted of plot 1 and plot 2. In the deed M. J. Allen was described as the owner in fee simple of the land, whereas at that time he only had an option to purchase. Plot 1 was conveyed to M. J. Allen on July 3, 1908, and on the same day he mortgaged it to Willcocks. The mortgage was redeemed on Aug. 1, 1911, and Willcocks conveyed the land discharged from the incumbrance to Emily Allen in fee. In July, 1911, Emily Allen built three houses. On Oct. 9, 1911, she then charged the land together with the three messuages to Norris by way of mortgage. M. J. Allen had erected a wall on plot 2 which he contended was not a "building, structure, or other erection" within the meaning of the covenant. The plaintiffs claimed as against M. J. Allen and Emily Allen (i) a declaration that neither of them was entitled to erect or place or cause to be erected or placed, any building, structure, or other erection upon either of the plots; (ii) an order directing M. J. Allen, or alternatively Emily Allen, to pull down and remove the houses erected on plot 1; (iii) an order directing M. J. Allen to pull down and remove the wall erected on plot 2; (iv) an injunction restraining M. J. Allen, or alternatively, Emily Allen from erecting or placing, or causing to be erected or placed, any building, structure, or other erection upon plot 1, and a similar injuction against M. J. Allen as to plot 2; and (v) damages. As against Norris the plaintiffs claimed (i) a declaration that he was not entitled to retain upon plot 1 the three houses or any other building, structure, or other erection; (ii) an order directing him to pull down and remove or to concur with M. J. Allen and Emily Allen in pulling down and removing the houses.

It was admitted that the plaintiffs were not owners of any adjoining land, and that the covenant did not run with the land at law. Avory, J., was not satisfied that Emily Allen had not notice of the restrictive covenant. He held that Norris and Willcocks had constructive notice of it. He refused to grant a mandatory injunction to pull down the three houses, and awarded the plaintiffs nominal damages against the defendants M. J. Allen and Emily Allen with costs, and he gave judgment in favour of the defendant Norris without costs. As to plot 2, he held that the wall was a "structure" or "erection" within the meaning of the covenant, and made an order against M. J. Allen to pull down and remove it. All the defendants appealed, the defendant Norris by leave on the question of costs.

Cozens-Hardy, K.C., and *Goodman* for the defendant Norris.
Cozens-Hardy, K.C., and *Chartres* for the defendant Emily Allen.
Dickens, K.C., and *Daldy* for the plaintiffs.
Chartres for the defendant M. J. Allen.

Cur. adv. vult.

May 28, 1914. The following judgments were read.

BUCKLEY, L.J.—This action is brought by the London County Council upon an indenture dated Jan. 24, 1907 made between the defendant Morris Joseph Allen

of the one part and the London County Council of the other part, claiming certain mandatory injunctions and damages for breach of a covenant contained in that indenture. Before the date of the execution of the deed the defendant M. J. Allen had applied to the London County Council for their permission under s. 7 of the London Building Act, 1894 to his laying out a certain new road, called Galloway Road, running from south to north, and a further small portion of road at the northern end of Galloway Road running from east to west in continuation of a road called Dunraven Street. The London County Council gave their permission upon the terms, amongst other things, that this defendant should enter into a certain deed of covenant, and that was the deed of Jan. 24, 1907. The covenant in question was as follows: [HIS LORDSHIP read it, and continued:] The deed recited (but contrary to the fact) that the applicant was the owner in fee simple of the land in question. He was not. He had at the date of this deed of covenant merely an option of purchase, which might or might not result in his becoming owner of the land. The portions coloured green were two, namely, plot No. 1, being the continuation of Dunraven Street to the west of Galloway Road, and plot No. 2, being the continuation of Galloway Road to the north of Dunraven Street. It is necessary to deal with these two plots separately.

First as regards plot No. 1. On July 3, 1908 this was conveyed to the defendant M. J. Allen in fee. On the same day he mortgaged it with other land to one Willcocks to secure a sum of £3,600. On Aug. 1, 1911 the mortgage was redeemed, and Willcocks, with the concurrence of Allen, conveyed the land discharged from the incumbrance to the defendant Emily Allen in fee. On Oct. 9, 1911 Mrs. Allen charged the land, together with the three messuages then recently erected thereon, to the defendant Norris in fee by way of mortgage. In the interval, namely, in July, 1911, Mrs. Allen built on plot No. 1 and completed by the end of that month three houses. The writ in this action was issued on Aug. 5, 1911.

By virtue of ss. 7 and 9 of the London Building Act, 1894, the London County Council have certain powers of control over land which the owner proposes to form or lay out in streets. But they have no estate or interest in such land. The plaintiffs at the date of the deed of covenant had no estate or interest in any land adjoining or in any manner affected by the observance or non-observance of the covenant contained in the deed. Under these circumstances the defendants Mrs. Allen and Norris, who were not covenanting parties, contend upon this appeal that as matter of law, assuming that there has been a breach of the covenant contained in the deed of Jan. 24, 1907, and assuming (although as matter of separate contention they deny it as a fact) that they had notice of that covenant, the plaintiffs cannot as against them maintain any action upon the covenant contained in the deed. The short proposition is that as matter of law a derivative owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, is not bound by the covenant, even if he took with notice of its existence, if the covenantee has no land adjoining that for the protection of which the covenant was imposed or any land affected by the observance or non-observance of the covenant. I proceed to examine how the law upon this point stands upon the authorities.

The defendants do not contend that the covenant here in question runs with the land. It is the better opinion, and in *Austerberry* v. *Oldham Corpn.* (1) the Court of Appeal, by way of opinion and not of decision, held that the burden of a covenant, not involving a grant, never runs with the land at law except as between landlord and tenant. COTTON, L.J., said (29 Ch.D. at p. 776):

> "In order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee."

The relation of landlord and tenant did not in the present case subsist between the plaintiffs, the covenantees and M. J. Allen, the covenantor. Under these circumstances the plaintiffs admit that this covenant did not run with the land at law. As

between the covenantee and the owner deriving title under the covenantor there is no privity of contract, and the law is that it is only where there is privity of estate between landlord and tenant that the burden of a covenant will run with the land. Ownership of land, both by covenantor and covenantee, must exist in order that *Spencer's Case* (2) shall apply, and that the covenant shall run with the land. But it does not follow that the covenantee is without remedy where the covenant does not run with the land. *Tulk* v. *Moxhay* (3) established that as between the grantor of a restrictive covenant affecting certain land and the owner of adjoining land the covenantee may in equity enforce the covenant against the derivative owner taking with notice. The reasoning of LORD COTTENHAM'S judgment in *Tulk* v. *Moxhay* (3) is that if an owner of land sells part of it, reserving the rest, and takes from his purchaser a covenant that the purchaser shall use or abstain from using the land purchased in a particular way, that covenant (being one for the protection of the land reserved) is enforceable against a sub-purchaser with notice. The reason given is that, if that were not so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. If the vendor has retained no land which can be protected by the restrictive covenant, the basis of the reasoning of the judgment is swept away. In *Haywood* v. *Brunswick Permanent Building Society* (4) the Court of Appeal declined to extend the doctrine of *Tulk* v. *Moxhay* (3) to covenants other than restrictive covenants. They rejected the doctrine that, inasmuch as the defendants took the land with notice of the covenants, they were bound in equity to perform them. That, therefore, is not the principle upon which the equitable doctrine rests. In the present case we are asked to extend the doctrine of *Tulk* v. *Moxhay* (3), so as to affirm that a restrictive covenant can be enforced against a derivative owner taking with notice by a person who never has had or who does not retain any land to be protected by the restrictive covenant in question. In my opinion the doctrine does not extend to that case. The doctrine is that a covenant not running with the land, but being a negative covenant entered into by an owner of land with an adjoining owner, binds the land in equity and is enforceable against a derivative owner taking with notice. The doctrine ceases to be applicable when the person seeking to enforce the covenant against the derivative owner has no land to be protected by the negative covenant. The fact that he has notice is in that case irrelevant.

The particular equity recognised in *Tulk* v. *Moxhay* (3) has been said to be analogous to an equitable charge upon land subsisting in the owner of the adjoining land, or to a negative easement enjoyed, not in gross, but by the adjoining land over the land to which the covenant relates. It arises from the possession by the covenantee of land enjoying the benefit of the negative covenant coupled with notice of the existence of the covenant. In *London and South Western Rail. Co.* v. *Gomm* (5) SIR GEORGE JESSEL says (20 Ch.D. at p. 583):

> "The doctrine of *Tulk* v. *Moxhay* (3), rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (2) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* (3) was affirmative in its terms, but was held by the court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement."

A LINDLEY, L.J., says (ibid. at p. 587):

> "The first thing, therefore, the plaintiffs must show is, upon what legal principle the defendant is bound by a contract into which he did not enter . . . Upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in *Haywood* v. *Brunswick Building Society* (4), and, because it was sought there to extend the doctrine of *Tulk* v. *Moxhay* (3) to a degree which was thought dangerous, considerable pains were taken by the court to point out the limits of that doctrine."

In *Re Nesbet and Potts' Contract* (6) this view of the matter is, I think, accepted, and in *Formby* v. *Barker* (7) and *Millbourne* v. *Lyons* (8) that view was, I think, definitely accepted by the Court of Appeal. In *Formby* v. *Barker* (7) the question arose between the assign of the covenantee and the derivative owner deriving title under the covenantor. So much of the judgment as relates to derivative title in the plaintiff is not pertinent to the present case. The London County Council have never assigned. They are original not derivative owners of the benefit of the easement. But the case is directly in point as regards the right of a proper plaintiff to sue the owner deriving title under the covenantor. There are interlocutory observations made during the argument which are important; for instance, ROMER, L.J., referring to *Spencer's Case* (2) and to *Stokes* v. *Russell* (9), says: "In equity you could only sue on such a covenant in respect of some land," and VAUGHAN WILLIAMS, L.J.: "The plaintiff has no estate for the benefit of which the covenant was entered into." VAUGHAN WILLIAMS, L.J., in the course of his judgment, pointed out that the plaintiff's testator had conveyed his whole estate, and had no contiguous estate which would be benefited by the covenant, and, after pointing out that the vendor had sold all his land, he goes on to say ([1903] 2 Ch. at pp. 550, 551):

> "It becomes necessary, therefore, to ascertain whether the principle of *Tulk* v. *Moxhay* (3) applies to a case in which the vendor sells his whole estate. I have not been able to find any case in which, after the sale of the whole of an estate in land, the benefit of a restrictive covenant has been enforced by injunction against an assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, although there are cases in which restrictive covenants seem to have been enforced at the instance of plaintiffs, other than the vendor, for the benefit of whose land it appears from the terms of the covenant, or can be inferred from surrounding circumstances, that the covenant was intended to operate. In all other cases the restrictive covenant would seem to be a mere personal covenant collateral to the conveyance. It is a covenant which cannot run with the land either at law or in equity, and, therefore, the burden of the covenant cannot be enforced against an assignee of the purchaser."

He then goes on to negative the proposition that the doctrine is based upon obligations on the conscience of the purchaser taking with notice of the covenant, quoting COLLINS, L.J., in *Rogers* v. *Hosegood* (10) ([1900] 2 Ch. 388 at p. 407):

> "The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion."

There is a further passage, which I do not read at length ([1903] 2 Ch. at p. 552). ROMER, L.J., gave judgment principally upon the question of the effect of the fact that the plaintiff was administratrix of the covenantee but he says (ibid. at p. 554):

"If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object."

STIRLING, L.J., agreed with the other members of the court and dwelt upon the fact that the covenantee was not entitled to any land for the protection or benefit of which the restrictive covenants were or could be intended. Upon these judgments, and particularly upon the principal judgment as delivered by VAUGHAN WILLIAMS, L.J., it seems to me that the Court of Appeal affirmed the view taken by SIR GEORGE JESSEL that the doctrine of *Tulk* v. *Moxhay* (3) was either an extension of *Spencer's Case* (2) or of the equitable doctrine of negative easements, regarding it as something arising from the relation of two estates, the one to the other. In *Millbourne* v. *Lyons* (8) the decision rests upon a similar view. Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefits of the restrictive covenant could not enure against a derivative owner even where he took with notice. I have had the advantage of reading an advance copy of the judgments delivered in the Court of Appeal. They all adopt this view.

On the other hand the decisions of the Court of Appeal in *Catt* v. *Tourle* (11) and of FRY, J., in *Luker* v. *Dennis* (12) undoubtedly create a difficulty. In *Catt* v. *Tourle* (11) SELWYN, L.J., referred to *Wilson* v. *Hart* (13). But that is a case upon which the difficulty, as it seems to me, does not arise. The land there was part of a building estate, and it would seem that there were other lands of the covenantee in respect of which the benefit of the covenant might be enjoyed. I do not, it is true, find that that was the case in *Catt* v. *Tourle* (11). But on the other hand the Court do not seem to have considered and given judgment upon the exact point here raised, namely, whether the covenantee had any land in respect of which the benefit could be enjoyed. The question of fact, whether there was or not ownership of other land, is nowhere mentioned either affirmatively or negatively, and no decision was given upon the point now under consideration. The concluding words of SELWYN, L.J.'s, judgment are not consistent with later authorities. Upon the general abstract question, whether a person purchasing with such a covenant, as there mentioned, is to be bound by it, the answer must be in the negative. Notwithstanding what was said by KNIGHT BRUCE, L.J., in *De Mattos* v. *Gibson* (14) (4 De G. & J. 276, at p. 282), it is not true as a general proposition that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant. This may be illustrated by the cases relating to the sale of chattels, such as *Taddy & Co.* v. *Sterious & Co.* (15) and *McGruther* v. *Pitcher* (16). The proposition is true only in certain cases, such as *Spencer's Case* (2) and *Tulk* v. *Moxhay* (3). The passage already quoted from LINDLEY, L.J., in *London and South Western Rail. Co.* v. *Gomm* (5) (20 Ch.D. at p. 587), and the decision in *Haywood* v. *Brunswick Building Society* (4) are enough to dispose of this point. In *Luker* v. *Dennis* (12) the covenant related as well to a public-house which was leased by the brewer to the covenanting publican, and also to another public-house which the publican held under a different landlord, and FRY, J., held that the covenant was binding in equity upon an assignee of the second public-house who had notice of the covenant. The point here in question certainly arose, but the point which the learned judge expressly decided was another, namely, that *Keppell* v. *Bailey* (17) had been displaced by *Tulk* v. *Moxhay* (3). The decision in *Luker* v. *Dennis* (12) was in 1877, and since that date this doctrine has been so examined and developed by *London and South Western Rail. Co.* v. *Gomm* (5) (20 Ch.D. at p. 587), *Austerberry* v. *Oldham Corpn.* (1), and quite recently by *Formby* v. *Barker* (7) and *Milbourn* v. *Lyons* (8) that it cannot, I think, be relied upon as now accurately stating the law. Further, as regards *Catt* v. *Tourle* (11), which was a

A decision of the Court of Appeal, we are of course bound by that decision, but again that was in 1869, and since that date the decisions to which I have referred seem to me to have recognised and established the principle to which we are bound to give effect, and, as I have already pointed out, the decision in *Catt* v. *Tourle* (11) does not deal with the exact point now in debate. As regards *Clegg* v. *Hands* (18) I do not feel any difficulty. The case was one as between lessor and B lessee.

Upon the authorities, therefore, as a whole I am of opinion that the doctrine in *Tulk* v. *Moxhay* (3) does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant. The doctrine is either an extension in equity of the doctrine in *Spencer's Case* (2) (in which ownership of land by both covenantor and C covenantee is essential) or an extension in equity of the doctrine of negative easements, a doctrine applicable not to the case of easements in gross, but to an easement enjoyed by one land upon another land. Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant. The appeal of Emily Allen and Norris D upon the point of law in my opinion succeeds.

Under these circumstances it is not necessary to determine whether they had notice or not. Upon that question we have not heard the appellants. But, if this case should go further, that point will be open to them in the House of Lords.

As regards the defendant M. J. Allen, he is not within the considerations above E dealt with. He was the covenanting party. The erection of the three houses was a breach of covenant. The learned judge has refused any injunction, but has given nominal damages for the technical breach. He has also given the plaintiffs, as against this defendant, the general costs of the action. The only matter which here requires observation is the question of costs. I will mention this presently. Secondly, as regards plot No. 2, the only defendant concerned in this matter is the defendant F M. J. Allen. He contends first that the wall which he erected on this plot was not a building, erection, or other structure within the covenant. The object of the covenant was to secure that plot No. 2 should remain unobstructed so as to be available for the extension of Galloway Road to the north. The wall is an erection which creates such an obstruction. It is, within the literal words of the deed, an erection or structure, and it is within the object of the deed. It is, to my mind, plain that its erection was G a breach of the covenant. But, further, this defendant says that there was at this place a sharp drop in the surface of the soil, and that a fence was necessary for the protection of the public; that the wall was only a 9 in. wall bonded into the walls on either side of the roadway to prevent it from falling, and was no more than a temporary fence. If this had been the case put forward at the trial there would have been no difficulty in the matter. This defendant might have offered an undertaking H to remove this, which he says is a mere temporary fence, if and when requested to do so. He did nothing of the sort. He maintained that it was no breach of the covenant, and that he was entitled to maintain it. In this, in my judgment, he was wrong. In the absence of such an undertaking or offer the order to pull down this wall was, I think, rightly made. As regards the order for costs as against the defendant M. J. Allen, I have felt some doubt whether the costs ought not to have I been divided as between the two plots. As regards plot No. 2 the defendant M. J. Allen was wrong, and would have to pay the plaintiffs' costs. As regards plot No. 1 the plaintiffs failed in obtaining the order to pull down for which they asked., and they recovered merely nominal damages. I have doubted whether in respect of this latter part of the action they ought to have costs against the defendant Allen, but I have arrived at the conclusion that the case is not one in which we ought to interfere. The learned judge in his discretion did not think proper to divide the costs as above suggested, and in giving the general costs as against the defendant M. J. Allen I think he was making an order which we ought not to review.

The result is that as against the defendants Emily Allen and Norris the action will be dismissed with costs, including their costs in this court, and as regards M. J. Allen his appeal will be dismissed with costs.

KENNEDY, L.J.—I have had an opportunity of reading and considering the judgments in this case which have been prepared by BUCKLEY, L.J., and SCRUTTON, J. I concur in the conclusions at which they have arrived. I only desire to add that, as regards plot 1 and the demurrer raised by Mrs. Allen and Mr. Norris to the plaintiffs' claim in regard to that property, I concur because, as the judgments of my colleagues point out, the most recent decisions of this court, and especially the decision in *Formby* v. *Barker* (7), bind us, I think, so to hold, whatever might be my own opinion, if I was not controlled by such recent decisions, but free, in accordance with judicial authority in earlier cases which SCRUTTON, J., has cited in order of date, from *Tulk* v. *Moxhay* (3) down to the year 1882, to treat a restrictive covenant in regard to the use of land as enforceable in equity at the suit of the covenantee, although he may retain no other land which can be affected by the covenant, against an assign of the covenantor who has acquired the land with notice of the restrictive covenant.

SCRUTTON, J.—In this case the London County Council on Jan. 24, 1907, entered into an indenture with one Morris Joseph Allen, a builder, describing himself as "the owner in fee simple of certain land," by which he covenanted: [HIS LORDSHIP read the covenant, and continued:] The plots coloured green were two plots intended to be reserved for the making of roads. On plot No. 1, in July, 1911 three houses were built by Mrs. Allen; on plot No. 2 a wall was built by Allen. The London County Council thereupon issued a writ claiming a mandatory injunction to pull down the houses and wall respectively. Thereupon it was alleged that as to plot No. 1 the legal estate was in one Norris as mortgagee, and the equity of redemption in Mrs. Allen, who had taken title from Mr. Allen and Willcocks, his mortgagee, who had no notice of the restrictive covenant; and it was contended (i) by way of demurrer that as the London County Council were not neighbouring landowners, or grantors of the plot in question, a covenant by Allen in their favour was only a personal covenant, and could not affect the land when in the hands of assigns of Allen, whether they had notice of the covenant or not. It was said that to affect them the right must be in the nature of a negative easement; that an easement required both a dominant and a servient tenement; and that as the council had no land to which the benefit of the covenant could attach, there could be no dominant tenement, and therefore no negative easement binding on a servient tenement, but only an easement in gross, which did not bind assigns of the land. (ii) It was alleged that the defendants Mrs. Allen and Norris could prove they were purchasers for value of the legal estate without notice of the covenant, and therefore not bound by it. AVORY, J., found on the second contention as a fact that Mrs. Allen and Norris had not satisfied him they had not notice, actual or constructive, of the covenant. On the first contention he said:

> "It was contended before me that this restrictive covenant being in the nature of a negative easement, the action would not lie except at the suit of a covenantee who was at the time of the covenant in possession of land which required protection, and that the plaintiffs were not at the time in possession of any such land. But having regard to the powers vested in the London County Council under ss. 7 and 9 of the London Building Act, 1894, and to the admission made in the argument before me that the conditions imposed in this case were not ultra vires, I think this contention fails."

He apparently treated the duty and interest of the county council in the matter of new streets as sufficient to make the covenant bind the land in the hands of assigns from Allen. This court determined to decide the first contention before

hearing argument on the second, and we have now to decide on the first contention. Counsel on each side agreed that the burden of this covenant would not run with the land at law, so as to bind assigns, for the reason stated in the notes to *Spencer's Case* (2) (1 Smith, L.C. (11th Edn.) p. 88), that

> "there appears to be no authority which has decided, apart from the equitable doctrine of notice [by which is meant, as herinafter explained, the doctrine identified with the case of *Tulk* v. *Moxhay* (3)], that the burden of a covenant will run with land in any case except that of landlord and tenant."

This opinion appears to be justified by the judgments of the Court of Appeal in *Austerberry* v. *Oldham Corpn.* (1), specially that of LINDLEY, L.J., and FRY, L.J. The question, then, is whether it is essential to the doctrine of *Tulk* v. *Moxhay* (3) that the covenantee should have at the time of the creation of the covenant, and afterwards, land for the benefit of which the covenant is created, in order that the burden of the covenant may bind assigns of the land to which it relates. It is clear that the covenantee may sue the covenantor himself, though the former has parted with the land to which the covenant relates: *Stokes* v. *Russell* (9). To answer the question as to the assigns of the covenantor and the land in their hands requires the investigation of the historical growth of the doctrine of *Tulk* v. *Moxhay* (3). Though the covenantee in that case did hold adjacent land, there is no trace in the judgment of LORD COTTENHAM of the requirement that the covenantee should have and continue to hold land to be benefited by the covenant. I read LORD COTTENHAM'S judgment as proceeding entirely on the question of notice of the covenant, and on the equitable ground that a man purchasing land with notice that there was a covenant not to use it in a particular way would not be allowed to violate the covenant he knew of when he bought the land. LORD COTTENHAM states the question (2 Ph. at pp. 777, 778),

> "Whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased,"

and answers it:

> "If there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

Up to 1881, when counsel in *Haywood* v. *Brunswick Building Society* (4) stated that *Tulk* v. *Moxhay* (3) had been applied in fifteen cases, I cannot trace, nor could counsel before us discover, that *Tulk* v. *Moxhay* (3) had been based on anything but notice of the covenant by the assignee. In the case cited, in which the Court of Appeal refused to extend the doctrine to an affirmative covenant to repair, LINDLEY, L.J., said (8 Q.B.D. at p. 410):

> "The result of these cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice."

BRETT, L.J., said (ibid. at p. 408):

> "That case [*Tulk* v. *Moxhay* (3)], decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced."

COTTON, L.J., after citing LORD COTTENHAM that

> "No one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased,"

said (ibid at p. 409):

"This lays down the real principle that an equity attaches to the owner of the land."

Meanwhile, in *De Mattos* v. *Gibson* (14), in 1858, KNIGHT BRUCE, L.J., had put the principle as applying to all property thus (4 De G. & J. at p. 282):

"Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller,"

resting the matter on knowledge of the previous contract, that is notice. In *Catt* v. *Tourle* (11) A., a brewer, had sold to B. with a covenant that he should have the exclusive right to supply all ale consumed in any public-house erected on the land. C., with knowledge of the covenant, bought part of the land from B., erected a public-house on it, but did not take his beer from A. The Court of Appeal, citing *De Mattos* v. *Gibson* (14), restrained C., treating the covenant as negative, and resting the judgment on the ground that C.

"clearly purchased with notice of the present covenant, and . . . cannot be heard to say that he is now entitled to disregard its provisions."

It is to be noted that A. is not stated to have owned any land, and as he might brew beer anywhere, the covenant could not relate to any particular land of his.

In *Luker* v. *Dennis* (12) in 1877, A., a brewer, granted a lease to B. of public-house X., with a covenant that B. should take from him all beer consumed not only in X., but also in public-house Y., which B. held of a different landlord. C. took public-house Y. from B. with notice of the covenant, and did not take his beer from A. It was argued before FRY, J., that notice was not enough unless the covenantee had some interest in the land bound by the covenant, either as vendor or lessor. That learned judge refused to accede to this argument, and, citing *De Mattos* v. *Gibson* (14) and *Catt* v. *Tourle* (11), granted the injunction, giving, as he said, effect to the equitable doctrine of notice. I think up to this point the doctrine had been rested on notice, and did not depend on the covenantee having land in favour of which the covenant was created.

The first departure from this position occurs in the judgment of SIR GEORGE JESSEL, M.R., in *London and South Western Rail. Co.* v. *Gomm* (5) in the following year, March, 1882. The contract to be enforced was one to re-convey land on notice, and clearly, therefore, an affirmative covenant, and, as such, within the doctrine laid down in *Haywood's Case* (4) in December, 1881, excluding such contracts from the doctrine of *Tulk* v. *Moxhay* (3). The court also held that the sale was ultra vires the railway company, and void for remoteness. But SIR GEORGE JESSEL, holding that the covenant did, but for its being ultra vires and void, create an interest in the land, discussed the nature of the right. He said:

"The doctrine of that case [*Tulk* v. *Moxhay* (3)] rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (2) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* (3) was affirmative in its terms, but was held by the court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception

A to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; B the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not."

It will be noticed that the equitable estate or burden was held to arise independent of notice, which I respectfully think was contrary to the previous authorities, and C that in SIR GEORGE JESSEL'S view it did not matter whether it was by analogy to covenants running with the land, or on analogy to an easement. Both, however, had this in common, that some land belonging to the covenantee was required, either for him to let, that the covenant might run with the land, or as a dominant tenement for the easement, an easement in gross being merely a personal right. Whether the "analogy" or "extension" spoken of by SIR GEORGE JESSEL involved D this condition as to land is not discussed. The other members of the court did not discuss the foundation of *Tulk* v. *Moxhay* (3), though LINDLEY, L.J., seems again to put it on notice. *Catt* v. *Tourle* (11)—a decision of the Court of Appeal—and *Luker* v. *Dennis* (12) were not cited to the court.

In 1890, in *Clegg* v. *Hands* (18), the doctrine of *Tulk* v. *Moxhay* (3) was applied by the Court of Appeal to a case somewhat similar to *Catt* v. *Tourle* (11) without any E discussion of SIR GEORGE JESSEL'S explanation of the doctrine. The case, however, being one of landlord and tenant. In *Rogers* v. *Hosegood* (10), in 1900, A., the mortgagor, and B., the mortgagee of some land, conveyed plot X., to C., who entered into a restrictive covenant with the mortgagor only, who had not the legal estate in the land. This plot X. was purchased by D. with notice of the restrictive covenant. A. also conveyed some of his adjoining land, plot Y., to E., who had F no notice of the restrictive covenant on plot X. D. then proceeded to erect buildings on plot X., said to contravene the restrictive covenant. E. then sued D. to enforce the covenant. FARWELL, J., treated D. as obviously bound by the covenant.

"He is obviously bound, by reason, of notice, whether the covenant as regards him runs with the land or not."

G (This expression of the reason why he is bound does not harmonise with the later decisions, but does, I think, with all the earlier ones.) And he held that the benefit of the covenant passes to E. at law running with his land. There was an appeal. In the course of the argument of Mr. Haldane, Q.C., that the covenant ran with the land in equity, RIGBY, L.J., said ([1900] 2 Ch. at p. 401):

"I do not think any covenant runs with the land in equity. The equitable H doctrine is that a person who takes with notice of a covenant is bound by it";

a remark again which seems to me to harmonise with the earlier authorities. The court held that the benefit of the covenant did not run with the land at law, as the covenantee, the mortgagor, had no legal interest in the land, but did run with the land at equity, as there was a clear intention to benefit that land, and equity would regard the mortgagor as the owner, and, citing SIR GEORGE JESSEL, I M.R., in *London and South Western Rail. Co.* v. *Gomm* (5) (20 Ch.D. at p. 583), continued ([1900] 2 Ch. at pp. 405, 406):

"These observations, which are just as applicable to the benefit reserved as to the burden imposed, show that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another,

and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant."

This makes land bound or benefited by the covenant essential to bind or benefit assigns. The judgment proceeds:

"These authorities [*Renals* v. *Cowlishaw* (19) (9 Ch.D. at p. 130), and *Child* v. *Douglas* (20) (Kay, at p. 571)] establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion."

This again appears to me to treat land as essential, on both sides of the covenant, to affect assigns whether of the benefit or burden.

This view seems to me to be adopted also by the Court of Appeal in *Formby* v. *Barker* (7). A., the owner of land, conveyed all his land with a restrictive covenant against its being used in particular ways to B., who assigned it to C., who had notice of the covenant. A. died; C. began to use the land in a way forbidden by the covenant; the administratrix of A., who had no land, sued C. It was argued that the right to enforce such a covenant depended entirely on notice; members of the court suggested in argument that the benefit of the covenant, if not pursued by the covenantee, must follow some land; and this was the argument put forward for the defendant, that without the land the covenant was only one in gross. ROMER, L.J., asked ([1903] 2 Ch. at p. 546),

"Is there any case in which it has been held that such a covenant purporting to bind land for ever is valid except for the protection of an estate?"

and counsel for the plaintiff did not refer him, as they might have done, to *Catt* v. *Tourle* (11) and *Luker* v. *Dennis* (12), in neither of which cases had the plaintiffs an estate, but only a trade. In the judgments, VAUGHAN WILLIAMS, L.J., points out that A. conveyed his whole estate and had no contiguous estate which would be benefited by the covenant in question. I refer to, but do not read, the lord justice's judgment, but it seems to me, adopting the language of COLLINS, L.J., in *Rogers* v. *Hosegood* (10) ([1900] 2 Ch. at p. 407), to negative the view that the doctrine of *Tulk* v. *Moxhay* (3) depends on notice, and to make it depend, where there is no contractual privity, on a "relation of dominancy and serviency of lands," and to fail if the covenantee or his assign has no land to which the covenant relates. ROMER, L.J., thought that the assign of a covenantee could not sue unless the covenant related to or concerned some ascertainable property belonging to him or in which he was interested. STIRLING, L.J., while saying that different considerations would apply if the covenantee sued, a remark which leaves it doubtful whether he thought the covenantee could, though owning no land, have sued assigns of the land restricted, rested his judgment on the ground that damages, not injunction, would be the appropriate remedy.

The doctrine was again considered, and I think further developed in *Re Nesbet and Potts' Contract* (6) in 1905. The owner of certain land had entered into restrictive covenants with the vendor, who owned an adjoining estate. A squatter, without notice of these covenants, acquired a title by adverse possession, and

A sold to A., who did not require a forty years' title, which would have disclosed the restrictive covenants. A. sold to B., who, having reason to believe there were restrictive covenants, declined to complete. B. took out a summons for a declaration that the title was not one which he ought to be compelled to accept. FARWELL, J., treated the nature of the right of action created under the doctrine of *Tulk* v. *Moxhay* (3) as analogous to an equitable charge on real estate, not depending in B any way on notice for its validity, but only defeated by a legal estate acquired for value and without notice. He held, therefore, that the squatter, though he had notice and had the legal estate, was bound by the restrictive covenants, as apparently he only took the land subject to the equitable interest in it, and that as the purchaser from the squatter of the legal estate for value would, if he had required a forty years' title, have had notice of the covenants, he had constructive notice and C was bound by the covenants. In the Court of Appeal the appellant argued that notice was part of the course of action, the respondent that the doctrine rested on an interest in land, binding on the land itself, with a dominant and servient tenement. The Court of Appeal adopted the latter argument, and held that the restrictive covenant was an equitable interest in the land, whether the occupier of the land had notice of it or not, unless he had purchased the legal estate for value D without notice. They do not expressly refer to the necessity of there being a dominant tenement to enforce the interest, but there was in fact such a dominant tenement in the case. Lastly, in *Millbourne* v. *Lyons* (8), where a person who had agreed to sell with a restrictive covenant died, and his personal representatives, having sold all their land, conveyed with a similar restrictive covenant, NEVILLE, J., enforced the title against a purchaser who knew of the restrictive covenant, E and, therefore, objected to complete, on the ground that there was no restriction against him, as the vendors, at the date of the covenant, had no land to which the benefit of the covenant could be attached, and the Court of Appeal affirmed his judgment on similar grounds.

I think the result of this long chain of authorities is that, whereas to my view, at the time of *Tulk* v. *Moxhay* (3) (1848), and for at least twenty years afterwards, F the plaintiffs in this case would have succeeded against an assign on the ground that the assign had notice of the covenant, since *Formby* v. *Barker* (7), *Re Nesbet and Potts' Contract* (6), and *Millbourne* v. *Lyons* (8) three decisions of the Court of Appeal, the plaintiffs must fail on the ground that they have never had any land for the benefit of which this "equitable interest analogous to a negative easement" G could be created, and, therefore, cannot sue a person who bought the land with knowledge that there was a restrictive covenant as to its use, which he proceeds to disregard, because he is not privy to the contract. I think the learned editors of DART ON VENDOR AND PURCHASER (7th Edn.) vol. 2, p. 769, are justified by the present state of the authorities in saying that

> "the question of notice to the purchaser has nothing whatever to do with the H question whether the covenant binds him, except in so far as the absence of notice may enable him to raise the plea of purchaser for valuable consideration without notice."

If the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit I of certain land, all or some of which remains in the possession of the covenantee or his assign, suing to enforce the covenant. It may be, if the matter is considered by a higher tribunal, that tribunal may see its way to revert to what I think was the earlier doctrine of notice, or at any rate to treat it as co-existing with the later refinement of "an equitable interest analogous to a negative easement" binding on persons who are ignorant of it. The remarks of LORD SELBORNE in *Earl of Zetland* v. *Hislop* (21) (7 App. Cas. at pp. 446, 447), are not favourable to the too rigid development or enforcement of the latter alternative; and the observations of LORD MACNAGHTEN ([1902] A.C. at p. 32), LORD DAVEY (ibid. at p. 35), and LORD

LINDLEY (ibid. at p. 36) in *Noakes & Co., Ltd.* v. *Rice* (22) seem to suggest that the doctrine of *Tulk* v. *Moxhay* (3) may well be reconsidered and put on a proper footing. For I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after careful consideration of the authorities, I am forced to the view that the later decisions of this court compel me so to hold. In my opinion, therefore, the demurrer of Mr. Norris and of Mrs. Allen succeeds. The action against Mr. Norris must be dismissed with costs. I regret that I do not see my way to depriving Mrs. Allen of her costs, as, whatever may be her equitable rights, I am not at all favourably impressed with her conduct as a good citizen. I see no reason for interfering with the judgment against Mr. Allen in respect of plots No. 1 or 2, and his appeal must be dismissed with costs.

Appeal of Norris and Emily Allen allowed. Appeal of M. J. Allen dismissed.

Solicitors: *E. Tanner; Rodgers, Gilbert & Rodgers; Hogan & Hughes.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BOALER. Re VEXATIOUS ACTIONS ACT, 1896

[COURT OF APPEAL (Buckley and Kennedy, L.JJ., and Scrutton, J.), May 21, 29, 1914]

[Reported [1915] 1 K.B. 21; 83 L.J.K.B. 1629; 111 L.T. 497; 30 T.L.R. 580; 58 Sol. Jo. 634; 24 Cox, C.C. 335; 78 J.P. Jo. 280]

Vexatious Action—Order prohibiting institution of "legal proceedings"—Inclusion of criminal proceedings—Vexatious Actions Act, 1896 (59 & 60 *Vict.*, c. 51), *s.* 1.

By s. 1 of the Vexatious Actions Act, 1896 [see now Supreme Court of Judicature Act, 1925 (18 HALSBURY'S STATUTES (2nd Edn.) 472), s. 51], the High Court may, on the application of the Attorney-General, if satisfied "that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings . . . against the same person or against different persons," make an order that no "legal proceedings shall be instituted" by that person in the High Court or any other court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the court or judge that such legal proceeding is not an abuse of the process of the court, and that there is a primâ facie ground for such proceedings."

Held: by KENNEDY, L.J., and SCRUTTON, J. (BUCKLEY, L.J., dissenting), that the words "legal proceedings" in the section do not include criminal as well as civil proceedings.

Notes. Considered: *Robinson* v. *R.*, [1921] 3 K.B. 183. Referred: *Chester* v. *Bateson*, [1920] 1 K.B. 829; *R.* v. *Hammer*, [1923] 2 K.B. 786.

As to vexatious actions see 1 HALSBURY'S LAWS (3rd Edn.) 19, 20, and cases there cited.

Cases referred to:

(1) *Vacher & Sons, Ltd.* v. *London Society of Compositors*, [1913] A.C. 107; 82 L.J.K.B. 232; 107 L.T. 722; 29 T.L.R. 73; 42 Digest 605, 54.

(2) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr. N.S. 29; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 42 Digest 650, 569.

(3) *National Telephone Co.* v. *Postmaster-General*, [1913] A.C. 546; 82 L.J.K.B. 1197; 109 L.T. 562, H.L.; 42 Digest 648, *539*.

(4) *Re Briton Medical and General Life Assurance Association* (1886), 32 Ch.D. 503; 55 L.J.Ch. 416; 54 L.T. 152; 34 W.R. 390; 2 T.L.R. 344; 1 Digest (Repl.) 10, *77*.

(5) *R.* v. *City of London Court Judge and Payne*, [1892] 1 Q.B. 273; 61 L.J.Q.B. 337; 66 L.T. 135; 40 W.R. 215; 8 T.L.R. 191; 36 Sol. Jo. 138; 7 Asp. M.L.C. 140, C.A.; 1 Digest (Repl.) 288, *1912*.

(6) *Inland Revenue Comrs.* v. *Herbert*, [1913] A.C. 326; 82 L.J.P.C. 119; 108 L.T. 850; 29 T.L.R. 502; 57 Sol. Jo. 516; 11 L.G.R. 865, H.L.; 42 Digest 622, *235*.

(7) *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 54 J.P. 820; 6 T.L.R. 465; sub nom. *Bell-Cox* v. *Hakes*, 60 L.J.Q.B. 89; 63 L.T. 392; 39 W.R. 145; 17 Cox, C.C. 158, H.L.; 42 Digest 633, *367*.

(8) *Public Works Comr.* (*Cape Colony*) v. *Logan*, [1903] A.C. 355; 72 L.J.P.C. 91; sub nom. *Smart* (*Public Works Comr.*) v. *Logan*, 88 L.T. 779, P.C.; 42 Digest 704, *1212*.

(9) *Re Chaffers, Ex parte A.-G.* (1897), 76 L.T. 351.

(10) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 42 Digest 648, *543*.

(11) *Johnson* v. *Upham* (1859), 2 E. & E. 250; 28 L.J.Q.B. 252; 33 L.T.O.S. 327; 5 Jur. N.S. 681; 121 E.R. 95; 42 Digest 604, *49*.

(12) *East and West India Dock Co.* v. *Shaw, Savill and Albion Co.* (1888), 39 Ch.D. 524; 57 L.J.Ch. 1038; 60 L.T. 142; sub nom. *Shaw, Savill and Albion Co.* v. *East and West India Dock Co.*, 6 Ry. & Can. Tr. Cas. 94; 42 Digest 648, *541*.

Appeal by the Attorney-General from a decision of the Divisional Court (DARLING and LUSH, JJ., BANKES, J., dissenting), reported [1914] 1 K.B. 122, on a motion by the applicant, Bernard Boaler, for an order discharging an order made against him by the Divisional Court on Dec. 17, 1910, under the Vexatious Actions Act, 1896.

It appeared that Mr. Boaler, believing himself to be entitled to some 800 shares in John Esson & Son, Ltd., about the year 1907 commenced a series of actions against that company, and, as stated in the affidavit of Mr. Howes, the liquidator appointed in the voluntary winding-up of the company, filed in November, 1910, up to that time some forty-six separate and distinct legal proceedings in connection with the company. In practically all of this large amount of litigation Mr. Boaler had been unsuccessful. Upon the application of the Attorney-General for an order against Mr. Boaler under the Vexatious Actions Act, 1896, the Divisional Court (RIDLEY, PICKFORD and HAMILTON, JJ.), after hearing the Attorney-General and Mr. Boaler, gave judgment granting the application, and on Dec. 17, 1910, made the following order against Mr. Boaler under s. 1 of the Act:

> "It is ordered that no legal proceedings shall be instituted by the said Bernard Boaler in the High Court or in any other court unless he obtains the leave of the High Court or some judge thereof and satisfies the court or judge that such legal proceeding is not an abuse of the process of the court and there is a primâ facie ground for such proceeding."

Leave to appeal from that order was refused by the Court of Appeal. In his affidavit, filed in support of the present motion, Mr. Boaler stated that on May 21, 1913, he gave the clerk of the Central Criminal Court notice that he proposed at the next ensuing sessions to be held on May 27 to present a bill of indictment against John Esson & Sons, Ltd., in respect of certain misdemeanours committed within the jurisdiction of the Central Criminal Court, of which the courts of summary jurisdiction had no jurisdiction to hear and determine or to commit for trial; that on May 28 he was requested by an official in the indictment office of that court to

go to the recorder who was then sitting, who, on reading the order, said that in his opinion the order of Dec. 17, 1910, made against Mr. Boaler prohibited him from instituting any legal proceedings unless he had obtained the leave of the High Court or some judge thereof to present the bill of indictment to the grand jury, and said that he could not institute criminal proceedings without the leave of the High Court or some judge thereof. The applicant had also applied to a magistrate for a summons upon an information sworn by him, but he was then told that the order made against him was a bar to his so proceeding, though Mr. Boaler stated that the magistrate had not given any reason for his refusal. Thus, on these two occasions on which the applicant attempted to take criminal proceedings he was prevented from so doing by the order against him. In order to obtain the decision of the court upon the question whether the order of Dec. 17, 1910, prevented him from instituting criminal proceedings, the applicant on June 18, 1913, served upon the Attorney-General, John Esson & Son, Ltd., and Mr. Howes, as the liquidator of the company, a notice of motion that, by leave of the Divisional Court, the Divisional Court would be moved for an order declaring that the order made on Dec. 17, 1910, did not prevent him from instituting criminal proceedings; that the order might be discharged upon the grounds specified in the affidavit; and, in the alternative, for an order limiting the order of Dec. 17, 1910, to civil legal proceedings, and, in the further alternative, for an order declaring that upon the construction of the Vexatious Actions Act, 1896, the High Court had no jurisdiction to make an order to abrogate the applicant's common law rights as a citizen to prefer a bill of indictment to the grand jury of the Central Criminal Court.

Section 1 of the Vexatious Actions Act, 1896 [see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 51], which was entitled an "Act to prevent the abuse of the process of the High Court or other courts by the institution of vexatious legal proceedings," provides:

> "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings, without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other court unless he obtains the leave of the High Court or some judge thereof, and satisfies the court or judge that such legal proceeding is not an abuse of the process of the court, and that there is a primâ facie ground for such proceedings. . . ."

The Divisional Court made the following order:

> "Upon hearing Mr. Solicitor-General of counsel for the Crown, Mr. Sims of counsel for John Esson & Son, Ltd., and for the liquidator of such limited company, and Bernard Boaler in person on his notice of motion herein dated June 18, 1913, and mature deliberation thereupon had: This court doth declare that criminal offences are not within the meaning of the words "legal proceedings" mentioned in the Vexatious Actions Act, 1896."

The Attorney-General appealed.

The Solicitor-General (*Sir Stanley Buckmaster*, *K.C.*) and *G. A. H. Branson* for the Attorney-General.

The applicant in person.

May 29, 1914. The following judgments were read. *Cur. adv. vult.*

BUCKLEY, L.J.—In point of form the application with which we have to deal is singular, and a short statement is necessary in order to make plain how the

matter comes before the court. On Dec. 17, 1921, upon reading an affidavit of Edward Kennedy Howes, an order was made under the Vexatious Actions Act, 1896, in the terms of that Act prohibiting Mr. Boaler from instituting legal proceedings. The affidavit I have mentioned was one which stated that Mr. Boaler had brought, made, moved, taken out, lodged, supported, or caused forty-six separate and distinct legal proceedings in connection with a company called John Esson & Son, Ltd., of which short particulars were set out in a schedule to the affidavit. Nos. 2 to 7 in the schedule were informations by way of institution of criminal proceedings. On June 2, 1913, Mr. Boaler served a notice of motion in the Divisional Court, asking for an order declaring that the order of Dec. 17, 1910, did not prevent the applicant from instituting criminal proceedings. It appears that he had after Dec. 17, 1910, and before June 2, 1913, attempted to institute criminal proceedings in two cases. In the one he attempted to prefer a bill of indictment before a grand jury at the Central Criminal Court, and in the other he applied to a magistrate to grant him a summons upon an information sworn by him. Upon that motion of June 2 the Divisional Court made no order except that Mr. Boaler was to be at liberty to serve a fresh notice of motion praying that the order of Dec. 17, 1910, be discharged, or, in the alternative, that the same be limited to a prohibition in civil proceedings. Under the leave thus given Mr. Boaler on June 18, 1913, served a notice of motion for an order discharging the order of Dec. 17, 1910, upon grounds there assigned, or in the alternative for an order limiting the order to civil proceedings, or for a declaration that upon the construction of the Vexatious Actions Act, 1896, the High Court has no jurisdiction to make an order preventing him from preferring a bill of indictment to a grand jury. Upon that motion the order now under appeal was made. It would seem that by arrangement, in the presence of the Attorney-General and of Mr. Boaler, the court heard an argument and expressed an opinion upon the construction of the Act, and, without going into other grounds upon which Mr. Boaler wished to contend that the order of Dec. 17, 1910, was wrong, declared "that criminal offences are not within the meaning of the words 'legal proceedings' mentioned in the Vexatious Actions Act, 1896." The word "offences" must here be a mistake for "proceedings." It is from this order that the Attorney-General appeals to this court. It seems to me, and I think that was the view taken in the court below, that the Attorney-General might have objected to any order at all being made upon Mr. Boaler's motion of June 18, but he did not do so, and, by agreement, the question of the construction of the Act was argued and decided by the court.

Under these circumstances I think this court can properly review the decision of the Divisional Court, although, technically, it is difficult to say how in such a form of proceeding the jurisdiction to make, or the true construction of the order of Dec. 17, 1910, could be raised and decided. The only question before us, and the only question I propose to consider, is the true construction of the Act of Parliament. The Act is one which contains no preamble. In the words of Lord Macnaghten in *Vacher & Sons, Ltd.* v. *London Society of Compositors* (1) ([1913] A.C. at p. 118),

> "In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shown either that the words taken in their natural sense lead to some absurdity, or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed."

His Lordship had immediately before quoted the language of Tindal, C.J., in the *Sussex Peerage Case* (2) (11 Cl. & Fin. at p. 143):

> "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and

ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

It is upon this principle that I must proceed to construe this Act of Parliament. Section 2 of the Act gives it a short title—namely, "The Vexatious Actions Act, 1896." The marginal note to s. 1 runs: "Power of court to prohibit institution of action without leave." The word "action" is not elsewhere found in or about the statute. I set wholly out of consideration the fact that the word "action" is thus used. As to title, the matter is governed by the title placed at the head of the Act, and that is, "An Act to prevent abuse of the process of the High Court or other courts by the institution of vexatious legal proceedings." That is the governing title. The fact that for the purpose of identification only, and not of enactment also, authority is given to identify the statute by a particular name, in which the word "action" occurs, is, I think, immaterial. The words "This Act may be cited as the Vexatious Actions Act, 1896" effects nothing by way of enactment. They do no more than create a name and whether it is as matter of description accurate or not is immaterial. In support of this view I refer to that which LORD HALDANE, L.C., said in *Vacher & Sons, Ltd.* v. *London Society of Compositors* (1) as regards the title "Trade Disputes Act, 1906," and that which LORD MOULTON said in the same case, and to that which the latter said further in *National Telephone Co.* v. *Postmaster-General* (3). I may add that if any importance were attributed to the word "action" it is not a word from whose meaning are excluded proceedings in a criminal court. COMYN'S DIGEST under the title of "Action" says that:

"In life everyone has a property and right, and if they are violated the law gives an action to redress the wrong."

BACON'S ABRIDGMENT says that "actions are divided into criminal and civil." With this I leave the matter.

The language of the Act is that if a person has habitually and persistently instituted vexatious legal proceedings, &c., the court may order that no legal proceedings shall be instituted by that person. The words "legal proceedings" are, I think, applicable to and include both criminal and civil proceedings in a court. In the argument in the court below the Attorney-General referred to several Acts of Parliament in which the word "proceedings" is used to indicate criminal proceedings. I may add as relevant to the particular criminal proceedings which Mr. Boaler desired to take, that s. 65 of the Companies Act, 1862, was headed with the words "legal proceedings," and that s. 276 of the Companies (Consolidation) Act, 1908, is headed "legal proceedings, offences, &c.," and in both cases the sections which follow deal (inter alia) with criminal proceedings [cf. Companies Act, 1948, ss. 438–446 ("Offences") and ss. 447–450 ("Legal Proceedings")]. In *Re Briton Medical and General Life Assurance Association* (4), it was held that criminal proceedings were capable of being restrained under s. 85 of the Act of 1862. Section 100 of the Judicature Act, 1873, in defining an action, speaks of a "civil proceeding" and of a "criminal proceeding [see no s. 225 of Supreme Court of Judicature (Consolidation) Act, 1925]. This is enough, I think, to show that the words "legal proceedings" are words sufficient in themselves to include criminal proceedings. The words "legal proceedings" are no doubt general words, but generality is, to my mind, not ambiguity. The verb used in the Vexatious Actions Act is "institute." That is a word which is applicable to criminal proceedings. For instance, in s. 9 of the Costs in Criminal Cases Act, 1908, occur the words "a person at whose instance the prosecution has been instituted" [Costs in Criminal Cases Act, 1952, s. 17 (1)]. The expression "to institute a prosecution" is, I think, an accurate one. Colloquially, "to start or to launch a prosecution" might be used, but I should not expect to find those expressions in an Act of Parliament. The only other verbs which occur to me are "institute" or "initiate"

or "begin." So far, therefore, the words of the Act seem to me to be sufficient to include criminal proceedings.

Next, the proceedings which may be restrained are spoken of as proceedings in "the High Court or any other court." By s. 16 (11) of the Judicature Act, 1873, there is vested in the High Court jurisdiction in criminal matters, and s. 29 speaks of "criminal jurisdiction capable of being exercised by the said High Court" [see now Supreme Court of Judicature (Consolidation) Act, 1925, ss. 18, 70]. Again, therefore, the words of the Act of Parliament are sufficient to include criminal proceedings in the High Court or any other court, even if the later words ought to be confined to other courts having jurisdiction similar to that of the High Court. The words "legal proceedings" are twice used in the Vexatious Actions Act, 1896. According to ordinary principles of construction they ought to receive the same interpretation in each case in which they are used. Ought the words when first used to be taken to mean legal proceedings other than criminal proceedings? Let me suppose a case in which a person has habitually and persistently instituted vexatious criminal proceedings, has repeatedly alleged fictitious criminal acts, and has habitually and persistently, whether against the same person or against different persons, instituted unfounded criminal proceedings, is there any reason in the language of the Act to doubt that it is intended to give power to order that no further criminal proceedings shall be instituted by him in the High Court or any other court? If that habitual and persistent institution of proceedings is proved, why am I to suppose that the plain words of the Act do not intend that a stop shall be put to it? If, then, the words when first used include criminal proceedings, the same words when next used must also include them, and the Act empowers the prohibition of criminal proceedings. If the case were one in which the persistent proceedings were civil proceedings only, it may be that the Act might reasonably have provided that a veto shall be imposed upon like proceedings only to the exclusion of criminal proceedings, and inasmuch as the words of the Act are that "no legal proceedings shall be instituted" it may be that if an order is made it must extend to both. This, I think, is not matter for me to consider in determining what is the plain meaning of the words. I find in them a provision depriving a subject under extraordinary circumstances of those which would, but for this Act of Parliament, be his rights as a free citizen, and I have no right to say that the legislature ought to have imposed a smaller right of veto than it has imposed. I have only to ascertain the ordinary and natural sense of the words. Construing the Act upon those principles, it seems to me that the Act extends to criminal proceedings, and I so hold.

Considerations have been urged before us based upon questions of public policy and the like. I do not think that these considerations are admissible when the question is only as to the meaning of the words of the Act, but I will say a word upon them as they have been raised. It seems to me that this is an Act giving extraordinary powers under extraordinary circumstances. On the one side, it is, no doubt, a grave matter that a subject should be debarred from remedy if a criminal offence be committed against him. On the other hand, it is a grave matter if a person has so conducted himself as to expose himself to an order under the extraordinary powers of this Act that he should be allowed to continue his litigious insistence undisturbed. As between those two matters the legislature, I conceive, was convinced that the latter was the more grave. The subject is not deprived of redress, but, being a person such as he is proved to be, he is not allowed to seek redress until he has satisfied the proper authority that the legal proceedings which he desires to take are not an abuse. I cannot think the Act intended that, if, say, a person has persistently made false accusations of criminal offences and instituted prosecutions, it should not be possible to make an order under the Act against him. It is said that, under such circumstances, a magistrate might refuse a summons irrespective of this Act. This seems to me to overlook two facts:

first, that the magistrate might well not have knowledge of, or, if he had knowledge, might have great difficulty in giving effect to, the known character of the intending prosecutor; and, secondly, that if the magistrate, having such knowledge, did on that ground refuse a summons, he would be shutting the doors of a criminal court against the intending prosecutor without giving him the benefit of the extraordinary precautions of the present Act, which allow an order to be made only if the Attorney-General upon his responsibility takes it upon himself to apply to the court for an order. At the date of this Act the Vexatious Indictments Act, 1859 (repealed, Administration of Justice (Miscellaneous Proceedings) Act, 1933) had long been in operation, and had been from time to time extended to other offences. It differs from the present Act in two respects: first, that it applies to every subject, and not to the particular class of person governed by the Act of 1896; and, secondly, that it applies only to certain offences. The Act of 1896 seems to me to cover a larger field in one respect, and a smaller field in another. No inference, I think, is to be drawn from the fact that the Act of 1859 already dealt with criminal proceedings to a certain extent. The construction which I place upon the Act of 1896 is that it extends to criminal proceedings. I think that the order under appeal ought to be discharged, and that there should be substituted a declaration that criminal proceedings are within the meaning of the words "legal proceedings" in the Act of 1896.

KENNEDY, L.J.—The result of this appeal depends wholly upon the interpretation of the expression "legal proceedings" in s. 1 of the Vexatious Actions Act, 1896. Do these words, or do they not, include criminal as well as civil proceedings? The Divisional Court by a majority (DARLING, and LUSH, JJ., BANKES, J., dissenting) has decided that they do not, and we, in the Court of Appeal, are invited by the appellant to hold that this decision was wrong.

There is no sort of doubt, in regard to the proper principle of interpreting a statutory enactment, that a judicial tribunal, which is called upon to interpret, is bound as a general rule, if the effect of the words of the enactment, read in their ordinary and natural sense, is clear and unambiguous, to give to those words that effect and no other. The legislature must be intended to mean what it has plainly expressed.

> "It matters not in such a case what the consequences may be. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd and mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them":

MAXWELL ON INTERPRETATION OF STATUTES (5th Edn.), p. 5; and see per LORD ESHER, M.R., in *R.* v. *City of London Court Judge* (5) ([1892] 1 Q.B. at p. 290). LORD MACNAGHTEN in *Vacher & Sons, Ltd.* v. *London Society of Compositors* (1) ([1913] A.C. at p. 118), and LORD HALDANE, L.C., in *Inland Revenue Comrs.* v. *Herbert* (6) ([1913] A.C. at p. 332) have recently stated the law in almost equally stringent terms. The present case is not that case. It is, in my view, impossible to say that the meaning of the expression "legal proceedings" is, in itself, and by itself, clear and unambiguous. The words, taken by themselves, have a sufficient and a natural meaning if they are read as referring either to civil proceedings or to criminal proceedings; or they may be inclusive, and signify both civil and criminal proceedings. In the present context no one contends that the words "legal proceedings" are to be read as applying only to criminal proceedings: the question is whether they ought to be read as including any but civil proceedings. It by no means follows, because the words are wide enough to do so, that they ought to be interpreted. Speaking of general words in a statute, MR. MAXWELL, at p. 47 of his INTERPRETATION OF STATUTES (5th Edn.), observes:

A "However wide in the abstract, they are more or less elastic and admit of restriction or expansion to suit the subject-matter. . . . It is, therefore, a canon of interpretation that all words, if they be general and not express or precise, are to be restricted to the fitness of the matter."

So "persons" may or may not include corporations; "inhabitants" may or may not include all actual dwellers in the locality.

B In *Cox* v. *Hakes* (7), LORD HALSBURY, L.C. (15 App. Cas. at pp. 515, 517), deals with, and justifies by quotation, the right to give in the interpretation of general words in a statute a narrower or limited meaning if the intention of the legislature appears to require it. I shall not quote the whole of the passage, but I will quote one sentence of it. The question there was as to the interpretation in regard to the right of appeal from an order of the Queen's Bench Division for discharging a C prisoner under habeas corpus. The Judicature Act, 1893, s. 19, gave the Court of Appeal power to hear appeals in all matters not criminal. The Lord Chancellor in reference to this s. 19 said (15 App. Cas. at p. 517):

"My Lords, I don't deny that the words of s. 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for D discharge upon a writ of habeas corpus; but it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy."

In the present case this court has to consider the true meaning in this statute of the general words "legal proceedings." We are, therefore, at liberty, and, indeed, are bound, in ascertaining that which we have to ascertain, namely, the intention E of the legislature, to consider, in choosing between the possible interpretations, the context itself, the accord or the want of accord of one or other interpretation with well-recognised principles in regard to the interpretation of statutes, and, further, if other things are equal, the comparative reasonableness of the legislation as it is interpreted in one way or the other. This last consideration, which I hold must be very cautiously applied, is put by LORD ESHER in *R.* v. *City of London Court* F *Judge* (5) in the strongest form in the following words ([1892] 1 Q.B. at p. 290):

"If the words of an Act admit of two interpretations then they are not clear: and if one interpretation leads to some absurdity, and the other does not, the court will conclude that the legislature did not intend to lead to the absurdity and will adopt the other interpretation."

G I proceed first to consider the context. The title speaks of "the institution of vexatious legal proceedings": s. 1 speaks of a person's having habitually and persistently "instituted vexatious legal proceedings" and "no legal proceedings shall be instituted." I have no doubt that the word "institute" may be found in use in statutes, legal text-books, and legal parlance in reference to criminal as well as to civil proceedings. But when it is used in reference to criminal proceedings, what H does it denote? It denotes the commencement of the proceedings. How, in criminal proceedings, does that commencement take place? It is stated in ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (24th Edn.) at p. 92:

"The commencement of the prosecution is the preferring of the indictment when it is sent up without a preliminary inquiry; or the laying of the information; or, it would seem, the arrest of the accused, or the application for I summons or warrant in respect of the offence."

Is it reasonable to suppose that the legislature, when by this Act it gave the High Court power by order to prevent a person who had habitually and persistently instituted civil proceedings in the High Court or any inferior court without any reasonable ground from instituting legal proceedings in the High Court or any other court, intended that such a vexatious litigant, man or woman, should not, if robbed or assaulted, be entitled to give the criminal wrongdoer in charge, or to apply to a magistrate for a summons, without first going to a judge in chambers

in London, or to a Divisional Court, and satisfying the judge or the court that his proceeding is not an abuse of the process of the court? But for the divergence of opinion in the present case, both in the Divisional Court and in this court, I should have ventured to think that the refusal of the institution of proceedings seeking redress for a criminal wrong, however vexatiously litigious the applicant for that redress may have been, unless he first instituted an inquiry into the merits of his claim by civil proceedings in the High Court of London to get leave to institute the criminal proceedings—and this follows from the contentions of the learned Solicitor-General—was in itself sufficient to show that the construction which the appellant seeks to put upon "legal proceedings" in this statute was untenable. And in this connection it is not an unimportant consideration that in the case of indictable offences our law, in the preliminary stage before the magistrate, or, if the matter goes before the grand jury, in their inquiry, has already given ample safeguards against the further prosecution of anything like a frivolous charge. Passing from the use of the words "institute" and "institution" in the context, I think that on a well-known principle of construction the narrower meaning of the words "legal proceedings" is entitled to preference. The enactment is one which even in regard to civil proceedings seriously abridges the right of the subject to such redress in the courts of law. I do not presume for one moment to question the wisdom of the abridgment. But if it includes an abridgment of the rights of the subject in regard to redress for crimes committed in regard to his person or his property, one would, I venture to think, justly expect the legislature, instead of using words of general import, to make it quite clear that criminal proceedings were intended to be included in the enactment.

> "Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly [the learned author has in the preceding chapter been dealing with the construction of penal Acts] subject to a strict construction. . . . It is a recognised rule that they should be interpreted, if possible, so as to respect such rights":

MAXWELL ON INTERPRETATION OF STATUTES (5th Edn.), p. 461.

For these reasons I am of opinion that the judgment of the Divisional Court was right, and ought to be affirmed. I lay no stress upon the language of s. 2 (2): "This Act may be cited as the Vexatious Actions Act." In the first place, although the use of the word "actions" except in reference to civil proceedings is now obsolete, it is just possible that the Parliamentary draughtsman may have had in his mind the fact that in a passage in BACON'S ABRIDGMENT, which was cited to us by counsel, is to be found the statement that "actions are divided into criminal and civil." In the second place, in two recent cases in the House of Lords there have been expressions of opinion on the part of the Lord Chancellor and LORD MOULTON against the use of its short title as an aid to the interpretation of the statute. Nor do I attach any value to the marginal note: "Power of court to prohibit institutions of actions without leave." The marginal note forms no part of the statute. I have come to my conclusion by giving to the statute that which, in my humble judgment, is not only a natural interpretation of the words which I find in it, but one which, if due regard is paid to its subject-matter and its working, is most in accord with recognised principles of interpretation.

SCRUTTON, J. (read by KENNEDY, L.J.).—One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused, and it is of course quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the courts and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension. It cannot be denied that, on the meaning put on the statute by

the Solicitor-General, Mr. Boaler may be robbed or assaulted in a distant county, or a lady litigant, who frequently brings vexatious actions, and is restrained under the Act, may suffer the gravest wrong a woman can suffer; an unsympathetic policeman may say: "It's only Boaler or Mrs. So-and-So" and decline to take action, and the restrained litigant may be unable to obtain a warrant, or get any redress until he or she has satisfied a judge in London, either by affidavit or personal evidence that a wrong has been done to him or her. I approach the consideration of a statute which is said to have this meaning with the feeling that, unless its language clearly convinces me that this was the intention of the legislature, I shall be slow to give effect to what is most serious interference with the liberties of the subject.

Omitting for the moment the title or short title, the material enacting words are that if the Attorney-General satisfies the court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings whether in the High Court or in any inferior court, the court may order that no legal proceedings shall be instituted by that person in the High Court or any other court, unless he obtains the leave of the High Court or some judge thereof. The words "legal proceedings" are, in my opinion, wide enough to cover criminal as well as civil process. "Instituting legal proceedings," however, seems to me a phrase much more appropriate to civil than to criminal process. A subject of the King by issuing a writ against a person within the jurisdiction institutes a proceeding which must proceed. He can serve the writ and obtain judgment by default or compel the defendant to take part in the proceedings. A person presenting a bill of indictment to a grand jury or applying for a summons to a magistrate sets on foot of his own motion no proceedings which injure the accused. Nothing will happen unless the grand jury find a true bill, or the magistrate gives leave to issue the summons and when the grand jury, or the magistrate, have allowed the proceedings to affect the accused, the proceeding is not the private prosecutor's. His name never, as far as I can trace, appears on the record; the title is, "The King *v.* the accused." The King can control the whole proceedings; he can deprive the private prosecutor of any voice in them, by taking over the prosecution, or he can stop the proceedings by entering a nolle prosequi. If the accused formally pleads, the replication, where there is a private prosecutor, runs: "The King's coroner or clerk of arraigns, or clerk of assize [as the case may be] before the King himself, who for our Lord the King in this behalf prosecutes, puts himself on the country as to the plea of the said A. B." The private prosecutor can do nothing to harm the accused unless a public body or officer allows the proceedings to go on, and they go on, not as the private prosecutor's proceedings, but as the King's proceedings. Under these circumstances the language instituting proceedings appears to me far more appropriate to civil than to criminal proceedings. Further, I find in an Act nothing about appeals as I should expect to do if it related to criminal proceedings. An order restraining the vexatious litigant from taking civil proceedings or allowing him to bring one civil proceeding may be appealed to the House of Lords. An order restraining him from taking criminal proceedings or allowing or refusing to allow him to initiate one criminal proceeding would, I think, be an order in a criminal matter, which by the Judicature Act is not subject to an appeal, and, if so, an order refusing to allow a man or woman to endeavour to initiate proceedings in the criminal courts in respect of a wrong alleged to be done to himself or herself would be made by a judge in the unreportable privacy of chambers without appeal. Parliament may enact this as they may enact anything else. But I should expect words showing a clear intention so seriously to interfere with the liberties of the subject.

The court has, then, general words which in one respect—"legal proceedings"—cover both civil and criminal proceedings, in another respect—"institute legal proceedings"—are words far more applicable to civil than criminal proceedings.

For what reasons may the court restrict these general words? The object of the courts is from the words used, construed in reference to the subject-matter in which they are used, to get at the intention of the legislature and give effect to it. When the legislature has used general words capable of a larger and a narrower meaning, those words may be restricted by innumerable presumptions all designed to give effect to the reasonable intent of the legislature. A presumption against any alteration of the law beyond the specific object of the Act; a presumption against intending an excess of jurisdiction or a violation of international law; a presumption against intending what is inconvenient or unreasonable, against intending injustice or absurdity; a strict construction of penal laws or statutes encroaching on rights, especially the liberties of the subject or imposing burdens; all are cases where general words have been cut down to a narrower meaning in endeavouring to seek the intention of the legislature, not from the widest meaning of the word used, but from the considerations that must have influenced Parliament in forming the enactment.

For instance, the Judicature Acts provide that the Court of Appeal shall have jurisdiction to determine appeals from any judgment of the High Court of Justice, except certain specified exceptions which do not include appeals from orders discharging persons from custody under a writ of habeas corpus [see now Administration of Justice Act, 1960]. Yet the House of Lords in *Cox* v. *Hakes* (7) cut down those wide general words and refused an appeal from such an order on the ground, among others, of the great change that would be made in the liberties of the subject by giving the words their literal meaning, and the consequences that would follow such a change in the law. Where there were two possible constructions of general words, one of which took away the respondent's property without compensation, LORD DAVEY in *Public Works Comr. (Cape Colony)* v. *Logan* (8) said ([1903] A.C. at pp. 363, 364):

> "Such an intention should not be imputed to the legislature unless it be expressed in unequivocal terms. This principle has frequently been recognised by the courts of this country as a canon of construction."

I think one of the principles of limitation is correctly stated in MAXWELL ON INTERPRETATION OF STATUTES (5th Edn.), p. 461:

> "It is presumed where the objects of the Act do not obviously imply such an intention that the legislature does not desire to confiscate the property or to encroach on the rights of persons; and it is therefore expected that if such be its intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt."

In the case of this statute the legislature clearly intends to interfere with some rights of persons, and uses words capable of extension to rights of litigation in criminal matters, but, in my opinion, more suitable to the subject-matter of rights of litigation in civil matters only. In my view, looking at the enacting part of the statute only, the presumption against interference with the vital rights and liberties of the subject entitles, even compels, one to limit the words to that meaning which effects the least interference with those rights.

Two other matters have also influenced me in coming to this conclusion. I am influenced by consideration of the difficulty and evil which was in existence at the time this Act was passed, and which I have no doubt it was intended to remedy. The first order made under the Act of 1896 was made in January, 1897 (see *In re Chaffers, Ex parte A.-G.* (9)), against one Chaffers, who had brought before the passing of the Act forty-seven civil actions against the Speaker, the Archbishop of Canterbury, the Lord Chancellor, and numerous other high functionaries, without success and without payment of costs. He had not extended his mischievous activity to criminal proceedings. I have no doubt that this was the grievance that Parliament was remedying. Secondly, s. 2 of the Act contains a sub-section

"This Act may be cited as the Vexatious Actions Act, 1896." This has certainly, in my mind, supported the conclusion to which I have come. I am aware that two members of the House of Lords have as dicta said that no attention should be paid to the short title of an Act. There are similar dicta with regard to the full title, but I think that the law is correctly stated by LORD MACNAGHTEN in *Fenton* v. *Thorley & Co., Ltd.* (10) ([1903] A.C. at p. 447):

> "It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, 'The title of an Act of Parliament is no part of the law, but it may tend to show the object of the legislature.' Those were the words of WIGHTMAN, J. in *Johnson* v. *Upham* (11), and CHITTY, J., observed in *East and West India Docks* v. *Shaw, Savill and Albion Co.* (12) that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act. Surely, if such a reference is ever permitted, it must be permissible in a case like this."

MAXWELL ON INTERPRETATION OF STATUTES (5th Edn.), p. 67, summarises the authority thus: "It is now settled law that the title of a statute may be referred to for the purpose of ascertaining its general scope." I agree that the court should give less importance to the title than to the enacting part, and less to the short title than to the full title, for, the short title, being a label, accuracy may be sacrificed to brevity, but I do not understand on what principle of construction I am not to look at the words of the Act itself to help me to understand its scope in order to interpret the words Parliament has used by the circumstances in respect of which they were legislating. It is by no means conclusive, but it is striking, if they were intending to deal with criminal proceedings, that they should call their Act the Vexatious Actions Act. I respectfully decline to believe that they did so, because they were aware that BACON'S ABRIDGMENT speaks of criminal actions, and I am fairly confident that for the last century the term has never been used of criminal proceedings until counsel suggested such a use in this case. The anonymous author of the marginal note thought the correct summary of s. 1 was "Power of court to prohibit institution of action without leave," but this is not part of the statute, and I pay no attention to it in forming my opinion. I refer also, in support of the conclusion to which I have come, to the judgment of LUSH, J., with which in general I concur.

But the broad, general ground on which I have formed my opinion is this. I find general words used in the Act capable of two meanings, a wider and a narrower one; on the whole, I think the language is more suited to the narrower than the wider meaning. The narrower meaning will affect the liberties of the subject to some extent, the wider meaning will most seriously affect the liberties of a subject, and, in a manner, his personal liberty and safety, which I see no reason in the Act to believe was in the contemplation of the legislature. I decline to make this more serious interference with the liberty of the subject unless the legislature uses language clear enough to convince me that that was their intention; and I think ample meaning is provided for their words, and ample remedy is provided for the grievance in respect of which Parliament was legislating, by putting the narrower construction on the general words they have used. In my opinion, the appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Steadman, Van Praugh & Gaylor.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

ATTWOOD *v.* CHAPMAN

[KING'S BENCH DIVISION (Avory, J.), May 28, June 11, 1914]

[Reported [1914] 3 K.B. 275; 83 L.J.K.B. 1666; 111 L.T. 726; 79 J.P. 65; 30 T.L.R. 596]

Libel—Privilege—Absolute privilege—Licensing justices—Application for renewal of licence—Objections containing alleged libel—Objections sent to police superintendent and owner of premises in addition to licensee.

The plaintiff applied to the licensing justices sitting at general annual licensing sessions for the renewal of the old on-licence of his public house. The defendant gave written notice of objection to the renewal of the licence on grounds specified in the Licensing Act, 1910, Sched. 2, Part II, and served the notice on the clerk to the licensing justices, the superintendent of police, and the owners of the public-house, in addition to the plaintiff, the licensee, the only person required to be served by the Licensing (Consolidation) Act, 1910, s. 16. In an action for damages for a libel alleged to be contained in the notice of objection, the defendant pleaded absolute privilege.

Held: the defence of absolute privilege was not open to the defendant, since (i) licensing justices sitting to determine applications for renewal of licences were not a court in law: *Boulter* v. *Kent Justices* (1), [1897] A.C. 556, applied; (ii) even if the licensing justices were a court in law, the defendant as a person objecting to the renewal of the licence was not one of the classes of person entitled to claim privilege; and (iii) in any event, the privilege did not extend to the service of copies of the notice of objection on the superintendent of police and the owners of the public house.

Notes. The Licensing (Consolidation) Act, 1910, so far as unrepealed was repealed by the Licensing Act, 1953, and replaced by provisions in that Act, for which see the Comparative Table to the Act of 1953 set out in 33 HALSBURY'S STATUTES (2nd Edn.) p. 309.

Considered: *Veal* v. *Heard* (1930), 46 T.L.R. 448. Referred to: *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405; *Everett* v. *Griffiths*, [1920] 3 K.B. 163; *Bottomley* v. *West Derby Assessment Committee* (1931), 47 T.L.R. 468.

As to tribunals and proceedings to which absolute privilege applies in an action for libel, see 24 HALSBURY'S LAWS (3rd Edn.) 49 et seq.; and for cases see 32 DIGEST 102.

Cases referred to:

(1) *Boulter* v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 30 Digest (Repl.) 75, *579*.

(2) *Dawkins* v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 21 W.R. 544, Ex. Ch.; affirmed (1875), L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 40 J.P. 20; 23 W.R. 931, H.L.; 32 Digest 102, *1339*.

(3) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409, 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 32 Digest 128, *1592*.

(4) *R.* v. *Howard, etc., Farnham Licensing Justices*, [1902] 2 K.B. 363; 71 L.J.K.B. 754; 51 W.R. 21, 18 T.L.R. 690; sub nom. *R.* v. *Farnham Licensing Justices, Ex parte Smith*, 86 L.T. 839; 66 J.P. 579, C.A.; 30 Digest (Repl.) 50, *377*.

(5) *Tynemouth Corpn.* v. *A.-G.*, [1899] A.C. 293; 68 L.J.Q.B. 752; 80 L.T. 633; 63 J.P. 404; 15 T.L.R. 370; 43 Sol. Jo. 531, H.L.; 30 Digest (Repl.) 71, *533*.

Preliminary Issue on a point of law raised on the pleadings in an action for damages for alleged libel.

The plaintiff, who was the licensee of the Castle Inn, Cold Ash, Berkshire, brought an action against the defendant, a bookmaker, claiming damages for libel. Paragraph 2 of the plaintiff's statement of claim was as follows:

"The plaintiff has suffered damage from the defendant falsely and maliciously writing and publishing of the plaintiff in a document purporting to be a notice of

objection to the renewal of the plaintiff's licence of the said inn the words following, that is to say: To A. Attwood (meaning the plaintiff), the Castle Inn, Cold Ash, Berks, licensed victualler, to John Gamble, chief superintendent of the police, Newbury, Berks, and to Francis Quekett Louch, clerk to the justices of Newbury Division of Berks: I, Charles Villiers Chapman, of Nos. 24 to 26, Maddox Street, London, do hereby give you notice that it is my intention to appear by myself, my counsel, or solicitor, at the general annual licensing meeting to be held for the Newbury Division of the county of Berks at the Municipal Buildings on Thursday, Feb. 5, next, at twelve noon, and to oppose the renewal of the justices' licence which you the said A. Attwood (the plaintiff), now hold for the sale of beer at the premises now occupied by you at Cold Ash in the said licensing district, on one or more of the following grounds—that is to say: (i) That you, the said A. Attwood (the plaintiff) have used the said inn and premises for the purpose of receiving bets upon races. (ii) That on behalf of the customers of the said inn, you, the said A. Attwood (the plaintiff), have made bets with the said Charles Villiers Chapman, and have received from the said Charles Villiers Chapman certain moneys upon the event of horse races, and have distributed the moneys so received to customers of the said inn. (iii) That you the said A. Attwood (the plaintiff) have retained the moneys paid to you by customers for the purpose of being remitted to the said Charles Villiers Chapman in your own hands, and have appropriated the sum to your own use, and when sued by the said Charles Villiers Chapman you have pleaded the illegality of the transaction taking place upon your said licensed premises. (iv) That you the said A. Attwood (the plaintiff) are not a fit and proper person to hold a licence. (v) That the said Castle Inn and premises have been ill-conducted and are of a disorderly character, and by reason thereof should not be licensed for the sale of intoxicating liquors.
Dated Jan. 23, 1914.

(Signed) CHARLES VILLIERS CHAPMAN

The plaintiff further alleged that the defendant published the notice by sending it to the said John Gamble, Francis Quekett Louch, and to Messrs. H. and G. Simonds, Ltd., Brewers, Reading, the owners of the premises in question.

He also alleged that the defendant did not appear at the annual general licensing meeting to support the allegations contained in his notice of objection, which were withdrawn by his solicitor.

By his defence, after denying the publication of the alleged defamatory words or that they bore the meaning alleged, or that the plaintiff had suffered any damage, the defendant pleaded in the alternative that the occasion was absolutely privileged, and delivered the following particulars:

"The Castle Inn, of which the plaintiff is the licensee, is situated in the licensing district known as the Newbury Division of Berks. The plaintiff was at all material times an applicant for the renewal of his said licence. The justices of the Newbury division of Berks are the licensing justices by whom the plaintiff's application for renewal of his said licence would of necessity be heard, and the said Francis Quekett Louch is and was at all material times the clerk to the said justices. Messrs. H. and G. Simonds are the brewers owning the said Castle Inn, and are entitled to be heard on any objection to the renewal of the said licence. The said John Gamble is the chief superintendent of police for the said division, and is also entitled to be heard on any such objection as aforesaid. The plaintiff's said application was heard by the said justices at the general annual licensing meeting for the said division on Feb. 5, 1914. The said justices, in entertaining and hearing the said application, exercised judicial functions authorised by law. The defendant, as he lawfully might, desired and intended to oppose the renewal of the said licence and to appear for that purpose at the said hearing, and accordingly published the words complained of by giving the necessary notice of objection required by law and serving the same on the said Louch, Gamble, and H. and G. Simonds, Ltd., and not otherwise. In so publishing the words alleged the defendant was taking a necessary and proper step in a

judicial proceeding—namely, the hearing of the plaintiff's application for a renewal of his said licence, and any lawful objections thereto, and was taking a necessary preliminary step in such judicial proceeding in accordance with the recognised and usual procedure before the said justices, and such publication is absolutely privileged."

By the Licensing (Consolidation) Act, 1910, s. 16 (3):

Subject to the provisions of this section, the licensing justices shall not, where the holder of a justices' licence applies for the renewal of his licence, entertain any objection to or take any evidence with respect to the renewal thereof unless written notice of an intention to oppose the renewal of the licence stating in general terms the grounds on which the renewal is opposed, has been served on the holder thereof not less than seven days before the commencement of the general annual licensing meeting.

Gordon Hewart, K.C., and *D. Owen Evans* for the plaintiff.
Clavell Salter, K.C., and *Bromley Eames* for the defendant.

Cur. adv. vult.

June 16, 1914. **AVORY, J.**, read the following judgment.—This action is brought to recover damages for an alleged libel contained in a written notice of objection to the renewal of the licence of the Castle Inn, in the county of Berkshire, an old on-licence within the meaning of s. 16 and s. 18 of the Licensing (Consolidation) Act, 1910, of which the plaintiff was then the holder. The notice was served by the defendant on the plaintiff, on the clerk to the licensing justices, on the superintendent of police, and on H. and G. Simonds, Ltd., the owners of the said premises. The question of law set down for argument is whether the occasion of this publication was one of absolute privilege—in other words, whether the defendant can claim absolute immunity from liability to an action for libel in respect of anything defamatory of the plaintiff contained in this notice of objection. For the purposes of the decision it must be assumed that the defamatory statement complained of may have been made falsely, with knowledge of its falsity, and maliciously, i.e., from a motive of personal ill-will; and the principle of law to be applied is that contained in the judgment of the Exchequer Chamber in *Dawkins* v. *Lord Rokeby* (2), that no action for libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law. This principle was approved by the Court of Appeal in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (3), with the qualification that the tribunal referred to must be a court in law or a court recognised by law (see the judgments of FRY and LOPES, L.JJ.).

The first question to be determined, therefore, is whether the licensing justices sitting at the general annual licensing meeting for the consideration of the renewal of an old on-licence, in the case where the applicant for the renewal is the holder of the existing licence, are a court in law or recognised by law within the meaning of these decisions. In such a case the holder of the licence need not attend in person at the licensing meeting unless he is required to attend—the licensing justices cannot entertain any objection or take any evidence with respect to the renewal unless written notice of an intention to oppose the renewal has been served on the holder, and the licensing justices cannot receive any evidence with respect to the renewal of the licence which is not given on oath: (see s. 16 (2), (3), and (6) of the Licensing (Consolidation) Act, 1910). The notice of objection in this case was on grounds specified in the second part of Sched. 2 to the Act and therefore, if established, gave jurisdiction to the licensing justices at the annual meeting to refuse the renewal under s. 18, and it is contended on behalf of the defendant that in these circumstances the licensing justices would be investigating a charge of personal misconduct involving, perhaps, offences against the law which could only be decided on the evidence on oath before them; that, being justices of the peace engaged in an investigation of that character, they ought to be held to constitute a court in law to which the privilege claimed attaches, and several decisions of the High Court to the effect that licensing justices must act judicially were quoted in support of this view.

On the other hand, it is to be observed that the licensing justices at the annual meeting may themselves object to the renewal of such a licence (see s. 16 (4)) and afterwards sit and adjudicate on their own objection (see *R.* v. *Howard, etc., Farnham Licensing Justices* (4)) and may in the exercise of their discretion, on proper materials including their own knowledge of the locality, refer the matter of the renewal to the compensation authority under s. 19, although the objection of which notice has been given, as in this case, is not established by the evidence, and in the event of such a reference the licensing justices themselves are entitled to be heard before the compensation authority in support of their own report (see s. 19 (2)). Further, in the event of the licensing justices refusing the renewal of the licence on such an objection as is made in this case, the applicant has a right of appeal to quarter sessions. On such appeal the licensing justices themselves are the only possible respondents (see s. 29), provision being made for their costs in sub-s. 31 and sub-s. 32, and the objector has no right to appear or be heard (see *Tynemouth Corpn.* v. *A.-G.* (5), a position which appears incompatible with that of a court recognised by law, and against the contention of the defendant in this case there is finally the opinion expressed by LORD HALSBURY in *Boulter* v. *Kent Justices* (1), ([1897] A.C., at p. 561) that justices sitting at a licensing meeting are not a court at all. In answer to this it has been argued that this opinion was not necessary to the decision, the only question before the House of Lords in that case being whether they were a court of summary jurisdiction, and that since the decision in that case the jurisdiction of the licensing justices to refuse the renewal of an old licence has been restricted to the grounds specified in the schedule to the Licensing (Consolidation) Act, 1910, but I do not think the opinion can be regarded as an obiter dictum. It was the foundation of the reasoning by which the learned Lord arrived at his conclusion, and was adopted by the Court of Appeal in *R.* v. *Howard, etc., Farnham Licensing Justices* (4), and I do not think the restriction on the jurisdiction can be held to have completely altered the nature of the tribunal.

As to the point that licensing justices dealing with objections to renewal and other matters are bound to act judicially, I think the passage in the judgment of FRY, L.J., in the *Royal Aquarium Case* (3) applies in this case. He said ([1892] 1 Q.B. at p. 447):

> "It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word judicial is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterises proceedings in courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege."

The rule of law which establishes this immunity, being founded on grounds of public policy and convenience, it would, I think, lead to much confusion and inconvenience if the licensing justices when dealing with the renewal of an old on-licence on the application of the holder were held to be a court in law to which the privilege attaches, and not such a court when dealing at the same meeting with applications for new licences or the renewal of licences which are not old licences within the definition or in respect to which the applicant is not the holder, in which latter case the applicant is not entitled to notice of objection under s. 16 (3). While recognising the force of the argument for the defendant, I have come to the conclusion that the licensing justices at their annual meeting,

even when dealing with an objection to a renewal of a licence as in this case, are not a court in law to which the privilege attaches.

The second question is whether the defendant, in objecting to the renewal of the licence, comes within any of the classes of persons entitled to claim the privilege, if the meeting of licensing justices were held to be a court in law. It was clearly held in *Boulter* v. *Kent Justices* (1) that such an objector was not a party. He cannot be made liable in costs either on the original hearing or on appeal, and is not entitled to notice of appeal, nor can the privilege in this case be claimed as that of a witness, and therefore he does not appear to come within the category of persons on whose behalf the immunity has been established.

The third question is whether, if the licensing justices at their annual meeting were held to be a court in law and the objector a person who could claim the privilege, such privilege or immunity from action would extend to the notices of objection served in this case on the superintendent of police and on the brewers, the owners of the premises. The Licensing (Consolidation) Act, 1910, s. 16, only requires the notices of objection to be served on the holders of the licence. It is obviously convenient and necessary for purposes of procedure that the notice should also be served on the clerk to the justices, and it was said in argument that it is usual in such cases also to serve the superintendent of police and the owners of the premises. I do not know that this is so where the objection is made by a private individual, but in my opinion such a statement of procedure is not sufficient to justify me in holding that the notices served on the superintendent and the owners which were unnecessary come within the rule as to words written in the ordinary course of any proceeding before a court. On all grounds, therefore, I think the defendant's plea of absolute privilege and immunity from liability in this action fails and the plaintiff is entitled to judgment on the question of law.

Judgment for the plaintiff.

Solicitors: *Fielder, Jones & Harrison*, for *Charles Lucas*, Newbury, *Cunningham & Co.*

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

PILKINGTON *v.* ROSS

[KING'S BENCH DIVISION (Avory, Rowlatt and Shearman, JJ.), April 30, 1914]

[Reported [1914] 3 K.B. 321; 83 L.J.K.B. 1402; 111 L.T. 282; 78 J.P. 319; 30 T.L.R. 510; 12 L.G.R. 944; 24 Cox, C.C. 277]

Licensing—Offence—Child allowed in bar—Kitchen of licensed premises—Kitchen used for both trade and domestic purposes—Children Act, 1908 (8 *Edw.* 7, *c.* 67) *s.* 120.

By s. 120 of the Children Act, 1908 [now s. 126 of the Licensing Act, 1953], the holder of the licence of licensed premises is prohibited from allowing a child to be in the "bar" of the licensed premises, except during the hours of closing; and "bar" is defined [see now s. 165 of the Licensing Act, 1953] as meaning any open drinking bar or any part of the premises "exclusively or mainly used for the sale and consumption of intoxicating liquor."

The appellant was the licensee of a small beer-house. One evening, when the house was open for business, a woman, who had a child with her, was found in the kitchen of the beerhouse consuming beer purchased from the appellant, there being other customers in the room. The kitchen was the only room in the house which was used or could reasonably be used for domestic purposes; in it were the ordinary fittings and appliances of a kitchen, but it was also fitted up as a drinking room. The appellant was summoned under s. 120 for allowing the child to be in the "bar" of his licensed premises, and the justices convicted him, being of opinion that the room was extensively used for trade purposes during certain parts of the day, and that the fact that it was used during certain periods of the day for domestic purposes did not prevent them from holding that at other periods of the day it was "mainly used" for the sale and consumption of liquor.

Held: in deciding whether a room was or was not a "bar" the justices must look at the general character and general and regular user of the room; in the present case there was clear evidence that on every day on which the house was open for business the kitchen was extensively used for trade purposes; the user of the room during certain periods of the day for domestic purposes did not preclude the justices from holding that it was mainly used for the sale and consumption of intoxicating liquor; and, therefore, the appellant was properly convicted.

Notes. Section 120 of the Children Act, 1908, has been replaced by ss. 126 and 165 of the Licensing Act, 1953.

As to offences in relation to the sale of intoxicating liquor to infants, see 22 HALSBURY'S LAWS (3rd Edn.) 675; and for cases see 30 DIGEST (Repl.) 100. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Cases referred to in argument:

Westropp v. *Elligott* (1884), 9 App. Cas. 815; 52 L.T. 147, H.L.; 31 Digest (Repl.) 389, *5148*.

Donaghue v. *M'Intyre*, [1911] S.C.(J.) 61; 48 Sc.L.R. 310; 1 S.L.T. 131; 6 Adam, 422; 30 Digest (Repl.) 100, * *425*.

Case Stated by justices for the borough of Leigh in the county of Lancaster.

The appellant was convicted and fined 5s. and costs for an offence under the Children Act, 1908, the charge being that the appellant being the holder of a licence for the sale intoxicating liquors by retail in his house and premises on Sept. 21, 1913, did unlawfully allow a certain child aged two years to be in the bar of his licensed premises during part of the period during which the licensed premises were open in pursuance of the Licensing (Consolidation) Act, 1910, contrary to s. 120 (1) of the Children Act, 1908 [now s. 126 of the Licensing Act, 1953]. Upon the hearing the following facts were proved or admitted: The appellant was a licensed beerseller and was on Sept. 21, 1913, the licensee of the Globe Inn, Leigh. On the date in question at 8.40 in the evening

a woman named Smith was found by the police in a room in the appellant's beerhouse consuming certain beer which she had purchased from the appellant. She had with her in the room her daughter, a child aged two years. There were two other customers in the room and later whilst the police were there three other customers came into the room. The room in question was the kitchen of the appellant's beerhouse. The appellant's beerhouse was but a small one. It was two stories high and had on the ground floor a bar, a parlour, a taproom, and a kitchen, and on the first floor a clubroom and two bedrooms. There was a cellar for the storage of beer. Accompanying the Case was a plan which showed the appellant's premises. It will be observed that the bar, the parlour, the taproom, the kitchen, and the clubroom were in such plan tinted with pink colour. This indicated that such rooms were intended by the brewery owners to be used by the licensees for trade purposes. It will also be observed that there was no back kitchen or scullery. The justices found that the kitchen was the only room in the house which was used and could reasonably be used for domestic purposes. In the room were the ordinary fittings and appliances of a kitchen—namely, an oven and grate, a gas stove, shelves for crockery, a slopstone, a clothes drying line, and in fact the ordinary requisites of a kitchen. At the same time the justices found that the room was also fitted up as a drinking room, there being in the room a long table with a white top with a hand bell on it, a form or bench such as is commonly used by customers of beerhouses and a number of stools. It was not contended that the child referred to in the charge was such a child as could lawfully have been on the premises under the provisions of s. 120 (4) and it was not disputed that the appellant allowed the child to be in the kitchen at the time mentioned, and that at such time the kitchen was being used for the sale and consumption of intoxicating liquor. The defence was that the kitchen was not a "bar" within the meaning of s. 120 (5) of the Children Act, 1908. The appellant's contention was that the "main" user of the room was for domestic purposes as a kitchen, and that the occasional user of the room during certain periods of the day was merely secondary, and was not inconsistent with the "main" user of the room being domestic. The justices agreed with the appellant that the room could not be said to be "exclusively" used for the sale and consumption of intoxicating liquor within the meaning of the subsection, and that the only point they had to consider was whether on a correct construction the room could be said to be "mainly" so used. The justices were satisfied that the room was extensively used for trade purposes during certain portions of the day, and they came to the conclusion that they were justified in holding that the user of the room during certain periods of the day for domestic purposes did not preclude them from holding that the same room during other periods of the day could be "mainly used" for the sale and consumption of intoxicating liquor within the meaning of the Act of Parliament.

A. F. Wootton for the appellant.
Rigby for the respondent.

AVORY, J.—If counsel for the appellant had satisfied us that these justices really found, and meant to find, that they had to look at a particular period of the day and determine whether at that particular period of that particular day the room in question was mainly used for the sale and consumption of intoxicating liquor, the case would, I think, have required further consideration; but, in my opinion, that argument is founded upon what I may call a hypercritical examination of the words of the Case. We must look at the substance of the matter and at what the contention of the appellant was before the justices. Here was a room in respect of which there was clear evidence—as I read the statement of facts—that on every day on which the house was open for business this kitchen was extensively used for trade purposes—that is to say, for drinking purposes. There were the ordinary fittings for trade purposes, the table, the form and stools, and the bell upon the table to enable customers to summon the attendant, and the contention which was put before the justices was that as the room was used as a kitchen—that is to say, for domestic purposes—it could not be said to be "mainly" used for the sale and consumption of intoxicating liquor within the meaning of this statute. The justices say:

A "We were satisfied that the room was extensively used for trade purposes during certain portions of the day [I think that means during certain portions of every day when the house is open] and we came to the conclusion that we were justified in holding that the user of the rooms during certain periods of the day for domestic purposes did not preclude us from holding that the same room during other portions of the day could be mainly used for the sale and consumption of intoxicat-
B ing liquor."

It is the use of those words "during other periods of the day" that has given rise to this argument. I do not think that the justices meant by those words to limit their own judgment in the sense which has been contended for. I think the substance of this finding is that in their opinion the user of the room during certain periods of the day for
C domestic purposes did not preclude them from holding that it was mainly used for the sale and consumption of intoxicating liquor within the meaning of the Children Act, 1908. I am of opinion that there was certainly evidence upon which they were justified in coming to that conclusion, and I think therefore that this appeal must be dismissed.

ROWLATT, J.—I agree. The case turns entirely upon what we think is the proper
D construction of the finding of the justices in this case, and speaking for myself, I wish to guard myself carefully against giving any countenance to the idea that for the purpose of ascertaining what is the "main" user of a room you can split the day up into parts and say that a room comes within the definition of a bar during certain parts of the day and does not come within the definition of a bar during other parts of the day. It seems to me that this definition contemplates a room either being a room which is open to
E children or a room which is forbidden to children, and that the character of the room must be impressed upon it, having regard to its "main" user once and for all, until the user, of course, changes. Any other construction would, as it seems to me, open the door to great dangers to the children, because in any case, except that of the open bar—namely, in any case where the question would have to be gone into, whether the room was "exclusively" or "mainly" used for the sale and consumption of intoxicating liquor, if
F the publican were entitled to come and say, "Although this is the bar parlour of the public house I can show you that at this particular time of the day there never was anybody supplied with drink or consuming drink therein," I think that a door would be open to the abuse aimed at by the section.

SHEARMAN, J.—I agree that this conviction should be affirmed. In my view, the
G argument that has been put before us, that we must look at the regular and general user of the room, is the correct one. I think that appears from sub-s. 120 (1) of the Act of 1908, which runs as follows:

"The holder of the licence of any licensed premises shall not allow a child to be at any time in the bar of the licensed premises, except during the hours of closing."

H It seems to me that those words make it clear that it was intended to impress a regular character on each particular room of any licensed premises, and I think we must look for the same result when we come to the definition of "bar" in s. 120 (5), [now s. 165 of the Act of 1953]. What the justices, therefore, in my judgment, have in each case to decide, if a child is found in a room in licensed premises, is whether the room in which the child is found is a prohibited room or is not a prohibited room, and in deciding that
I matter, which is purely a question of fact, they must look at the general character and general and regular user of the room. Having arrived at that result, we have to look closely at this case in order to see exactly what the justices did find. It appears to me that, reading the Case in a sensible manner and trying to make it consistent throughout with the arguments put forward before they could have found for the appellant, they would have to say that this place could not be a prohibited room because at certain periods of the day it was regularly used as a kitchen; but all that is found by the Case is that the justices said that the fact that this room during certain portions of the day was used as a kitchen did not prevent them from holding, as they did hold upon the

facts, that it was a place mainly used for the sale and consumption of intoxicating liquor. In these circumstances I think that the justices were right, and that this conviction should be affirmed.

Appeal dismissed. Conviction affirmed.

Solicitors: *Kinch & Richardson*, for *Albert H. Hayward*, Leigh, Lancashire; *Snow, Fox, Higginson*, for *Harcourt E. Clare*, Clerk of the Peace, Preston.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

R. *v.* VICAR AND CHURCHWARDENS OF ST. MARY, DYMOCK. Ex Parte BROOKE

[KING'S BENCH DIVISION (Darling, Lord Coleridge and Shearman, JJ.), October 13, 1914]

[Reported [1915] 1 K.B. 147; 84 L.J.K.B. 294; 112 L.T. 156; 79 J.P. 91; 31 T.L.R. 11; 13 L.G.R. 48]

Ecclesiastical Law—Sexton—Tenure of office—No presumption of law that office freehold.

The applicant had carried out the customary duties of a sexton for 25 years in a certain parish. He received a salary which at some time during this period had been increased, and he was paid the usual sexton's fees for marriages and burials. He was found to be negligent in his duties, and the vicar and churchwardens served on him a written notice determining his office. On an application by him for a writ of mandamus directed to the vicar and churchwardens commanding them to restore him to the office he contended that the vicar and churchwardens had no right to dismiss him and claimed to be restored to his office on the ground that his office of sexton was a freehold one for life.

Held: there was no presumption that the office of a sexton was a freehold, and, in any event, in the present case there was no evidence to satisfy the court that the applicant was ever elected to the office of sexton as a freeholder.

Per DARLING, J.: "There is also another ground upon which the application fails—namely that mandamus is not the only remedy which is open to the applicant . . . he can bring an action to recover the fees to which he claims that he is entitled."

Notes. As to sextons in general, see 13 HALSBURY'S LAWS (3rd Edn.) 176; and for cases see 19 DIGEST 300.

Cases referred to:

(1) *Isles's Case* (1671), 2 Keb. 820; T. Raym. 211; 84 E.R. 518; sub nom. *Ile's Case*, 1 Vent. 153; sub nom. *R.* v. *Kingscleere (Churchwardens)*, 2 Lev. 18; 19 Digest 300, *978*.

(2) *Merrick's Case* (1804), 2 Peck. 91; 19 Digest 301, *986*.

(3) *R.* v. *Thame (Churchwardens)* (1718), 1 Stra. 115; 93 E.R. 419; 13 Digest (Repl.) 232, *556*.

Also referred to in argument:

Cansfield v. *Blenkinsop* (1849), 4 Exch. 234; Cripps' Church Cas. 217; 3 New Mag. Cas. 216; 18 L.J.Ex. 361; 13 L.T.O.S. 285; 13 J.P. 521; 154 E.R. 1197; 19 Digest 300, *981*.

R. v. *Stoke Damerel (Minister and Churchwardens)* (1836), 5 Ad. & El. 584; 2 Har. & W. 346; 1 Nev. & P.K.B. 56; 6 L.J.M.C. 14; 111 E.R. 1286; 19 Digest 300, *980*.

Roberts v. *Aulton* (1857), 2 H. & N. 432; 29 L.T.O.S. 280; 21 J.P. 629; 157 E.R. 178; sub nom. *Aulton* v. *Roberts*, 26 L.J.Ex. 380; 19 Digest 298, *949*.

R. v. *Taunton St. James (Churchwardens)* (1776), 1 Cowp. 413; 98 E.R. 1160; 19 Digest 301, *997*.

A *R.* v. *Davies* (1827), 9 Dow. & Ry.K.B. 234; 4 Dow. & Ry.M.C. 310; 5 L.J.O.S.M.C. 46; 19 Digest 300, *971.*

R. v. *Smith* (1844), 5 Q.B. 614; 1 Dav. & Mer. 564; 13 L.J.Q.B. 166; 2 L.T.O.S. 400; 9 J.P. 5; 8 Jur. 599; 114 E.R. 1381; 19 Digest 299, *965.*

Ex parte Johnson (1853), 17 J.P. 538; 19 Digest 301, *998.*

B **Rule Nisi** directed to the vicar and churchwardens of the parish of Dymock, in the county of Gloucester, to show cause why a writ of mandamus should not issue against them commanding them to restore the applicant for the rule, George Brooke, to the office of sexton of the church of St. Mary, Dymock, on the ground that the office of sexton was a freehold office.

E. W. Hansell and *A. M. Latter*, for the vicar and the churchwardens, showed cause.

C *Harold Hardy* in support of the rule.

DARLING, J.—In this case a rule was granted calling upon the vicar and the churchwardens of the parish of Dymock to show cause why a writ of mandamus should not issue directed to them commanding them to restore one George Brooke to the office of sexton of the parish of Dymock on the ground that the office is a freehold one. It is true that Brooke has for many years performed the duties which a sexton has to do, D and in one sense I think he may be called a sexton. He was a sexton in the sense that he rang the bell, dug the graves, and did such other things as a sexton would ordinarily do; but the mere fact of calling a man a sexton does not make him the holder of a freehold office.

It is entirely a question of evidence whether such a man has a freehold or not, and the E cases which have been cited in the course of the argument go to show that the court will only issue a mandamus to restore a person to the office of sexton provided evidence is given that he was really a sexton and holding a freehold office. There is, indeed, something against this view, for in vol. 11 of HALSBURY'S LAWS OF ENGLAND (1st Edn.) at p. 478 there is the following statement:

"In the absence of a custom to the contrary, the office of sexton in ancient parishes F is a freehold for life."

In support of that proposition reference is made to certain cases, and also to BLACKSTONE'S COMMENTARIES (Edn. 1809), vol. 1, p. 395. The passage in BLACKSTONE is as follows:

"Parish clerks and sextons are also regarded by the common law as persons who have G freeholds in their offices; and therefore, though they may be punished, yet they cannot be deprived, by ecclesiastical censures."

That looks like an assumption that the office is one that is to be held for life. For the statement in BLACKSTONE a reference is made to ROLLE'S ABRIDGMENT, vol. 2, p. 234, but at that page in ROLLE'S ABRIDGMENT there is nothing at all dealing with the appointment of a sexton, nor with the nature and tenure of the office. The statement of H BLACKSTONE has been reproduced in STEPHEN'S COMMENTARIES (16th Edn.), vol. 2, p. 794, and also in HALSBURY'S LAWS OF ENGLAND (1st Edn.), vol. 11, p. 478. But on the same page of HALSBURY'S LAWS OF ENGLAND, in the footnote, there are cases cited, and the two important ones are *Ile's Case* (1) and *Merrick's Case* (2). The first of these two cases simply says this:

"A mandamus was prayed to restore a sexton. The court at first doubted whether I they should grant it, because he was rather a servant to the parish than an officer, or one that had a freehold in his place. But upon a certificate from the minister, and divers of the parish, that the custom was there to choose a sexton, and that he held it for his life, and that he had 2d. a year of every house within the parish, they granted a mandamus, and it was directed to the churchwardens."

The latter of the two cases is reported thus:

"John Merrick voted for his office of sexton. It was proved in support of the voter's title that he had acted as sexton of Uxbridge; and an entry was shown from the

proceedings of the vestry of his election as sexton on Aug. 29, 1799; but it did not appear that he had been elected for life: and no proof being given that the office was for life, the committee determined the vote to be bad."

In my opinion these two cases make it perfectly clear that there must be evidence that the office of sexton in the particular parish is a freehold which the person elected thereto is entitled to hold for life unless gross misconduct can be proved against him. In the present case has Brooke shown that he was a freeholder? All that he can say in his affidavit is this, that he is informed and believes that he held the office of sexton as a freehold. He gives no reason for his belief. He says that he was appointed to the office about twenty-five years ago. There is no entry in the books of the vestry, and no reference anywhere else to his appointment. He has carried out the work of a sexton during the period of twenty-five years or so, and he has been paid a sum of money for his services. The salary was also increased after a certain time. If Brooke had been elected for life why should there have been an extra salary paid to him? There was no necessity for it. It seems to me, therefore, that this rule must be discharged on the ground that there is no evidence to satisfy the court that the applicant was ever elected to the office of sexton in the parish of Dymock as a freeholder.

There is also another ground upon which the application fails—namely, that mandamus is not the only remedy which is open to the applicant. If he is entitled to hold the office for life as he suggests, he can bring an action to recover the fees to which he claims that he is entitled. In the event of such an action being brought, he can then prove the real terms of his appointment.

LORD COLERIDGE, J.—There are two questions in this case. The first is whether the office of sexton is a freehold office by presumption of law, and the second is whether Brooke was appointed to that office. It is quite true that in BLACKSTONE'S COMMENTARIES (Edn., 1809) vol. 1, p. 395, to which reference has been made, it is stated that sextons and parish clerks are presumed to have freeholds in their offices. But whilst my brother DARLING has been speaking I have referred to a later edition of BLACKSTONE, that of 1825, and there the editor, in commenting upon the text of the 1809 edition which has been already read, says:

"With respect to sextons, it can hardly be said that they are regarded by the common law as having freeholds, because the tenure by which they hold varies accordingly, and is as often during pleasure, as for life, or during good behaviour. It should seem that the presumption of law is that they hold by the first. In *R.* v. *Thame (Churchwardens)* (3) it was said that a mandamus to restore a sexton ought not be granted unless there was a certificate that he was chosen for life. And it was decided in an election committee of the House of Commons, 2 Peck. 91, that where the office of sexton is not shown to be held for life, it gives no right to vote."

Therefore, the dictum of BLACKSTONE was certainly discovered to be erroneous so long ago as 1825, and the presumption, so far from being as stated by BLACKSTONE, is quite the other way. In the absence of any presumption that the office of sexton is a freehold one, I am not satisfied that any evidence has been given which shows that Brooke was appointed to the office of sexton as a freehold office. For these reasons I agree that the rule nisi must be discharged.

SHEARMAN, J.—I am of the same opinion. Even supposing that the parish of Dymock is one where the vicar and the churchwardens are empowered to appoint a person to the office of sexton as a freehold for life, there is, in my opinion, no evidence at all before the court to show that Brooke was ever appointed to fill that office for life.

Rule nisi discharged.

Solicitors: *Helder, Roberts, Walton & Giles*, for *R. F. Melville Harry*, Gloucester: *G. W. Grice-Hutchinson*, for *T. Weldon Thomson*, Tewkesbury.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

STOCK *v.* CENTRAL MIDWIVES BOARD

[KING'S BENCH DIVISION (Lord Reading, C.J., Avory and Low, JJ.), May 7, 11, 12, 1915]

[Reported [1915] 3 K.B. 756; 84 L.J.K.B. 1835; 113 L.T. 428; 79 J.P. 397; 31 T.L.R. 436; 13 L.G.R. 1227]

Midwife—Misconduct—Removal from roll—Matters for consideration—Need for strict compliance with rules—Midwives Act, 1902 (2 *Edw.* 7, *c.* 17), *s.* 3, *s.* 4.

The appellant was a certified midwife and three years after she had separated from her husband she had a child of whom H. was the father. Subsequently she went to live in the same house as H. and his sister and was living there at the time the Central Midwives Board held an inquiry into her conduct. At the first hearing of the inquiry the appellant, H. and H.'s sister gave evidence. At the adjourned hearing of which the appellant was given notice, but which she did not attend, the Board had before them a report which was now admitted to be inaccurate, and the appellant's name was removed from the roll of midwives. Under the rules of the Board, the report should have been verified by statutory declaration and a copy supplied to the appellant, neither of which steps had been taken. On an appeal to the High Court by the appellant under s. 4 of the Midwives Act, 1902,

Held: "misconduct" was not confined to matters connected with a woman's ability to perform her duties properly as a midwife, and, if the Board were satisfied from the facts and circumstances of the case that a woman was unfitted by her conduct to act as a midwife, they were entitled to remove her from the roll; each case depended on its own facts, and it was for the Board to judge the fitness of the midwife; but the power to remove the name of a midwife from the roll should not be exercised except in strict compliance with the rules, and in the present case the evidence which was admitted was not in accordance with the rules and the evidence given during the appellant's absence was inaccurate; and, therefore, the appellant was entitled to succeed.

Per LORD READING, C.J. In my view, the right of appeal is as full a right of appeal as is given by any statute which gives a right of appeal to this court, and R.S.C., Ord. 59, rr. 19 and 20 [now Ord. 59, r. 38], make it clear that this court has full power to hear further evidence.

Notes. The Midwives Act, 1902, has been replaced by the Midwives Act, 1951, s. 3 (1) of which empowers the Central Midwives Board to remove from the roll the name of a certified midwife "who misconducts herself." The present rules relating to appeals from the Central Midwives Board are in R.S.C., Ord. 59, r. 38.

Referred to: *Davies* v. *Central Midwives Board* (1919), 88 L.J.K.B. 962.

As to the removal of names from the roll of Midwives, see 26 HALSBURY'S LAWS (3rd Edn.) 166–171; and for cases see 34 DIGEST 564–565. For the Midwives Act, 1951, see 30 HALSBURY'S STATUTES (2nd Edn.) 246.

Case referred to:

(1) *Re Feldmann* (1907), 97 L.T. 548; 71 J.P. 269; 23 T.L.R. 432; 5 L.G.R. 653; 34 Digest 565, *227*.

Appeal by Mrs. Lucy Henrietta Stock, a midwife, from a decision of the Central Midwives Board striking her name off the roll of midwives on the ground that she had been guilty of misconduct under s. 3 of the Midwives Act, 1902.

The appellant was a married woman and had two children. She lived with her husband until the year 1909, when she obtained a separation order under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of her husband's misconduct. The custody of the two children of the marriage was given to the appellant, and the husband was ordered to pay to her a sum of 10s. a week. The husband had failed to pay the money ordered, and the appellant had been compelled to earn her own living. In

1912 appellant became acquainted with a man named Hill, and had a child of which Hill was the father. From 1912 until 1914 the appellant's name was on the roll of midwives, and she practised as a midwife. In 1914 Hill obtained work at a place near where the appellant was employed, and went to live with his sister. The appellant afterwards went to live in the same house, and whilst there she slept with Hill's sister, Hill himself occupying a separate room. In July, 1914, the Central Midwives Board served a notice upon the appellant charging her with misconduct in cohabiting with a man who was not her husband. An inquiry was heard before the Central Midwives Board on July 22, 1914, at which the appellant, Hill, and Hill's sister attended. All three denied that any immoral relations existed between the appellant and Hill, but the Board were not satisfied with some of the statements made by the appellant as to her past relations with her husband and the custody of her children, and the inquiry was adjourned until October. Notice was given to the appellant of the adjourned inquiry, but she did not attend. The Board made a further investigation into the allegations against the appellant, and had before them a report which contained statements which were now admitted to be inaccurate. They came to the conclusion, however, that the appellant had not spoken the truth with regard to her husband and her children, and removed her name from the roll of midwives.

By s. 3 of the Midwives Act, 1902 [now s. 1 of the Midwives Act, 1951]:

"On the passing of this Act, the Lord President of the Council shall take steps to secure the formation of a Central Midwives Board . . . The duties and powers of the Board shall be as follows:

IV. To publish annually a roll of midwives who have been duly certified under this Act [now s. 2 of the Midwives Act, 1951].

V. To decide upon the removal from the roll of the name of any midwife for disobeying the rules and regulations from time to time laid down under the Act by the Central Midwives Board, or for other misconduct, and also to decide upon the restoration to the roll of the name of any midwife so removed [now s. 3 of the Midwives Act, 1951].

By s. 4 of the same Act [now s. 3 (6) of the Midwives Act, 1951].

"Any woman thinking herself aggrieved by any decision of the Central Midwives Board removing her name from the roll of midwives may appeal therefrom to the High Court of Justice within three months after the notification of such decision to her; but no further appeal shall be allowed."

By R.S.C., Ord. 59 [see now Ord. 59, r. 38].

"Rule 19. An appeal from any decision of the Central Midwives Board, under the Midwives Act, 1902, shall be made to the Divisional Court by notice of motion and supported by affidavit, or, if the court shall so direct on the hearing of the motion by oral evidence.

Rule 20. The notice of motion shall be an eight days' notice, and shall be filed at the Crown Office, and upon filing the notice the appeal shall be set down in the Crown paper for hearing as if it were an appeal from an inferior court."

Lord Robert Cecil, K.C., and *Theobald Mathew* for the Board.
Eales for the appellant.

LORD READING, C.J.—We are of opinion that this appeal should be allowed. One of the objects of the Midwives Act, 1902, was to place midwives under the control of a Board consisting of persons of experience and repute, and, in order to carry out that object, certain powers were given to the Board which are defined by the Act. These powers included the making of rules. Rules have been made and they have been approved by the Privy Council. Except as provided by s. 4 of the Act, there is no right of appeal from the decision of the Board. In view of the conclusion at which we have arrived, it is unnecessary for us to decide whether an appeal under the Act is a rehearing or whether the right of appeal is of a limited character. Counsel for the appel-

lant, however, has called our attention to *Re Feldmann* (1), in which that point was left open. I therefore desire to say that in my view the right of appeal is as full a right of appeal as is given by any statute which gives a right of appeal to this court, and rr. 19 and 20 of Ord. 59 [now Ord. 59, r. 38] make it quite clear that this court has full power to hear further evidence. When Parliament invested the Central Midwives Board with the administration of all matters regulating the practice of midwives it gave them an unrestricted right of action, subject to one right of appeal, and, in my opinion, in a case of this kind it is the duty of this court to see that justice is done. Unless, then, the power of this court is fettered by the words of the Act, it must inquire into all the circumstances of the case, and it is absolutely free to make any investigation it chooses in order to ascertain the real facts that are involved.

On behalf of the appellant it is contended that, even if the facts as found by the Board were correct, and even if the appellant was living under such conditions that there was sufficient ground for holding that she was cohabiting with Hill, yet she had not been guilty of such misconduct as to entitle the Board to remove her name from the roll of midwives under s. 3 of the Act when there was no other charge of any kind of misconduct made against her. It is said that the word "misconduct" as used in that section is confined to matters connected with a woman's ability to perform her duties properly as a midwife. I do not think that that is a correct view to take of the meaning of the section. If, in the opinion of the Board, the conduct of a midwife is such as to tend to unfit her for the discharge of her duties, the Board have a right to treat it as misconduct under the Act and to visit it with the penalties which it deserves. If the Board are satisfied from the facts and circumstances of the case that a woman is unfitted by her conduct to act as a midwife, they are entitled to remove her name from the roll of midwives. Each case must be dealt with upon its own merits, and I do not think that there could be any body better fitted to judge as to this fitness or unfitness than the Central Midwives Board as constituted by the Act.

Another point which was taken on behalf of the appellant is that the Board admitted evidence wrongly and in breach of the rules which they had passed. It is also said that the evidence which they admitted was heard in the absence of the appellant, and that the report before them contained inaccurate statements which were bound to have influenced their decision. It is quite clear that under r. 2 (d) the Board ought to have had the statements in the report verified by a statutory declaration, and that a free copy of the report should have been supplied to the appellant. The Board received a report from the relieving officer, and it was upon that report that they arrived at their decision. It was not verified by a statutory declaration, and no copy was supplied to the appellant before the adjourned meeting in October, 1914. The omission is in itself a serious matter. The Board has made rules, as it was empowered by the Act to do, and it is essential that these rules should be strictly adhered to. In cases of this character, if the court comes to the conclusion that evidence has been admitted irregularly and in breach of the rules that fact must be fatal to the decision of the Board. The power of removing the name of the midwife from the roll should not be exercised except in strict compliance with the rules. The evidence which was admitted was not in accordance with the rules. It appears, moreover, from the facts which are before us that the statements made in the report thus irregularly admitted were inaccurate, and that if they were accepted as being accurate they cast such a reflection upon the appellant's veracity as to lead the Board to the conclusion that she was a woman entirely unworthy of credence and that she was in fact still cohabiting with the man Hill. It is possible to understand the Board saying that if she had misled them in one particular, they could not place much reliance upon her statement as to the question which has been investigated before us. If the Board had had before them the correct statement, namely, that all that she had said about her past life was true and that it was she who had suffered ill-treatment from her husband, and that the custody of the children had been given to her when she obtained the order of separation from her husband, the Board might have arrived at a different conclusion. They dealt with the evidence irregularly, and in my opinion as we have now unquestionably the true facts of the case before us, and as we know that the evidence given in her absence was incorrect, the decision of the Board cannot be supported.

Having had evidence brought before us in addition to that which was before the Board, we have come to the conclusion that this appeal must be allowed.

AVORY, J.—I am of the same opinion. I entirely concur in the judgment of the Lord Chief Justice, and in the reasons that he has given for it. I desire to add two observations only. If this case had rested solely upon the allegation that in the place where the appellant was carrying on her profession she was cohabiting with a man who was not her husband, I am not prepared to say that the Board would not have been justified on that ground alone in removing her name from the roll; and I am not prepared to say that this court ought to have differed from their conclusion upon the evidence which was before them. It has to be borne in mind that the patients who are attended by the midwife have to be considered. Women are very sensitive of each other's honour, sometimes more so than of their own, and certainly much more so than men are of each other's honour in matters of this kind, and it might be exceedingly mischievous if there was reasonable ground for believing that a woman who professed to be carrying on the calling of a midwife and who was certified as such was leading or was reputed to be leading an immoral life. If the present case rested solely and entirely upon the allegation as to the mode of life of the appellant I should not differ from the finding of the Board; but it is quite clear from a perusal of the shorthand notes of the proceedings that the Board wished to ascertain certain particulars as to the reasons why the appellant's children had been taken by the guardians, whether it was or was not on account of her mode of life, and also to ascertain whether she was speaking the truth in the account which she gave with regard to that matter. From the shorthand notes it appears clear that at that hearing one of the members of the Board said to the appellant, "It was on account of your mode of life that they (i.e., the guardians) took the children?" and she said, "It was because I had no home." The chairman then asked the member of the Board who put the question whether he had any knowledge that that was the reason why the guardians took away the children, and the member replied that he had no evidence. The clerk thereupon said that there was no evidence, but that it could be procured, and the Board then adjourned the hearing for the purpose of obtaining further evidence. On the second occasion a document was produced, the report which has been referred to, and part of it was read as evidence before the Board. That document must have led the Board to believe that the appellant had not spoken the truth when she said that her husband had once been in prison, and had twice been arrested for not paying maintenance for the children, and must have led them to believe that from the guardians' point of view the appellant had been guilty of a dereliction of duty with regard to the children. I agree with my Lord as to the powers of this court, but even if they were more limited than they are, it would be impossible to say that the Board was not influenced against the appellant by statements which are now known to have been incorrect, and also clearly irregularly admitted. The appeal must therefore be allowed.

LOW, J.—I agree. Speaking for myself, I have no desire, and I think that the court has no desire, to give any expression of opinion as to the way in which the facts of any particular case should be dealt with. But on the facts of the present case, and in view of the manner in which the investigation took place, I am quite sure that the court is doing right in ordering that the name of the appellant should be restored to the roll of midwives.

Appeal allowed.

Solicitors: *Rodwell*, for *Henderson-Cleland*, Coventry; *Julius Bertram*.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law*.]

UNITED STATES STEEL PRODUCTS CO. *v.* GREAT WESTERN RAIL, CO.

[HOUSE OF LORDS (Lord Buckmaster, L.C., Lord Atkinson, Lord Parker of Waddington, Lord Parmoor and Lord Wrenbury), June 7, July 13, 1915]

[Reported [1916] 1 A.C. 189; 85 L.J.K.B. 1; 113 L.T. 886; 31 T.L.R. 561; 59 Sol. Jo. 648; 21 Com. Cas. 105]

Carriage of Goods—Carrier's lien—General lien—Particular lien—Goods stopped in transitu—Claim to general lien by carriers—No priority over right of stoppage.

The vendors of goods authorised their agents to forward the goods to the buyers "by connecting carrier and upon such conditions as the latter may exact." The goods were delivered to carriers for delivery to the buyers, and a clause in the carrier's consignment note provided that all goods carried were subject to a particular lien "for money due to them for the carriage of and other charges upon such goods" and a general lien "for any other moneys due to them from the owners of such goods upon any account." The vendors paid all delivery charges in respect of the goods. The buyers became insolvent and the vendors exercised their right of stoppage in transitu. The buyers owed the carriers for charges in respect of other consignments and the carriers claimed they had a general lien on the goods as against the vendors for these unpaid charges.

Held: under the common law the general lien had no priority over the right of stoppage in transitu, and as there was no agreement express or implied on the part of the vendors to postpone their right as unpaid vendors to the general lien, the common law rule applied and the carrier's claim failed.

Notes. Considered: *Booth Steamship Co.* v. *Cargo Fleet Iron Co.*, [1916–17] All E.R. Rep. 938.

As to carrier's right of lien, see 4 HALSBURY'S LAWS (3rd Edn.) 194–195; and for cases see 8 DIGEST (Repl.) 160 et seq. As to the right of stoppage in transitu, see 34 HALSBURY'S LAWS (3rd Edn.) 127 et seq; and for cases see 39 DIGEST 612 et seq.

Cases referred to:

(1) *Wright* v. *Snell* (1822), 5 B. & Ald. 350; 106 E.R. 1219; 8 Digest (Repl.) 163, *1047*.

(2) *Oppenheim* v. *Russell* (1802), 3 Bos. & P. 42; 127 E.R. 24; 8 Digest (Repl.) 162, *1045*.

(3) *Rushforth* v. *Hadfield* (1806), 7 East, 224; 3 Smith, K.B. 221; 103 E.R. 86; 8 Digest (Repl.) 162, *1044*.

Also referred to in argument:

Leuckhart v. *Cooper* (1836), 3 Bing.N.C. 99; 7 C. & P. 119; 2 Hodg. 150; 3 Scott, 521; 6 L.J.C.P. 131; 132 E.R. 347; 32 Digest 241, *266*.

Smith v. *Goss* (1808), 1 Camp. 282; 170 E.R. 958, N.P.; 39 Digest 613, *2104*.

Appeal from a decision of the Court of Appeal, in an action brought by the appellants to recover £1,170 paid by them under protest to the defendants to release goods over which the respondents had claimed to exercise a general lien. PICKFORD, J., [1913] 3 K.B. 357, found in favour of the appellants, but his decision was reversed by the Court of Appeal (LORD SUMNER, KENNEDY, L.J., and BRAY, J.), [1914] 3 K.B. 567.

Sir Robert Finlay, K.C., and *Schiller, K.C.*, for the appellants.

Duke, K.C., *Lynden Macassy, K.C.*, and *H. A. McCardie* for the respondents.

The House took time for consideration.

July 13, 1915. The following opinions were read.

LORD BUCKMASTER, L.C.—The appellants in this case, who are the United States Steel Products Co. of Philadelphia, entered into a contract on Dec. 29, 1910, with a firm of Tupper & Co., Ltd., of Batman's Hill Works, Bilston, in the county of Stafford, for the

sale to them of 1,500 gross tons of steel billets. By the terms of the contract the goods were to be delivered to the purchasers at their works at Bilston at a price of £4 12s. 9d. net per ton, cost, insurance, and freight being paid by the vendors. Under this contract a consignment was made by the appellants in February, 1911, of about 499 tons, but before delivery was complete Messrs. Tupper & Co., Ltd., became insolvent, and thereupon the appellants asserted their right as unpaid vendors to stop delivery and regain possession of the goods.

If the only rights to be considered were those between the appellants and Messrs. Tupper & Co., Ltd., there would be no dispute but that the appellants were justified in what they did. The goods, however, were, at the moment when the appellants' notice to stop their delivery was received, in the custody of the Great Western Rail. Co. who are the respondents to this appeal, and they claimed that, under circumstances to which I will more exactly refer, they were entitled to retain possession in order to satisfy a lien for moneys due to them from Messrs. Tupper & Co., Ltd., not for the carriage of these particular goods, but on a general account. Such a lien could not be maintained against the vendors apart from contract, and the real question in this case is whether such a contract exists. PICKFORD, J., has held that it does not, but his judgment was reversed by by the Court of Appeal, from whom the present appeal is brought to this House. In order to answer the question thus raised it becomes necessary to examine in some detail the history and circumstances of the case. The appellants were, as I have already stated, bound under the terms of their contract to provide carriage and pay the freight of the goods in question. They accordingly shipped them by the steamship *Manchester Shipper*, a vessel which formed part of a line of steamers owned by the Manchester Liners, Ltd., known as the Philadelphia-Manchester Line. The bill of lading, which was dated Feb. 28, 1911, was made to the appellants' order, and contained this clause:

"Goods to be forwarded to Batman's Hill Works, via Great Western Railway, Bilston, England, from Manchester, and the carrier is authorised by the owner to forward by a connecting carrier, and upon such conditions as the latter may exact. The carrier shall pay all charges for forwarding, but shall not be liable for any loss of, or damage to, the goods occurring after delivery to the connecting carrier."

At this date the appellants had full disposing power over the goods, and this condition was a condition to which they assented, and which bound anyone accepting the bill. This is indeed stated by the last clause in the bill of lading, which is in these terms:

"In accepting this bill of lading, the shipper, owner, and consignee of the goods, and the holder of the bill of lading agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee and holder."

The bill of lading was endorsed by the appellants and dispatched to Messrs. Tupper & Co., Ltd., by the post on Mar. 10, 1911. On this day, accordingly, the property of the goods passed to the purchasers. On the same day the shipping company, the Manchester Liners Ltd., in pursuance of the authority that they had received on the bill of lading, consigned the goods by the Manchester Ship Canal Co. upon terms that are contained in a consignment note of that date. The document is important, and it is necessary that I should read its actual words. They are these:

"Receive and forward the undermentioned goods, to be carried at the reduced through rate below the company's ordinary through or local rate, in consideration whereof I agree to relieve the Manchester Ship Canal Co. and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention (including detention of traders' trucks) except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. And I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all companies or persons, parties to any through rate under which goods are carried. All charges to senders."

The general conditions on the back of this note were sixteen in all, but there is only one, cl. 7, that calls for special attention. It is upon the true construction of this provision that the whole dispute depends. It is in these terms:

> "All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise, and the proceeds of the sale applied to the satisfaction of every such lien and expenses."

The goods were, pursuant to this note, delivered to the Great Western Railway on Mar. 22, they arrived at Bilston Station on Mar. 24, and on the same day, as Messrs. Tupper & Co., Ltd., had then suspended payment, the appellants directed the Manchester Liners, Ltd., to stop delivery, a direction which was at once forwarded by telegraph from the Manchester Liners, Ltd., to the Great Western Railway. In answer to this request the Great Western Railway replied on Mar. 25, that they had already exercised a lien upon the goods for money due from Messrs. Tupper & Co. to them. It is not necessary to pursue the further correspondence that took place between the parties. The railway company claimed that they were entitled as against the goods to payment of £1,170, money owing on a general account, apparently including a sum for costs of some legal proceedings, and to obtain the release of the goods this sum was paid to them by the appellants under an agreement which provided that, in the event of a decision that the respondents had not got a lien on the steel billets ranking in priority to the appellants' rights as unpaid vendors the respondents should repay such sum of £1,170 to the appellants. The dispute was thus transferred from the goods to the money, and it is the claim to this sum that is the subject of this present appeal.

Before more closely examining the terms of the contract of Mar. 10, under which the respondents claim, it is, I think, desirable to state how the law stands in relation to the rival claims of unpaid vendors and carriers of goods. Apart from any express contract, it is clear that a carrier of goods, whether by land or sea, has a lien on the goods for their freight; but this right, which arises from the common law, is confined to the carrier's charges payable on the carriage of the particular goods. Such a lien prevails against the rights of the vendors as well as those of the consignees. On the other hand, a general lien—that is, a right to retain the goods for other freights due upon other transactions—can only arise by express contract or from general usage, and such a lien, apart from contract, cannot affect the right of the consignor. A claim to such a lien was considered in *Wright* v. *Snell* (1). In that case goods were consigned by a manufacturer in Staffordshire to his agent in London for sale on commission in May and July, 1820. The carriers had at a date, stated in the report to be between September, 1819, and February, 1821, delivered to the consignor a printed freight note stating:

> "That all goods would be subject to a lien, not only for the freight of such particular goods, but also for any general balance due from the respective owners."

The report does not specify the exact date when this note was delivered, but the argument proceeded upon the footing that its terms were accepted as the terms of carriage. In reliance on this provision the carriers refused delivery to the consignee until he had paid the sum of £58 for the carriage of goods not belonging to the consignors. As in the present case, the goods were sold, the money was retained by the carriers, and the action was brought against them by the consignor for its recovery, and judgment was given in favour of the plaintiff. The different position of the consignee in that case from the consignees in the present instance, and the different character of the contract, prevent the case being treated as a direct decision, but in the course of his judgement BEST, J., made a statement to which reference is useful. He said (5 B. & Ald. at p. 355):

> "But even supposing these goods, instead of being addressed to a factor, had been addressed to the real purchaser, the carrier would have no right to say, if the bargain

was rescinded, either from the inability of the purchaser to pay, or his refusal to complete the bargain, that the original owner of the goods should not have them back without paying all that might be due from the proposed vendee."

Apart from special circumstances arising from contract or usage, I see no reason to differ from this statement of the law, and, indeed, it was not challenged before your Lordships. But it is in relation to the law so stated that the meaning of cl. 7 of the conditions endorsed upon the consignment note must be determined. Some discussion has taken place as to whether this consignment note bound Messrs. Tupper & Co. the consignees of the goods; and it appears that the judgment of LORD SUMNER in the Court of Appeal rested in part, at least, upon the view that they could not be bound. Counsel before your Lordships, both for the appellants and the respondents, admitted that Messrs. Tupper & Co. were bound; but as they are not before this House, too great reliance should not be placed on this admission. They were certainly bound by the terms of the bill of lading which they accepted, and it would seem that the only means by which they could avoid the liabilities created by the consignment note would be by establishing that it was outside the powers which the bill of lading conferred upon the shipping company. In my opinion, however, it is not necessary that the consideration of this question should be undertaken by your Lordships. The consignment note was certainly designed to bind the consignees, for it is not, in my opinion, possible to assign any meaning to the words "owners of such goods" in cl. 7, which would exclude them from the ambit of the phrase; in these circumstances interpretation of the document must be independent of the question whether, in fact, it bound the people whom it purported to affect. The efficacy and the meaning of a contract may be, and in this case are, different and independent questions, and the solution of the one is not assisted by the consideration of the other. Whether or not it bound Messrs. Tupper & Co. it certainly bound the vendors. It is argued on behalf of the respondents that when once this is conceded it follows that the appellants (the vendors) intended not only to confer upon the carriers of the goods a general lien for all moneys due to the carriers from the consignees upon any account, but also, in order to make this lien effectual, that the right to stop the goods in transit should be postponed in its favour; and in support of this contention it is pointed out that the contract is one under which the vendors obtained reduced terms for the carriage which they were liable to pay. This is no doubt true. But it does not make the language of the clause more plain; it only affords a reason why the vendors might have been induced to postpone their rights. It does not show that, in fact, they have been postponed. Now, in my opinion, the clause means no more than its actual words imply—viz., that the carriers are to have, first, a particular lien for the special freight and charges applicable to the particular goods; and, secondly, a general lien that will cover all outstanding moneys. These two liens take their position according to the law: the first has priority over the right of stoppage in transit, the second has not. It was argued that the fact that the first lien took precedence over the vendors' right showed that the second was intended to enjoy the same priority. Examination of the clause leads me to a contrary conclusion. The first lien was not stated to enjoy those rights, nor do they arise, by virtue of the contract, they attach to it by the character of the lien itself; in the same way the rights associated with the general lien are also defined, and in the absence of express bargain to the contrary they rank subsequent to those of the vendor. It was, indeed, contended on behalf of the respondents that such a bargain was to be found in the consignment note, since the contrary view would destroy the value of the general lien. I cannot accept this view. Without the provision as to the general lien the railway company could only have enjoyed a right against the consignees to retain the goods in respect of their general account by proof of a usage in the trade to that effect, while the contract gives them expressly rights of the widest character, which it might be difficult to support by any evidence of usage.

These considerations would be sufficient to answer the case set up by the respondents, but another view appears to have been presented to the Court of Appeal by the appellants, with which I cannot agree. The argument there seems to have been that the phrase "owners of such goods" in cl. 7 meant only the consignors, that consequently

the general lien was only intended to cover moneys due from them, and, since no such moneys were due, no lien existed. It must have been to this contention that LORD SUMNER directed his observations when he said ([1914] 3 K.B. at p. 578):

> "If you scratch out 'owners of such goods' and write in 'Tupper & Co.' cadit quæstio, and yet what other interpretation is to be put upon it?"

That in the circumstances of this case Messrs. Tupper & Co. were included within the meaning of the phrase "the owners of such goods" seems to me plain, but they are not the only people who answer to the description. I entirely agree with PICKFORD, J., that the phrase covers all persons who under the contract and the bill of lading were entitled to go to the railway company and receive the goods. But it does not follow from this that the general lien was a lien to be exercised as against any persons except such owners, or defeated rights that were paramount to theirs. The real question does not depend on ascertaining from whom the money is due, but as against whom the claim of retention in respect of such money can be asserted. For the reasons that I have already stated, it is my opinion that such right can only be asserted against the persons who both owe the money and claim the delivery, and if a person from whom no money is due is in a position to assert his right to the goods, the general lien is inoperative. I think the judgment of the Court of Appeal should be reversed, and that of PICKFORD, J., restored.

LORD ATKINSON.—The question for decision in this case is the true construction of the seventh of the conditions printed on the back of a certain contract, dated Mar. 10, 1911, entered into between the Manchester Liners, Ltd., and the Manchester Ship Canal Co. for the carriage of certain steel billets from Manchester to Batman's Hill Works, Bilston. These Batman's Hill Works belonged to Messrs. Tupper & Co., who had purchased, on credit, these billets from the appellants on Feb. 15, 1911. The purchasers had before the delivery of the goods stopped payment. The appellants, purporting to exercise their right as unpaid vendors to stop the goods in transitu, duly served notice on the respondents on Mar. 24, 1911, requiring them to stop delivery to Tupper & Co. of the consignment or any part of it undelivered. In fact, only a small portion of the billets had been delivered. The respondents held possession of the balance. The freight for the goods had been prepaid. Nothing whatever remained due to the respondents in respect of the carriage of these goods to their destination, but a sum of £1,170 was owed by Tupper & Co. to the respondents on a balance of account between them. The nature of the account or of the items composing it does not appear. The wording of the condition is wide enough to cover debts of any kind. The respondents contend that by this condition, properly construed, the lien of the appellants as unpaid vendors for the price of the goods is postponed to a general lien for this sum of £1,170, purported to be given to them by the terms of this condition. The appellants on the other hand contend that even if Messrs. Tupper & Co. are bound by this seventh condition, and have thereby, as owners, given to the respondents a general lien on goods in respect of this sum £1,170, yet that this condition does not, when properly construed, amount to an agreement binding upon the appellants to postpone their vendor's lien to this general lien. The question for decision resolves itself, then, into this: Which of these two constructions of the condition is its true construction? But, before dealing with that question, it is, I think, essential, owing to some of the observations of the learned lords justices in the Court of Appeal, to determine who, in the circumstances of the case, are bound by the provisions of this condition, whatever its precise meaning may be.

The goods were shipped by the vendors on board a steamship named the *Manchester Shipper*, belonging to the Manchester Liners, Ltd., under a bill of lading dated Feb. 28, 1911, signed by the latter company, according to which they were to be delivered at the port of Manchester to the order of that company or their assignees subject to the conditions, exceptions, and restrictions in the clauses (marginal and other) in the bill of lading contained. In many of these clauses the consignees are expressly named. By cl. 10 it is provided:

> "that goods destined to ports or places other than the ship's port of discharge are to

be forwarded thence at the risk of their owners, and subject exclusively to the conditions of the carriers who may complete the transit,"

and by the last clause but one it is provided that,

"in accepting this bill of lading the shipper, owner, and consignee of the goods and the holder of the bill of lading agree to be bound by all its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder."

By a clause printed in the margin of the bill of lading it is provided that the goods are to be forwarded from Manchester to Batman's Hill Works, Bilston, via the Great Western Railway, and that

"the carrier is authorised by the owner to forward by a connecting carrier upon such conditions as the latter may exact."

On Mar. 10, four days before the arrival of the goods at Manchester, this bill of lading was admittedly endorsed in blank by the appellants and forwarded by post to Tupper & Co., who, from the moment of the receipt of the bill of lading, if not from the moment of its posting, became holders of it, and presumably owners of the goods.

By s. 1 of the Bills of Lading Act, 1855, it is provided that every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. By the s. 2 it is provided that nothing contained in the statute should prejudice or affect any right of stoppage in transit. Tupper & Co. accordingly became, by force of this statute and of the provision of this penultimate clause of the bill of lading itself, as much bound by every one of its provisions as if they had themselves signed it. Under its tenth paragraph they became bound to submit to any conditions the carrier, who completed the transit of the goods, might insist upon.

On the same day, Mar. 10, 1911, whether before or after the bill of lading had been endorsed does not appear, the connecting carrier (the respondents) made a contract with the Manchester Liners, Ltd., for the carriage of these goods to their ultimate destination upon certain conditions. Clause 7 was one of these. One provision contained in it was to the effect that the respondents were to receive and hold the goods, subject to a general lien for any moneys (other than those due for the carriage of, or charges upon, the goods) due from the "owners" of the goods to them upon any account. This provision thus became one of the terms of a contract by which Tupper & Co. were as fully and effectually bound as if they had themselves been executing parties to the contract of carriage of Mar. 10, 1911. If they were, as is contended, the "owners" of these goods, within the meaning of the condition, then they contracted that the respondents should, altogether, irrespective of the vendors' lien, have a general lien on the goods for such sum as they, Tupper & Co., should owe the respondents on any account. And if they were not the "owners" of the goods, within the meaning of the condition, they assented that the respondent should have that general lien for such sum as the persons who were the owners should owe the respondents on any account. Indeed, counsel for the respondents did not dispute this. In my view, it is a matter of importance, because it would appear to me, from some of the observations made in the Court of Appeal, that it was assumed that this provision of cl. 7 would be futile and useless unless it had the effect of postponing the vendors' lien to the general lien claimed, inasmuch as Tupper & Co. were not bound by the condition, and did not, by their contract, create that general lien. I am wholly unable to take that view. I think that if Tupper & Co. were the owners of the goods, they being bound by this condition gave a right to the respondents, very valuable while they continued owners, even if the lien of the vendors was not postponed, for this general lien and the vendor's lien would not be conterminous. The second is only called into existence in one event, namely, the bankruptcy or insolvency of the purchaser. In that

A event the enforcement of it might, no doubt, render the general lien, good in other respects valueless or comparatively valueless, but in all other circumstances the general lien might afford most effective and valuable security to the creditor to whom it was given. In my view, there is nothing illogical or inconsistent in holding, as I think PICKFORD, J., held, that while by the terms of this condition Messrs. Tupper & Co., as owners, clearly contracted to give to the respondents a general lien for all sums due by them, yet that the B language of the condition is not so clear and unequivocal as to bind the appellants to postpone to this general lien their own lien as unpaid vendors.

There is no controversy as to the nature, extent, and operation of a vendor's lien either at common law or by statute. The vendor's right to stop in transition means not only the right to countermand delivery to the vendee, but to order delivery to the vendor. It is subject to the possessory lien of the carrier for the charges due in respect of the C carriage of the goods; but is not subject to any general lien which the carrier might have, as against the consignee of the goods, in respect of freight due on other goods: *Oppenheim* v. *Russell* (2). The vendor by stopping the goods in transition does not thereby regain the property in them, nor does he thereby cancel the sale. In no proper sense of the word does he, by the stoppage, become the "owner" of the goods. It is the indebtness of the "owners" for which a general lien is given. Yet if the goods have been sold during D transit, and before notice given, to a bona fide holder to whom the bill of lading had been endorsed or the document of title mentioned in s. 47 of the Sale of Goods Act, 1893, transferred, he would unquestionably be the "owner" of the goods and yet might owe nothing to the respondents. Again, it was, as I understood, admitted by counsel for the respondents that the vendors' lien was not lost, but merely postponed to the general lien of the respondents. If that be so, it would follow that, Tupper & Co. remaining the E owners, the vendors upon payment of this sum of £1,170 would be entitled to the possession of the goods, though they were not "owners," and did not as "owners" owe the respondents anything, and yet it was only the liability of the "owners" which was secured. The first three lines of the conditions, which merely embody the existing rule of law, do not raise this difficulty, as the word "owners" is not found in them. Under them whoever was entitled to demand possession of the goods would be bound to pay F the carriage of them and the other charges mentioned, no matter from whom those moneys might be due. The second clause of the condition appears to me to be most ambiguous. In the construction of it the word "owners" cannot receive its ordinary meaning. At law the vendor's lien would clearly take precedence of the general lien, however valid. It is not shown that the vendors knew of the existence, nature, or extent of the indebtedness covered by it. That indebtedness might have arisen from trans- G actions unconnected with any goods or their transit. It might have exceeded, as in fact it did exceed in this case, the price of the goods carried.

It is, I think, necessary before one decides that the vendors have postponed their lien, and thus practically given up in toto all the benefits of their legal right, to find in these conditions a clear agreement, express or implied, upon their part so to do. Their mere assent to the creation of a general lien by Tupper & Co. would not suffice, nor would, H I think, even a mere contract by them that Tupper & Co. should, as owners, give the lien. The only consideration received by the vendors to induce them to take a course so contrary to their interest, and apparently so reckless, was this, that the goods were to be forwarded at the lower rate, which rate they had to pay; but the general lien which the respondents got, whether it ranked behind or in front of the lien of the vendors, might I well have been in itself a sufficient inducement to them to carry the goods at a lower rate. In my opinion there is not to be found in this condition any clear and definite agreement, express or implied, binding on the appellants to postpone their lien as unpaid vendors to the general lien, thereby purported to be given by Tupper & Co., as owners, to the respondents. If that be so, then upon the authorities their lien ranks in front of the latter lien, and the appellants were entitled to obtain the possession of these goods without paying the sum of £1,170. I think, therefore, that the decision appealed from was erroneous and should be reversed; that the decision of PICKFORD, J., was right, and should be restored, and this appeal be allowed with costs.

LORD PARKER OF WADDINGTON.—On Dec. 29, 1910, the appellants agreed to sell to Messrs. Tupper & Co., Ltd., 1,500 tons of steel billets to be delivered c.i.f. to buyers' works, Bilston, England. The goods were to be shipped by about equal monthly quantities in February, March and April, 1911, and each delivery was to be treated as a separate contract. Pursuant to this agreement, the appellants, on Feb. 28, 1911, shipped a parcel of steel billets on board the steamship *Manchester Shipper*, taking therefor a bill of lading to their order of assigns, according to which, though the port of discharge was Manchester, goods destined to places other than Manchester were to be forwarded thence at the risk of their owners, and subject exclusively to the conditions of the carriers who might complete the transit. There was a marginal note to the effect that the goods were to be forwarded via Great Western Railway from Manchester to the works of Messrs. Tupper & Co., Ltd., at Bilston, upon such conditions as the connecting carrier might exact. Accordingly on Mar. 10, 1911, the owners of the steamship *Manchester Shipper*, pursuant to the authority conferred on them by the bill of lading, entered into a contract with the Manchester Ship Canal Co. to forward the goods to Messrs. Tupper & Co., at Bilston, at the reduced through rate therein mentioned. The contract provided that that it should be deemed to have been entered into separately with all companies or persons parties to the through rate. The Great Western Rail. Co. was such a party, and the contract, therefore, may be considered to have been entered into with them. It provided, cl. 7, that all goods delivered to the company, that is, for the purposes of this case, the Great Western Railway Co., should be received and held subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any other moneys due to them from the "owners" of such goods upon any account, and, further, that in case any such lien were not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods might be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of every such lien and expenses. The question your Lordships have to decide depends primarily upon the construction of this clause, for it has not been contended that the contract was outside the authority conferred by the bill of lading, or that anyone claiming a title to the goods under the bill of lading was not bound by the authority so given, at any rate unless and until it had been rescinded. Indeed the bill of lading contains an express provision to that effect. On the same day on which the contract of carriage was entered into the bill of lading, endorsed in blank, was forwarded by the appellants' London house to Messrs. Tupper & Co., Ltd. It was assumed in argument that, under these circumstances, the property in the goods was in Messrs. Tupper & Co. at the date of the contract of carriage. I will adopt this assumption, though I do not think it is necessarily correct. Clearly, however, the appellants, as unpaid vendors, had the right to stop the goods in transit for the purpose of asserting their lien for unpaid purchase money. It is admitted that as between the appellants and Messrs. Tupper & Co. this right of stoppage has been duly exercised, so that the vendor's lien prevails, but it is contended on behalf of the respondents that such lien is by virtue of the contract of carriage postponed to the lien thereby created in favour of the Great Western Rail. Co. for certain moneys due to them from Messrs. Tupper & Co. on general account. It is not disputed that the lien of the Great Western Rail. Co. for money due to them for the carriage of and other charges upon the goods in question would take precedence, apart from any agreement, over any vendor's lien, but all these moneys were prepaid by the appellants. It seems, however, reasonably clear that a carrier cannot claim any general lien upon goods which he carries unless such lien be created by express agreement. It is equally clear that no such express agreement between carrier and consignee will oust the right of the consignor to stop the goods in transit for the purpose of asserting his lien for unpaid purchase money. To oust this right there must be an express agreement by the consignor. The respondents' counsel in their argument accordingly relied on cl. 7 of the contract of carriage, first as an agreement on the part of Messrs. Tupper & Co. creating the lien in question for moneys due from them as the owners of the goods, and, secondly, as an agreement on the part of the appellants postponing their vendor's lien to the lien so created

It was assumed in argument on both sides that the agreement, according to its true construction, operated in the manner first suggested by the respondents' counsel. The dispute was whether it also operated in manner secondly suggested. The Court of Appeal on the other hand, were of opinion that Messrs. Tupper & Co. were not parties to or bound by the agreement at all, and therefore that the clause creating the lien of the Great Western Rail. Co., if any effect be given to it, must operate simply upon the interest of the appellants as unpaid vendors, and preclude them from setting up their vendors' lien as against the lien thereby expressed to be created in favour of the Great Western Rail. Co.

It does not seem to me to be very material whether Messrs. Tupper & Co. be considered a party to the agreement or otherwise. As endorsees of the bill of lading they were, both by general law and by the terms of the bill itself, bound by its provisions, and could not claim the goods thereunder without giving effect to any lien created under the authority thereby conferred. I am of opinion, therefore, that the Great Western Rail. Co. could by virtue of the agreement have lawfully refused to deliver the goods to Messrs. Tupper & Co. until they had paid the amount due from them to the railway company on general account. It might, of course, be contended, on the one hand, that the creation of this lien prevented the vendors from fulfilling their contract for delivery at the Bilston Works; and, on the other hand, that the acceptance of the endorsed bill precluded the purchasers from raising this point, but your Lordships are not in the present appeal concerned with either contention. It is enough to say that, by virtue of the contract of carriage, Messrs. Tupper & Co. could not demand delivery of the goods by the Great Western Rail. Co., except on the terms of satisfying the lien thereby created. It was assumed by the Court of Appeal that the word "owners" in cl. 7 of the contract of carriage referred to the persons who at the date of the contract were the legal owners of the goods. I have the gravest doubts whether the contract can be so interpreted. The contract is a common form contract for use in cases in which the consignor desires to secure what has been called a preferential rate in lien of the rates ordinarily chargeable for carriage by the companies concerned, and under these circumstances I think that the expression "owners" in the clause may well be used to denote the person entitled to the delivery of the goods, whoever such person may be, and does not necessarily refer to the person who at the date of the contract or at any other time may have the legal property in the goods. These common form contracts are intended to meet a variety of cases, and it is highly improbable that their effect was intended to be quite different according to whether the legal ownership, as to which the carriers did not necessarily know anything, was in one person or another. The goods carried might, for all the carrier could tell, be the property of consignor, consignee, or some third party, and the property might shift during the transit. Thus in the present case Messrs. Tupper & Co. might at the date of the contract have resold the goods and passed the property to a sub-purchaser. Again, but for the endorsement of the bill of lading, the property in the goods in question would have remained in the appellants, and according to the respondents' contention no one could have obtained delivery without satisfying all money due from the appellants to the Great Western Rail. Co. Or, again, the appellants might have endorsed the bill of lading in favour of a third party for re-endorsement and delivery to Messrs. Tupper & Co. in exchange for a draft in payment of the purchase price, in which case the agreement might create a lien for moneys due from the third party. These difficulties would not be met by construing "owners" as the owner for the time being, for non constat that the person entitled to delivery would be the owner. On the other hand, all difficulty is avoided by treating the word "owners" as meaning the persons entitled to demand delivery, whoever they may be, when the time for delivery comes, and this construction seems to be borne out by the fact that the company cannot sell to satisfy their lien without notice to the owners. If "owners" means the person demanding delivery this provision raises no difficulty, but if it means the person having the legal property as opposed to the person demanding delivery, all sorts of difficulties might arise in enforcing the lien.

If, as I think, this be the true construction of the contract of carriage, the "owners" were, in the events that have happened, the appellants. They were entitled to demand delivery by virtue of the stoppage in transit. They can only get such delivery on payment of what is due from them to the carriers on general account, as well as the charges in respect of the goods themselves. But there is no question of their having to pay anything due to the respondents from Messrs. Tupper & Co., who ceased to be entitled to delivery as soon as the right of stoppage was exercised. If, however, I am wrong in this construction, I still think that the appeal ought to succeed. There is, in my opinion great difficulty in giving to cl. 7 the double-edged effect for which the respondents contend. Had the parties to the contract intended that cl. 7 should not only create a lien for moneys due from Messrs. Tupper & Co. as the actual owners, but should give such lien priority over the right of the appellants as unpaid vendors, the contract would, in my opinion, have contained an express provision to that effect. Had the carriers insisted on any such express provision it is difficult to believe that the appellants would have been willing, for the sale of the preferential rate, to accept the risk which such a clause would involve. The debt from the owners in respect of which the lien was created might have far exceeded the value of the consignment. For the above reasons, I have come to the conclusion that the judgment of PICKFORD, J., was right and ought to be restored.

LORD PARMOOR.—The appellants by a contract of Dec. 29, 1910, agreed to sell to Tupper & Co., carrying on business at Bilston, 1,500 tons of steel billets. In February, 1911, the appellants dispatched to Tupper & Co. approximatly 500 tons of steel billets. The goods were shipped with the Manchester Liners, Ltd., who were further authorised by the appellants to forward the goods from the port of destination, Manchester, to the works of Tupper & Co. at Bilston. On Mar. 10, 1911, the Manchester Liners, Ltd., contracted with the Manchester Ship Canal Co. for the forwarding of the goods over the Great Western Railway system to Bilston. On the same day the appellants forwarded to Tupper & Co. the shipping documents and the bills of lading endorsed in blank. These bills of lading were duly received by Tupper & Co., and thereupon the property in the goods passed to them. The goods arrived at Manchester on Mar. 14, 1911, and were duly forwarded by the respondents, arriving at or near Bilston about Mar. 18. A portion of the goods was delivered to Tupper & Co., but on Mar. 22, the respondents stopped delivery, and claimed to hold the balance in their possession under a general lien for money due to them from Messrs. Tupper & Co., amounting to £1,170. The appellants had received no payment for any part of the goods, and on Mar. 24, 1911, they, as unpaid vendors, gave notice to the respondents to stop delivery of the goods, or any portion thereof undelivered. It is not disputed that the respondents were entitled to hold the goods under a lien for freight as against the appellants, but the respondents claimed further that they were entitled under the contract of carriage to hold the goods as against the appellants under a general lien until they received payment of the general balance of £1,170 due to them from the consignees, Messrs. Tupper & Co.

Whether the respondents were so entitled or not depends entirely on the conditions on which they held the goods under the contract of carriage, and the question is one of construction. The contract is in a form very generally adopted when goods are carried from station to station at owner's risk under special conditions. There are a number of these conditions on the back of the consignment note which are binding upon, and affect, any party in respect of the receiving, forwarding, or delivery of the goods, if they are reasonable, and signed by such party, or by the person delivering the goods for carriage. There was an option of sending the goods by the ordinary rate, the respondents accepting the ordinary liability, and it is not suggested that the conditions are unreasonable. Contracts at owner's risk have been extensively adopted, to the benefit and convenience both of the traders and the railway companies. The person delivering the goods for carriage, and who signed the contract, was R. J. Darlington, for Manchester Liners, Ltd., who were agents of the appellants. The contract, therefore, is binding upon the appellants and all other parties in a position to make any claim on the respondents in respect

of the receiving, forwarding, and delivery of the goods. Clause 7 is as follows:

> "All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any other moneys due to them from the owners of such goods upon any account, and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of every such lien and expenses."

There is often a difficulty in contracts of carriage to distinguish between the respective rights of the consignors or consignees. To meet this the appellants as senders of the goods are made liable in the first instance to pay the moneys due to the respondents for the carriage of the goods. It is a condition in the contract that where the charges of the carrier are not prepaid the goods are accepted for carriage only upon the condition that the sender remains liable for payment of the amount due to the carrier for the carriage of such goods without prejudice to the company's rights, if any, against the consignee or any other person. It is only necessary to add that the words "consignor" and "consignee" are found in the conditions, but that the general lien attaches, not in respect of moneys due to the respondents from the consignor or consignee, but from the owners of the goods. Apart from any obligation created by the contract, the respondents would have the right to hold the goods for money due to them on their carriage, as against unpaid vendors who have exercised their right to stop delivery. It is not necessary to consider whether any greater right of lien is given in this respect under the contract than would arise from the common law obligation, since the moneys due to the respondents for the carriage of and other charges upon the goods have been paid. In substance, there is no need to insert this term in the contract to meet the case of a claim to possession of the goods by an unpaid vendor, and I doubt whether the contract was framed with reference to the rights of an unpaid vendor. On the other hand, it has long been established that the respondents have no common law right to hold the goods against an unpaid vendor, who has stopped delivery, under a general lien for any other moneys due to them on any account from the owners of the goods. If such a right exists in the present case it must be imposed by the contract. It was pointed out in an early case—*Rushforth* v. *Hadfield* (3)—that if it is not convenient for the consignee to pay for the carriage of specific goods at the time of delivery, it is easy for the carrier to stipulate that they shall have a lien for their balance upon other goods which they may thereafter carry for him. A general lien of this character has been extensively introduced in contracts of carriage, in order to protect carriers in respect of moneys due to them on ledger accounts. These contracts have been found to be convenient as a matter of business and of advantage both to the carrier and to the trader, and in the present case the respondents have a general lien for moneys due to them from the owners of the goods on any account. The expression "the owners of such goods" under the terms of the contract means the persons for the time being entitled to demand and demanding actual possession of the goods by delivery from the carriers. I agree in this respect with the judgment of PICKFORD, J. BRAY, J., in his judgment in the Court of Appeal says ([1914] 3 K.B. at p. 585):

> "I do not think it means the owners for the time being; I think it means the owners of the goods at the time this contract was made."

I am unable to agree in this construction, but assume, although the matter is not quite free from doubt, that the owners at that date were the consignees, Messrs. Tupper & Co. It is clear that when the goods first reached the destination to which they were consigned and delivery of a portion thereof was made, the persons entitled to actual possession by delivery from the carriers were the consignees, Messrs. Tupper & Co.; and that a sum of £1,170 was due from them to the respondents on general account.

I do not doubt that as against Messrs. Tupper & Co. the respondents were entitled to a right of general lien for the sum of £1,170. Before, however, the delivery was completed

the respondents, having reason to doubt the solvency of Messrs. Tupper & Co., stopped further delivery. The appellants subsequently, on Mar. 24, gave notice to the respondents to "stop Delivery Billets Tupper & Co. pending instructions," a notice effective in reference to the portion of the goods still in the possession of the carriers, and of which delivery had not been made. So soon as this notice had been given the repondents became liable to re-deliver the portion of the goods not actually delivered to the appellants, or according to their directions. It is not suggested that there were any moneys due to the respondents from the appellants on any general account, but if such moneys had been due the respondents would have had a general lien upon the goods to the amount of such moneys, and could have refused to deliver the goods to the appellants, or according to their directions, until such moneys had been paid. In other words, the carriers would have the protection for which they bargained, a right to hold the goods subject to a general lien for moneys due to them on any account from the person rightly claiming to take or direct delivery. It makes no difference that on the arrival of the goods at their destination Messrs. Tupper & Co. had a right to claim delivery and received actual possession of a portion of the goods. The effect of the notice of stoppage in transitu has the same operation against the portion of the goods undelivered as it would have had against the whole parcel if none had been delivered, and in respect of that portion the appellants became entitled to demand or to direct possession. It is said that on this construction the main object of the contract would be defeated, and the carrier deprived of his right to a general lien in respect of a ledger account due to him from a consignee. I do not think that this is the main object of the contract. In my opinion the words "owners of such goods" have been carefully selected, and the condition is not intended to give the respondents a right to retain goods against a person rightly claiming possession for moneys due to them on general account from some other person. In any event, the only question before your Lordships is one of construction and subject to the provisions of the Railway and Canal Traffic Acts, it is open to the contracting parties to make any contract which will best meet the varying business contingencies. In my opinion the appeal succeeds and the judgment of the Court below should be restored.

LORD WRENBURY.—The question for decision is limited to the construction of a single clause—nay, more, to the meaning of a single word in the clause. The clause is cl. 7 in the contract of carriage of Mar. 10, 1911; the word is "owners." It is not disputed that while the right of the unpaid vendor to stop in transitu is subject to the particular lien of the carrier for charges for carriage, it overrides any general lien of the carrier in the absence of special contract to the contrary. The whole question is whether between the consignors—the unpaid vendors—and the Great Western Co., the carriers, there existed a special contract to the contrary. Clause 7 is by the words on the face of the contract note of Mar. 10, 1911, rendered binding upon the parties to that note. The parties are the Manchester Liners, Ltd., and the Manchester Ship Canal Co. The contract, however, binds the United States Co., the consignors, as having been made on their behalf under the authority given by the bill of lading of Feb. 28, 1911, and binds the Great Western Rail. Co. as a party to the through rate by virtue of the words to that effect in the contract of carriage. It is said that it binds the consignee also by virtue of the concluding words of the bill of lading. I do not doubt that it does, but it is, I think, immaterial whether it does or not. Clause 7, then, is part of a valid contract, binding at any rate the two parties to this appeal. The only question is, What does it mean? The condition is one which comes into operation when, notwithstanding the lien in favour of the carrier for which it provides (whatever that lien is), another party claims that the carrier must deliver the goods, because, as that party asserts, there is no subsisting lien in favour of the carrier. The condition deals with two liens, the one the carrier's common law lien for charges for carriage, the other the contractual lien created by the words on which the question arises. The vendor consigning the goods may, of course, give such rights paramount to the right arising in himself upon stoppage in transitu as he thinks proper. It is said that by the first words of the clause he has given such a paramount right to the carrier's common law lien. This seems to me erroneous. That paramount right existed

already. The consignor could not give the carrier that which the carrier already possessed. By the next words the consignor gives some paramount right. What is it? There are three possible meanings. First, the words may mean to grant in priority to the right of the unpaid vendor a right in the carrier to a charge on the goods for any money due from the consignor; or secondly, to a charge for any money due from the consignee; or thirdly, to a charge for any money due from such person (whoever he turns out to be) as is entitled to claim and claims delivery of the goods. To my mind the third is the only reasonable or possible meaning of the words. The first meaning would render it impossible for the consignee (if entitled to delivery) to get the goods without paying the consignor's debt, howsoever arising. The second would render it impossible for the consignor (if entitled to delivery) to get the goods without paying the consignee's debt, howsoever arising. The third is perfectly intelligible, and strictly pertinent to questions arising when some one comes and demands delivery and is met by the assertion of a lien in favour of the carrier, who in the absence of a lien would be bound to deliver. The word "owners" means, I think, "persons entitled to claim and claiming delivery." This is the meaning which PICKFORD, J., gave to the word, and in my opinion he was right in that view. For these reasons I think that this appeal succeeds.

Appeal allowed.

Solicitors: *A. J. Greenop & Co., L. B. Page.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* MILNE

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson and Lord Parker of Waddington), March 6, April 7, 1914]

[Reported [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 30 T.L.R. 476; 58 Sol. Jo. 577]

Estate Duty—Passing of property—Settlement estate duty—Liability of property deemed to pass—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 1, *s.* 2 (1) (*c*), *s.* 5 (1).

By a deed dated May 20, 1909, a settlor settled personalty on trust for his son for life and thereafter on trust for the issue of the son. On Dec. 8, 1911, the settlor died. It was accepted that estate duty was payable in respect of the settled fund under the Finance Act, 1894, s. 2 (1) (*c*). On the question whether settlement estate duty was also payable,

Held (LORD DUNEDIN dissenting): section 5 (1) of the Act of 1894 ought to be read literally as referring to property which actually "passes" on the death within s. 1 of the Act of 1894, and as excluding property which notionally passes within s. 2 (1) of that Act, and, therefore, settlement estate duty was not payable.

Decision of the Court of Appeal, [1913] 2 K.B. 606, affirmed.

Observations on the relationship of s. 2 (1) of the Act of 1894 to s. 1 of that Act.

Notes. The Finance Act, 1894, s. 5 (1), was repealed by the Finance Act, 1914, s. 18. This case remains important in view of the distinctions drawn between s. 1 and s. 2 (1) of the Finance Act, 1894.

Considered: *Adamson* v. *A.G.*, [1933] A.C. 257; *Haldane* v. *Eckford*, [1948] 2 All E.R. 622; *Re Brassey's Deed Trusts, Coutts & Co.* v. *I.R. Comrs.*, [1951] 2 All E.R. 353; *Re Payton, Payton* v. *I.R. Comrs.*, [1951] 2 All E.R. 425; *Re Hall's Settlement, Sanderson* v. *I.R. Comrs.*, [1954] 3 All E.R. 435; *Public Trustee* v. *I.R. Comrs.*,

[1960] 1 All E.R. 1. Referred to: *Scott* v. *I.R. Comrs.*, [1935] Ch. 246; *Re Hodson's Settlement*, *Brookes* v. *A.-G.*, [1939] 1 All E.R. 196; *Coutts & Co.* v. *I.R. Comrs.*, [1953] 1 All E.R. 14; *Sanderson* v. *I.R. Comrs.*, [1956] 1 All E.R. 14.

As to property deemed to pass on a death, see 15 HALSBURY'S LAWS (3rd Edn.) 12 et seq.; and for cases, see 21 DIGEST 8 et seq.

Cases referred to:

(1) *Earl Cowley* v. *I.R. Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest 7, *25*.

(2) *A.-G.* v. *Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 47 W.R. 257; 15 T.L.R. 85; 43 Sol. Jo. 94, H.L., 21 Digest 7, *26*.

(3) *Partington* v. *A.-G.* (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370, H.L.; 21 Digest 118, *899*.

(4) *A.-G.* v. *Earl of Selborne*, [1902] 1 K.B. 388; 71 L.J.K.B. 289; 85 L.T. 714; 66 J.P. 132; 50 W.R. 210; 18 T.L.R. 111; 46 Sol. Jo. 103, C.A.; 21 Digest 102, *753*.

Appeal from a decision of the Court of Appeal (COZENS-HARDY, M.R., BUCKLEY and KENNEDY, L.JJ.). Henry Ernest Milne died on Dec. 8, 1911, having by indentures dated May 20, 1909, settled certain shares and sums of stock upon trust for his son, John Rothwell Milne, for life, and, subject thereto, on trust for the benefit of the children or issue of John Rothwell Milne. The question arising for decision on this appeal was whether, on the death of Henry Ernest Milne, who predeceased John Rothwell Milne, settlement estate duty became by virtue of s. 5 of the Finance Act, 1894, as amended by s. 59 of the Finance (1909–10) Act, 1910, payable in respect of the property comprised in this settlement. It was admitted that the settled property was "property passing on the death of the deceased" within the meaning of s. 2 (1), of the Finance Act, 1894, and that estate duty was payable in respect of it, but the Commissioners of Inland Revenue claimed in addition "settlement estate duty" under s. 5 of the Act. The trustees of the settlement contended that the property did not pass under the settlement on the death of the deceased to some person not competent to dispose of it, and therefore the further duty was not payable. HORRIDGE, J., held that the duty was payable, but his decision was reversed by the Court of Appeal, and from that decision the Attorney-General appealed.

The Attorney-General (*Sir John Simon, K.C.*), *the Solicitor-General* (*Sir Stanley Buckmaster, K.C.*), and *Sheldon* for the appellant.

Danckwerts, K.C., and *Harman* for the respondents.

The House took time for consideration.

April 7, 1914. The following opinions were read.

VISCOUNT HALDANE, L.C.—At the conclusion of the case made for the Crown, the inclination of my opinion was that the Attorney-General had succeeded in shaking the foundation on which the judgment of the Court of Appeal rested. After further consideration I have arrived at a different conclusion, for which I will state my reasons.

The question is whether settlement estate duty became payable under s. 5 of the Finance Act, 1894 [now repealed] on the death of Henry Ernest Milne, which took place on Dec. 8, 1911, within three years of a voluntary settlement of property made by him on May 20, 1909. By s. 2 of the Act of 1894 property taken under a disposition purporting to act as an immediate gift inter vivos is, unless the disposition was made twelve months before the death of the disponer, deemed to be property passing on his death, and is accordingly liable to estate duty at all events. The period of twelve months was, by s. 59 of the Finance Act, 1910, extended to three years in the case of dispositions made after April 30, 1908. That estate duty became payable on the death of the deceased is not disputed. But as the first taker under the disposition succeeded for life only, and was alive when he died, whereby no further estate duty could become payable until the death of a person taking under the settlement and competent to dispose, the question is raised whether settlement estate duty is not payable. The answer to this question depends mainly on the interpretation to be placed on four sections of

the Finance Act, 1894. By s. 1 estate duty is to be levied on the principal value of property, settled or unsettled, which passes on death. By s. 2 "property passing on the death of the deceased shall be deemed to include" certain specified cases of property which does not actually pass on death, like the property to which s. 1 relates. The meaning of s. 2 was discussed in this House in *Earl Cowley* v. *I.R. Comrs.* (1), and was explained to be that the section was not a definition of the field of s. 1, but was framed for the purpose of rendering liable to taxation certain kinds of property that do not actually pass on death, but are sufficiently analogous to property so passing as to make it proper to tax them. Section 2 is thus not a definition section, but an independent section operating outside the field of s. 1.

I think that this view of s. 2 as not being a definition section is the correct one. It is confirmed by the presence in s. 22 of what is a real definition of property passing on death as including property passing at a period ascertainable only by reference to death. I now come to s. 5. It is in these terms:

> "Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(a) A further estate duty called 'settlement estate duty' on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or a husband of the deceased."

The section, therefore, applies only to a case in which certain conditions are fulfilled. The property must be property on which estate duty is leviable. It must then be either settled by the will of the deceased, and so be properly falling within s. 1, or it must be settled by some other disposition, and pass under that disposition on the death of the deceased to a person not competent to dispose. If the disponer is someone other than the deceased, a case of the kind in question is outside s. 2 altogether. What happens is the event of passing in point of fact on death according to the natural meaning of the words. The only case to which a notional passing under that section can possibly extend is one where the disposition which creates the settlement is that of the deceased himself.

For reasons already indicated, I have, after consideration, come to the conclusion that s. 2 cannot properly be read as extending the category of a notional passing on death beyond what is requisite for the special purpose of bringing certain cases within s. 1 in order to impose the particular tax which s. 1 levies. Section 2 does not purport to contain a general definition made applicable to every reference to passing on death of the subsequent sections of the Act. Such a definition occurs only in s. 22, a real definition section which is general in its application, but which does not affect the question before us. If this be so, then s. 5 ought to be read literally, as referring only to an actual passing under his disposition on the death of the settlor, and as excluding the notional passing, which s. 2 recognises for special purpose of s. 1. The duty imposed by s. 5 is a new and quite different duty. It may be that what Parliament thought it was doing in inserting after "passing" the words "under that disposition" was, as the Attorney-General suggested, merely to provide against the event of the passing to a person not competent to dispose taking place under some disposition made independently of the deceased. It may be that, if probabilities, apart from the words used, are to be looked at, there is, on the construction which the Court of Appeal have put on the statute, a casus omissus which the legislature was unlikely to have contemplated. But, all we are permitted to look at is the language used. If it has a natural meaning, we cannot depart from that meaning unless, reading the statute as a whole, the context directs us to do so. Speculation as to a different construction having been contemplated by those who framed the Act is inadmissible, above all in a statute which imposes taxation. It is not only possible but natural to give to the words of s. 5 the meaning contended for by the respondents—a meaning which restricts them to what has taken place in fact. The only legitimate consideration that could justify a different interpretation would be one which resulted from s. 2 being read as defining what was meant by

"passing on death" throughout the Act. A close examination of the structure of the Act has satisfied me that this section lays down no such general canon of construction, but is confined in its operation to the limited function of adding to the cases in which the duty enacted by s. 1 is imposed. In other words, s. 2 has no reference to the settlement estate duty which s. 5 imposes as a new and separate duty. Having come to this conclusion, I see no answer to the reasoning of BUCKLEY, L.J., in the Court of Appeal. I am, therefore, of opinion that the appeal fails, and ought to be dismissed with costs. I move accordingly.

LORD DUNEDIN. - Put in a single sentence, the question in this case may be stated thus: Does the word "passes" in s. 5 (1) of the Finance Act, 1894, mean "passes in the sense of this Act," or does it not? Unfortunately, to answer that question, as to which there has been a difference of judicial opinion, it is necessary to speak more at length.

I am not aware that, as a mere question of terminology, "to pass" has any technical meaning. I do not know if it has been used in other Acts of Parliament before the Finance Act. I have myself only succeeded in finding it in the Succession Duty Act, 1853. It is not there used in the taxing sections—which speak of dispositions and devolutions of law conferring a "succession"—but it is used in s. 14, which enacts that

> "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor,"

then only one duty shall be payable. It is obvious that the word is here treated as a word of ordinary language; and the meaning in the context is plain enough. The Finance Act itself does not define it. Section 22 (1), provides that the expression "property passing on the death" shall include certain things, but there, again, the word "passing" is not itself defined. We are, therefore, left to the meaning of ordinary language, subject to such light as the general use of the word in the Act and the context may give. I shall revert to this, but first I wish to treat it in reference to the general scheme of the Act. The paramount enacting section of the Act is undoubtedly to be found in s. 1. I need not quote it. The duty which it is the object of the Act to levy is imposed on property real and personal, settled or not settled, which "passes" on the death of any person dying after the commencement of the Act. Now, although the word "passes" is what I may call a neutral or vague word, it is so naturally associated with the idea of "from" and "to," and "on the death," so directs attention to the death of a person who leaves property behind him, that had that section stood alone it is reasonably clear that much property would have escaped which the framers of the Act wished to tax. Accordingly we have s. 2. That section was authoritatively discussed in your Lordships' House in *Earl Cowley* v. *I.R. Comrs.* (1). Whether LORD MACNAGHTEN was strictly correct or not in saying that the two sections were mutually exclusive seems to me to matter little. At any rate—and that is all that is material—s. 2 sweeps into the net various things which s. 1 would have failed to secure, or, as LORD WATSON put it in *A.-G.* v. *Beech* (2) ([1899] A.C. at p. 59),

> "it extends it to all cases where a survivor of the deceased takes a succession, or I should say rather derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased."

How does s. 2 do this? It does not do it by being conceived in the words of a taxing section imposing the duty on certain specified kinds of property. It does it by saying that property passing on the death of the deceased—which is already taxed by virtue of s. 1—shall be deemed to include the property following, that is to say—and then follow the various subsections. It seems to me that that is as much as to say that the words, "property passing on the death," in the first section, are to be read as if the words, "including the property following, that is to say—(and then all the subsections)"—had been there inserted. In other words, I do not think that anyone can criticise LORD MACNAGHTEN because in *Earl Cowley* v. *I.R. Comrs.* (1) he talks of property being

"deemed to pass," although that expression is not actually used. The net result is that the expression, "property which passes," in the first section, must include property which is deemed to pass by virtue of the second section—for s. 1 is the only taxing section.

I now pass to s. 5, but before I examine it minutely let me look at the situation as it would have been if there had been no s. 5 at all. By s. 1 and s. 2 a tax is imposed whenever, to use very untechnical language, a death occurs, and somebody, in consequence, gets property which he did not have before; and this tax is imposed on the property according to its value, irrespective of the question of the kind of interest which the new taker gets, and of his or her relation to the deceased person. It is very clear that had the matter rested there, the successive takers, under settlement, of interests less than a full fee would be very hardly dealt with. The whole object, therefore, of s. 5 is to temper this hardship, and the paramount provision of it is sub-s. (2), which enacts that once estate duty has been paid since the date of the settlement in respect of settled property, then no more shall be paid till the death of a person competent to dispose. But if sub-s. (2) had stood alone, the property under settlement would in a series of years have come off advantageously in comparison with settled property. It was therefore thought right to arrange for a further estate duty, to be called settlement estate duty, to be levied on settled property, and that is done by sub-s. (1) (a). So far, then, it would seem that there are two questions to be answered: (i) Is property liable to estate duty? That is answered by answering whether it does or does not pass on a death, either as under s. 1 or as under s. 2. Then (ii) if it is so liable, is it also liable to settlement estate duty? Now, primâ facie one would expect that the scope of the two sets of provisions would be the same, i.e. in other words that the question must be answered as to those kinds of property which are swept in by s. 2, just as much as to those which fall under s. 1. Inasmuch, however, as this is a taxing statute, and the duty here is an additional duty, I consider that it must be shown that the words would clearly cover the individual case to which it is right to apply them.

I now take the words of s. 5 (1) (a). Now, I think there we have three conditions expressed: (i) The property must be property in respect of which estate duty is leviable. That obviously includes property brought in by s. 1, and also that brought in by s. 2. (ii) It must be settled either (a) by the will of the deceased, or (b) by some other disposition. (iii) If it falls within the case (ii) (b), i.e., is settled by some disposition other than the will of the deceased, it must pass under that disposition on the death of the deceased to a person not competent to dispose. It is common ground that as regards the property here in question, conditions (i) and (ii) (b) are fulfilled. It is property in respect of which estate duty is leviable. It is settled by a disposition other than the will of the deceased. The whole controversy arises as to whether it fits the words of condition (iii). Now let me suppose for a moment that the words "on the death of the deceased" had been omitted. I imagine there could have been little controversy. Why, then, are these words inserted? The opponents of the Crown say in order to make sure that the passing is a natural passing which synchronises with the death, and here there was no such passing, for the property passed when the disposition was made two years before the death. I think the words were introduced for quite another purpose. We must notice that here we are making an inquiry which is unnecessary as regards the duty imposed by s. 1. That duty, the regular estate duty, is imposed quite irrespective of who is the taker of the passing property, or of what his interest therein is. But here we wish to know whether, the property being settled, the taker is a person who is not competent to dispose. Now, that necessitates a time element as applied to the different and successive interests possible to be taken by someone under the settlement. That time element is given by these words. If they were not there consider what might be the result. A settlement might be made two years ago. A succession of limited interests are created with an eventual remainder in full fee. By the time the death occurred all the possible takers of the limited interests might have died, and the actual taker would be a person competent to dispose. It would be very unfair that he should have to pay a settlement duty for a settlement which had, so to speak, evaporated as a settlement before the time for paying the tax arrived.

I, therefore, come to the conclusion that the word "passes" in this section is used in the same sense as it is used in every other section, as equivalent to passes within the meaning of the Act—inclusive, that is to say, of such passing as is described in s. 2. When I say every other section I allude particularly to ss. 4, 7 (4), 7 (10), 8 (4). As I understand the argument against me, it is that what I may call the non-natural meaning of passing explained by s. 2 is limited to the purposes of the duty imposed by s. 1, and that s. 5 imposes a new duty, and, therefore, being a taxing statute, as the non-natural meaning is not repeated in so many words as regards the new duty, the natural meaning must be reverted to. I quite bow to the rule as to taxing statutes. But after all, the question is what the words mean, and the expressions used must be given fair play. If, as here, where the word "passes" is used in any section except the fifth you are bound to give it the extended meaning to make sense, I think it not giving the words used fair play suddenly to revert to another meaning in s. 5, a section which is inextricably intertwined with the other sections, and which, if construed as that argument would construe it, leaves a perfectly obvious casus improvisus; for why should a will bring liability for the duty—other dispositions bring none? I am, therefore, of opinion that the appeal should be allowed, and the judgment of HORRIDGE, J., restored.

LORD ATKINSON.—I think the decision of the Court of Appeal was right, and that this appeal should be dismissed. The question turns on the construction of the fifth section of the Finance Act, 1894. To succeed, the Crown must bring the case within the letter of that enactment. It is not enough to bring the case within the spirit of it, or to show that if the section be not construed as the Crown contends it should be construed, property which ought to be taxed will escape taxation or will enjoy, under s. 5 (2), an immunity from successive levies of estate duty. These evils, if such they be, must, if they exist, be cured by legislation. The judicial tribunals must in interpreting these taxing Acts stick to the letter of the statute: *Partington* v. *A.-G.* (3); *A.-G.* v. *Earl of Selborne* (4).

The passing of property within the meaning of s. 1 of the Act has been conveniently styled "actual passing," and that under the s. 2 "notional" passing—that is, passing which in fact takes place before it is to be taken to have taken place. Under this latter section the property, the subject of this settlement of May 20, 1909, which in fact passed from the settlor to the trustees and the beneficiaries at that date, was deemed to pass on Dec. 8, 1911, and by virtue of that assumption became liable to estate duty. Now, the conditions which must be fulfilled in order to render, under s. 5, property subject to the additional duty styled settlement estate duty are these: First, estate duty must be leviable on it. That condition has been fulfilled. Second, the property must be settled by one or other of two kinds of dispositions. "Settled property" is, by the definition clause, s. 22, defined to be property comprised in a "settlement," and a "settlement" is defined to be "any instrument, whether relating to real or personal property, which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust." Under this section a settlement must limit land or any estate or interest in land to or on trust for persons by way of succession, and whether it does so or not is to be determined (sub-s. (4)) by the state of facts and the limitations of the settlement at the time of the latter's taking effect. In the case of a settlement by will, this time, of course, must be at the death of the testator, since the will only speaks from that date. The "notional" passing of property cannot in any way relate to the first mode of settlement mentioned in s. 5. The second mode of settlement must, like the first, create a succession, and whether it does so or not must in this case, as in the first, be determined by the condition of things and the limitations of the settlement at the time that settlement takes effect. This in the present case must be the date of the instrument. The limitations of the settlement then become operative, and to be within this section must provide that under them and by virtue of them the property should on a certain event pass to some person not competent to dispose of it. That event is the death of some person not necessarily the settlor. The words "under that disposition," in my view, can only mean that the settlement itself is to indicate the

event on which the property is to pass, the person to whom it is to pass, and the estate or interest which is to pass to that person. Primâ facie, the word "death" naturally means a real death, not a "notional death." There is no such thing provided for in the Act as a "notional death"—no clause to the effect that a person shall be deemed to be dead when in fact he is alive. There is a provision that there shall be a "notional" passing of property, not, however, to any person named or indicated, or for any particular estate or interest. Section 2 no doubt enacts that property which, in fact, has passed while a person was alive shall, in certain cases, be deemed to have passed as if he were then dead. This section, however, is not a definition section. It is supplementary to s. 1, and is designed to make liable to estate duty certain dispositions of property which are outside the scope and beyond the reach of s. 1. Even if the words of s. 5 were so altered as to run "by some other disposition, passes, or is deemed to pass, under that disposition on the death of the deceased to some person not competent to dispose of the property," as, in effect, the Crown, I think, contend they should, it does not appear to me that it would be sufficient for the purpose of the Crown, because the property would then pass, not under the "disposition," but under s. 2 of the Act, while it would not be carried by that section to the person to whom it must, under s. 5, be carried, namely, one not competent to dispose of it. I do not think the provision of the settlement can be put aside in part and retained in part, in this way, put aside where they fix the event on which the property is to pass, actual death, and retained when they designate the individual to whom it is to pass. Neither do I think words can be interpolated into the section to fix a burden on the subject not imposed by the letter of the statute. If there be a casus omissus in the Act it must be provided for by legislation. The appeal should, I think, be dismissed with costs.

LORD PARKER OF WADDINGTON.—Section 1 of the Finance Act, 1894, imposes in the case of every person dying after Aug. 1, 1894, a duty, called "estate duty," leviable on the capital value of all property which passes on the death of such person. The expression "property passing on the death" includes, according to the definition contained in s. 22 of the Act, property passing either immediately on the death or after any interval either contingently or certainly, and either originally or by way of substitutive limitation, and the expression "on the death" includes "at a period ascertainable only by reference to death." The expression "passing on the death" is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes. Section 2 of the Act, by providing that property passing at the death shall be deemed to include certain kinds of property which do not in fact pass at the death, artificially enlarges the ambit of the expression "property passing at the death." It also artificially limits such ambit by expressly excluding certain kinds of property which do in fact pass at the death. It is in no sense a definition section. It cannot be disputed that by virtue of s. 2, coupled with s. 59 of the Finance (1909-10) Act, 1910, the property passing on the death of Henry Ernest Milne is to be deemed to include the settled property, and estate duty on such settled property is therefore clearly payable.

Section 5 of the Finance Act, 1894, imposes an additional estate duty (called settlement estate duty), not on all property in respect of which estate duty is leviable, but where property on which estate duty is leviable is settled by the will of the deceased, or having been settled by some other dispositions, passes under that disposition on the death of the deceased to some person not competent to dispose of the property. It was argued that the initial words of this section, "where property in respect of which estate duty is leviable," raise some inference or presumption as to the kinds of property in respect of which settlement estate duty is intended to be charged. I do not think that this is so. The words in question merely make it clear that in no case when estate duty is not leviable is it intended to impose settlement estate duty. The kinds of property on which, where estate duty is leviable, it is intended to impose the additional duty, must be gathered from the following words, and consist of (i) property settled by the will of the deceased; and (ii) property which, having been settled by some other dis-

position, passes under that disposition on the death of the deceased to some person not competent to dispose of the same. Clearly the property comprised in the settlement does not pass under the will of the deceased; nor, though it was settled by some other disposition, does it pass under that disposition on the death of the deceased. How, then, is it proposed to show that it is subject to settlement estate duty? The argument to that effect may be stated as follows: First, it is said that, by virtue of s. 2, the settled property must be deemed to pass on the death of Henry Ernest Milne; secondly, it is said that, this being so, it must be deemed to pass under the settlement to the person in possession of it at that death; and, thirdly, it is said that this person is a person not competent to dispose of the property. In my opinion this argument reads into s. 2 a great deal more than it contains. Section 2 even if it be construed as providing that the settled property is to be deemed to pass on the death of Henry Ernest Milne, certainly does not provide to whom or under what disposition it shall be so deemed to pass. Indeed, these points seem to me to be immaterial for the purpose of s. 2, which merely enlarges on the one hand and narrows on the other the ambit of the expression, "passing on the death." For the purpose of the imposition of estate duty, it does not matter to whom or under what disposition the property passes. It is otherwise for the purpose of the settlement estate duty, and had the object of s. 2 been to create a notional passing for the purpose of settlement estate duty as well as for the purpose of estate duty, one would have expected s. 2 to contain some provisions as to whom and by what disposition the property was to be deemed to pass. Further, s. 5 is so worded as, in my opinion, to point to an actual as distinguished from a notional passing on death. I do not think, therefore, that the argument I have referred to ought to prevail. The Finance Act is a taxing statute, and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words. All the words of s. 5 can be satisfied without having recourse to any notional passing of property, and in my opinion considerable violence would be done to these words if the idea of a notional passing of property were introduced into the section. In my opinion the appeal fails.

Solicitors: *Solicitor of Inland Revenue*; *Rooke & Sons.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

R. LESLIE, LTD. *v.* RELIABLE ADVERTISING AND ADDRESSING AGENCY, LTD.

[King's Bench Division (Rowlatt, J.) January 21, 22, 28, 1915]

[Reported [1915] 1 K.B. 652; 84 L.J.K.B. 719; 112 L.T. 947; 31 T.L.R. 182]

Contract—Breach—Damages—Breach resulting in conviction of plaintiff of criminal offence—Right to recover fine and costs in criminal proceedings.

By a verbal contract the defendants, advertising agents, agreed to address circulars on behalf of the plaintiffs, a firm of moneylenders, to persons whose names appeared in Kelly's Handbook, omitting minors. By mistake a circular was addressed and sent to a minor and the plaintiffs were convicted of an offence under s. 2 of the Betting and Loans (Infants) Act, 1892, as amended by s. 5 of the Moneylenders Act, 1900, and were fined. In an action brought by them to recover the fines and costs as damages for breach of the contract,

Held: as the plaintiffs had known the facts which constituted the offence and had been convicted of "knowingly" circularising the infant the principle of *Colburn* v. *Patmore* (1) applied and the action failed.

Per ROWLATT, J.: A possible breach of the law, if a mistake was made in the list, with resulting penalties must have been within the contemplation of the parties, and no circumstances intervened to influence the magistrate in his decision other than the arrangement to which the defendants were parties.

Notes. Distinguished: *Proops* v. *Chaplin* (1920), 37 T.L.R. 112. Considered: *Harnett* v. *Bond*, [1924] 2 K.B. 517. Applied: *Bradstreets British, Ltd.* v. *Mitchell* (1932), 48 T.L.R. 670. Considered: *Howard* v. *Odhams Press, Ltd.*, [1936] 2 All E.R. 40. Applied: *Askey* v. *Golden Wine Co.*, [1948] 2 All E.R. 35. Referred to: *Weld-Blundell* v. *Stephens*, [1920] All E.R.Rep. 32; *Hambrook* v. *Stokes* (1924), 41 T.L.R. 125, *Tournier* v. *National Provincial and Union Bank of England*, [1924] 1 K.B. 461; *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1926), 135 L.T. 83; *Singleton Abbey* (*Owners*) v. *Paludina* (*Owners*), *The Paludina* (1926), 95 L.J.P. 135; *The Edison* (1932), 147 L.T. 141; *Re Simms, Ex parte Trustee*, [1934] Ch. 1.

As to implied rights of indemnity, see 18 HALSBURY'S LAWS (3rd Edn.) 529 et seq.; and for cases see 26 DIGEST (Repl.) 232 et seq. For the Betting and Loans (Infants) Act, 1892, see 12 HALSBURY'S STATUTES (2nd Edn.) 949. For the Moneylenders Act, 1900, see 16 HALSBURY'S STATUTES (2nd Edn.) 370.

Cases referred to:

(1) *Colburn* v. *Patmore* (1834), 1 Cr.M. & R. 73; 4 Tyr. 677; 3 L.J.Ex. 317; 149 E.R. 999; 32 Digest 83, *1137*.

(2) *Crage* v. *Fry* (1903), 67 J.P. 240; 1 L.G.R. 253; 17 Digest (Repl.) 141, *434*.

(3) *Cointat* v. *Myham & Son*, [1913] 2 K.B. 220; 82 L.J.K.B. 551; 108 L.T. 556; 77 J.P. 217; 29 T.L.R. 387; 11 L.G.R. 760; on appeal, 84 L.J.K.B. 2253; 110 L.T. 749; 78 J.P. 193; 30 T.L.R. 282; 12 L.G.R. 274, C.A.; 17 Digest (Repl.) 118, *297*.

(4) *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816; 68 L.J.Q.B. 545; 80 L.T. 591; 63 J.P. 532; 48 W.R. 13; 15 T.L.R. 286; 43 Sol. Jo. 351, D.C.; 34 Digest 117, *880*.

(5) *Adamson* v. *Jarvis* (1827), 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 12 Digest (Repl.) 601, *4656*.

(6) *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57; 4 Nev. & M.K.B. 64; 4 L.J.K.B. 1; 111 E.R. 22; 26 Digest (Repl.) 233, *1797*.

Also referred to in argument:

Scott v. *Brown, Doering, McNab & Co.*, *Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 12 Digest (Repl.) 267, *2060*.

Pearson v. *Skelton* (1836), 1 M. & W. 504; Tyr. & Gr. 848; 150 E.R. 533; 42 Digest 979, *104*.

Mowbray v. *Merryweather*, [1895] 2 Q.B. 640; 65 L.J.Q.B. 50; 73 L.T. 459; 59 J.P. 804; 44 W.R. 49; 12 T.L.R. 14; 40 Sol. Jo. 9; 14 R. 767, C.A., 17 Digest (Repl.) 130, *376*.

W. H. Smith & Son v. *Clinton and Harris* (1908), 99 L.T. 840; 25 T.L.R. 34; 26 Digest (Repl.) 234, *1799*.

Midland Insurance Co. v. *Smith* (1881), 6 Q.B.D. 561; 50 L.J.Q.B. 329; 45 L.T. 411; 45 J.P. 699; 29 W.R. 850; 1 Digest (Repl.) 73, *547*.

The Englishman and The Australia, [1895] P. 212; 64 L.J.P. 74; 72 L.T. 203; 7 Asp. M.L.C. 605; 11 R. 757; 42 Digest 982, *122*.

Fletcher v. *Harcot* (1622), Hut. 55; 123 E.R. 1097; sub nom. *Battersey's Case*, Win. 48; 26 Digest (Repl.) 233, *1796*.

D.P.P. v. *Witkowski* (1911), 104 L.T. 453; 75 J.P. 171; 27 T.L.R. 211; 22 Cox, C.C. 425; 15 Digest (Repl.) 892, *8595*.

Scott v. *Foley, Aikman & Co.* (1899), 16 T.L.R. 55; 5 Com. Cas. 53; 17 Digest (Repl.) 145, *465*.

Richardson v. *Mellish* (1824), 9 Moore, C.P. 435; 1 Digest (Repl.) 689, *2457*.

Fitzgerald v. *Leonard* (1893), 32 L.R.Ir. 675; 17 Digest (Repl.) 135, **295*.

Horne v. *Midland Rail. Co.* (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 21 W.R. 481, Ex. Ch.; 8 Digest (Repl.) 153, *964*.

Elbinger Act v. *Armstrong* (1874), L.R. 9 Q.B. 473; 43 L.J.Q.B. 211; 30 L.T. 871; 38 J.P. 774; 23 W.R. 127; 17 Digest (Repl.) 132, *388*.

Further Consideration of an action tried by ROWLATT, J., with a jury.

The plaintiffs, who were a registered firm of moneylenders, made a contract with the defendants to address a large number of circulars to the persons whose names appeared in the 1914 edition of KELLY'S HANDBOOK OF THE TITLED, LANDED, AND OFFICIAL CLASSES. The terms of the contract, which was verbal, were admitted to be accurately represented by the following letter from the plaintiffs to the defendants:

"Dear Sirs,—We confirm our instructions over the telephone to you to-day to address KELLY'S HANDBOOK for the year 1914 at 6s. per 1000. Also to address cards and inclose in envelopes, sealing down flaps, at an additional charge of 4s. per 1000 inclusive, and we agree to pay you a further 15s. to delete all minors from this list, and you will take every precaution to see that no such person is addressed."

The work, which necessitated the examination of about 32,000 names, was carried out by the defendants in a little over twenty hours at a cost to them of 11s. 2d. By a mistake the name of an infant was left undeleted, and a circular was sent to him. The plaintiffs and their manager were in consequence charged under the Betting and Loans (Infants) Act, 1892, and the Moneylenders Act, 1900, and were convicted, being fined £20 each with costs. They appealed to quarter sessions, where the conviction was affirmed, but the fines were reduced to £10 each. The plaintiffs then brought this action against the defendants to recover as damages the amount of the fines and the costs paid to the prosecution, together with the costs of their defence and of the appeal to quarter sessions, contending that the defendants had committed a breach of the contract and were negligent in carrying out the work. In their defence the defendants denied that the damage alleged or any damage was caused by any breach of contract or negligence on their part; they contended that it would be contrary to public policy to allow the plaintiffs to recover any part either of the fines inflicted or the costs paid to the prosecution. They also contended that the damages were too remote, and as a separate defence they brought into court the sum of £5 with a denial of liability, and said that the same was sufficient to satisfy the plaintiff's claim, if any. At the trial the jury found that the mistake was due to a want of due care on the part of the defendants.

By the Betting and Loans (Infants) Act, 1892, s. 2:

"(1) If anyone, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanour."

By s. 5 of the Moneylenders Act, 1900:

"Where in any proceedings under s. 2 of the Betting and Loans (Infants) Act, 1892, it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age."

J. B. Matthews, K.C., and *G. F. Spear* for the plaintiffs.
L. Sanderson, K.C., and *G. C. Rankin* for the defendants.

Cur. adv. vult.

Jan. 28, 1915. **ROWLATT, J.**, read the following judgment.—This action was brought to recover the amount of fines inflicted upon the plaintiff company and its manager for an offence under the Betting and Loans (Infants) Act, 1892, as amended

by s. 5 of the Moneylenders Act, 1900, together with costs of the prosecution and defence, by way of damages for a breach of contract by the defendants.

It was contended for the plaintiffs that the contract of the defendants was absolute to omit minors and not merely to exercise care. However, I left the question of care to the jury, and they found that the mistake was due to want of due care, so that in either view of the contract there was a breach. I was not asked to leave any other question to the jury. The effect of the two statutes referred to above, stated shortly, and so far as material for the present purpose, is to make it an offence to send a money lender's circular to an infant without reasonable ground for believing him to be of full age. The only ground the plaintiffs had for such a belief was the contract they had made with the defendants, and the magistrate held that the making of the contract above referred to did not afford them such reasonable ground. The position, therefore, is that a contract, reliance upon which in sending out the circulars was a default made a crime by statute, is now made the basis of an action to recover as damages compensation for the punishment in which such reliance has involved the plaintiffs, and their manager. I confess that when first I saw the nature of this action I formed and indicated a strong opinion that it was misconceived on the broad ground that a person convicted of a criminal offence could never have the assistance of a civil court to ease himself of the punishment by the recovery over either of the amount of any fine or costs or of damages to compensate him for any imprisonment, and that there could be no difference between cases where the legislature had made an act or default punishable as a crime without the existence of a guilty mind and any other class of offence. This view seems to me to have been accepted by the Court of Common Pleas in *Colburn* v. *Patmore* (1), though the decision itself went on another point. The action was by a newspaper proprietor against his editor to recover damages in respect of the conviction and fining of the plaintiff for a libel inserted in the paper by the defendant, and the question which I am now discussing seems to have been mooted in the broadest form during the argument. GURNEY, B., asked whether there was any instance of an action having been brought for compensation for having been convicted of an offence. The answer was that there was not, but that the action could be maintained in that particular case because, though the plaintiff by the policy of the law had been convicted, the defendant was the real offender. In the argument on the other side by Mr. Maule the contention is put quite clearly and broadly that no action lies by a convicted person to exonerate himself from the consequences, and that all crimes are alike in this respect. I think the court accepted this view, for, though the Lord Chief Baron speaks of the impossibility of a convicted person recovering damages against another who participated in the crime, I do not suppose he intended to indicate that the guilt of the defendant was what made the plaintiff's action fail.

In support of this view it may be said that a law which imposes a punishment as distinguished from a payment of compensation is defeated by the punishment being passed on to another. The object sought to be secured by such a statute in the public interest is not that so much money shall be collected by way of fine, but that a person who puts himself in such and such a position shall be punished by way of fine in order to make such persons prevent such things happening again, and I should have thought that the statute could not have its effect if the convicted person could obtain compensation in a civil court for the punishment inflicted upon him in the criminal court. There are, however, authorities the other way. In *Crage* v. *Fry* (2), before KENNEDY, J., and in *Cointat* v. *Myham & Sons* (3) before LORD COLERIDGE, J., plaintiffs, who had been convicted under s. 47 of the Public Health (London) Act, 1891, for having unsound fish or meat for sale, were allowed to recover their penalties against their vendors. In neither of these cases was the point now in question raised. It was, however, discussed by KENNEDY, J., in *Burrows* v. *Rhodes* (4). In that case the plaintiff had not been convicted though he had committed an offence, and the only objection to his claim was that the damages were the consequence of his own illegal act. The learned judge held against that contention, applying the rule laid down in *Adamson* v. *Jarvis* (5) and *Betts* v. *Gibbins* (6) that such objection cannot prevail where the act in itself was indifferent and the circumstances which made it illegal were not known or believed to be

absent. He went on, however, to express the opinion that in cases, of which he gave two instances, where a person may be convicted as a criminal without a guilty mind he might recover damages in respect of the penalty imposed. The cases he mentioned were serving a drunken person with liquor and keeping two or more lunatics without registration or licence. Speaking of the latter case, the learned judge adds this ([1899] 1 Q.B. at p. 832):

> "I am unable to see upon what ground of public policy or principle of justice the proprietor, who has been led into the commission of the offence by the fraud of another and who is free from any imputation of moral wrongdoing, should be denied a right of suing for damages the person whose successful fraud has led him to do that which the law in its care for the health and safety of lunatics has made an offence."

He does not consider the question whether criminal punishments are not by their nature incapable of being the subject of indemnity, and whether in saying that a person in such and such circumstances shall be punished by fine as a criminal the legislature is not also impliedly but necessarily saying (and this too in its care for lunatics) that he shall not recover the fine over against any one else. The learned judge then refers to the express provision in the Food and Drugs Act, 1875, s. 28, enabling a convicted person in certain cases to recover penalties over, as showing that there can be no principle of public policy or justice opposed to the existence of such a right. But there is no question of such a general principle of policy. The question is as to the position created by a penal statute where such a right over is not given. With regard to *Colburn* v. *Patmore* (1) the learned judge treats the view of the court as turning upon the circumstance that the defendant could not after the conviction be heard to say that he did not falsely and maliciously publish the libel, although in truth personally innocent of it, and he refers to a question put in the course of the argument by ALDERSON B., as follows (1 Cr.M. & R. at p. 76): "Is it not more correct to say that the plaintiff was actually ignorant though legally cognisant?" It seems to me, with great respect, that that is merely another way of saying that the moral guilt or innocence of the plaintiff was immaterial inasmuch as the law treated him as a guilty person. A little further on in the course of the argument, ALDERSON, B., made this further observation (ibid.):

> "If the law presumes the proprietor cognisant of the acts of his servants, and holds him criminally liable, must not that liability be taken with all its usual consequences?"

Whether a man is said under certain circumstances to have knowledge imputed to him by the statute and to be therefore correctly indicted for doing the act knowingly, or whether he is said under the same circumstances to be guilty without regard to his knowledge, so that he might be correctly indicted by alleging the fact and those circumstances without mentioning knowledge, seems to me a question of words. The question is not whether the conviction involves guilty knowledge, but whether the fine is punitive. Punishments would appear to be of necessity strictly personal no less when they are pecuniary than when they take the form of imprisonment. For the reasons given above, if it had not been for the views expressed by KENNEDY, J., I should have decided this case against the plaintiffs on much broader grounds than those I am about to set forth. It seems to me, however, that, giving the fullest effect to all that was said or even suggested in *Burrows* v. *Rhodes* (4), this action fails. To begin with, if KENNEDY, J.'s, explanation of *Colburn* v. *Patmore* (1) is correct, this case is precisely within it, for the plaintiffs were convicted by virtue of s. 5 of the Moneylenders Act, 1900, of "knowingly" circularising the infant. Secondly, if the substance is looked at, what the plaintiffs were convicted of was sending the circular without having reasonable ground for believing the addressee to be of full age. They knew what ground they had—namely, their contract with the defendants—and it was insufficient. They knew the facts which constituted the offence. It is not to the point to say that the defendants contracted to omit the minors and cannot be heard to say that the plaintiffs had not good ground for believing every recipient of the circular to be of full age. The action

fails on the ground of the plaintiffs' illegal action whether the defendants do or can allege it or not.

It was contended in addition for the defendants that the damages were in any case too remote. It is not really necessary to decide this, but as it was argued I may as well say that in my judgment they were not. A possible breach of the law, if a mistake was made in the list, with resulting penalties must have been within the contemplation of the parties, and no circumstances intervened to influence the magistrate in his decision, either in principle or as to the amount of the fine, other than the arrangements to which the defendants were parties. A subsidiary point was made that, even if the fine and the costs paid to the prosecution cannot be recovered, the costs incurred by the plaintiffs in defending themselves can. It seems to me that the ground on which I have decided this case clearly applies to the costs even if the broader ground on which I should have liked to decide it would not, as to which I say nothing. In the result, the plaintiffs are entitled to nominal damages of 1s. for breach of contract, but as the defendants paid £5 into court the defendants are entitled to the general costs of the action, and the plaintiffs to the costs of proving the breach of contract. As I think, however, that this action ought never to have been brought, and has in substance totally failed, I deprive the plaintiffs of those costs.

Judgment accordingly.

Solicitors: *M. A. Jacobs*; *Jesse Hoare.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

LIVERPOOL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN *v.* JONES

[KING'S BENCH DIVISION (Lord Coleridge, Avory and Atkin, JJ.), June 10, 1914]

[Reported [1914] 3 K.B. 813; 84 L.J.K.B. 222; 111 L.T. 806; 79 J.P. 20; 30 T.L.R. 584; 58 Sol. Jo. 723; 24 Cox, C.C. 434; 12 L.G.R. 1103]

Child—Wilful neglect—Person having custody, charge or care—Illegitimate children—Liability of putative father—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *ss.* 12, 38.

By s. 12 (1) of the Children Act, 1908 [now s. 1 of the Children and Young Persons Act, 1933]: "If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person . . . that person shall be guilty of a misdemeanour."

By s. 38 (2) of the same Act [now s. 17 of The Children and Young Persons Act, 1933]: "Any person who is the parent or legal guardian of a child or young person or who is legally liable to maintain a child or young person shall be presumed to have the custody of the child or young person. . . . Any other person having actual possession or control of a child or young person shall be presumed to have the care of the child or young person."

By s. 23 (1) of the Prevention of Cruelty to Children Act, 1904 [now repealed]: "The provisions of this Act relating to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression 'parent' when used in relation to a child, includes guardian and every person who is by law liable to maintain the child."

The respondent cohabited with a certain woman and both were charged under s. 12 of the 1908 Act with wilfully neglecting their four illegitimate children. The

woman had never applied for an affiliation order against the respondent. The magistrate convicted the woman, but dismissed the charge against the respondent on the grounds that he was not the parent or legal guardian or legally liable to maintain any of the children under s. 38 (2) of the 1908 Act.

Held: the magistrate had taken too narrow a view of s. 12; it was a question of fact in each case as to who had the custody, charge, or care of a child, and it did not depend on who was the legal guardian of the child; and, therefore, the case would be remitted to the magistrate to determine that question of fact.

Notes. The Prevention of Cruelty to Children Act, 1904, has been repealed. Sections 12 and 38 (inter alia) of the Children Act, 1908, have been repealed. Section 12 of the 1908 Act has been replaced by s. 1 of the Children and Young Persons Act, 1933, and s. 38 of the 1908 Act has been replaced by s. 17 of the 1933 Act.

Referred to: *Brooks* v. *Blount*, [1922] All E.R.Rep. 699.

As to cruelty to children, see 10 HALSBURY'S LAWS (3rd Edn.) 759–763; and for cases see 15 DIGEST (Repl.) 1033–1037. For the Children and Young Persons Act, 1933, see 12 HALSBURY'S STATUTES (2nd Edn.) 974.

Case referred to:

(1) *Butler* v. *Gregory* (1912), 18 T.L.R. 370; 15 Digest (Repl.) 1035, *10*, *177*.

Case Stated by the stipendiary magistrate for the city of Liverpool.

On Mar. 13, 1914, Alfred Jones (hereinafter called "the respondent") and Gladys Owens were brought up before the learned stipendiary magistrate for the city of Liverpool under a warrant issued at the instance of the Liverpool Society for the Prevention of Cruelty to Children (hereinafter called "the appellants"), charging the respondent and the woman Owens for that they, on Feb. 28, 1914, and on other days at the city of Liverpool, being each over the age of sixteen years, and having the custody, charge, or care of four children within the meaning of the Children Act, 1908, did wilfully neglect such children in a manner likely to cause them unnecessary suffering, contrary to s. 12 of the Children Act, 1908. The prisoners were remanded until Mar. 16, and again until Mar. 23. On the last occasion the learned stipendiary magistrate convicted the woman Owens and sentenced her to two months' imprisonment with hard labour, but dismissed the charge against the respondent. On the hearing of the charge the following facts were proved or admitted:

"(1) That on seven occasions, once in each of the months of October, November, December, 1913, and January, 1914, and three times in February, 1914, an inspector in the service of the appellants visited the house occupied by the respondent and Gladys Owens, and found four of the latter's illegitimate children, whose ages ranged from ten to two years, in a very dirty, ragged, verminous, and neglected condition. Of the four rooms in the house three were empty, and the other contained scarcely any furniture. On most of the visits the inspector found the woman Owens in the house drunk or drinking with other women. (2) That on four of the said visits the inspector saw the respondent in the house, and on two of the occasions he was drunk. (3) That the respondent during the period of the said offences, and for a considerable time prior thereto, had been cohabiting with the woman Owens. (4) That the respondent was and is the putative father of some, if not all, of the said children. (5) That no affiliation order in respect of the said children, or any of them, had ever been made or applied for against the respondent."

Having regard to the last-mentioned fact that no such affiliation order had been made, and in view of the decision in *Butler* v. *Gregory* (1), the learned stipendiary magistrate was of opinion that the respondent did not come within the scope of the first paragraph of s. 38 (2), of the Children Act, 1908, as being the parent or legal guardian or legally liable to maintain any of the said children. On behalf of the appellants it was contended that s. 23 (1), of the Prevention of Cruelty to Children Act, 1904, entitled the learned magistrate to convict the respondent of the said offence on the ground that he was cohabiting with the parent of the children. He decided, however, that this section had

no application to the Children Act, 1908, under s. 12 of which the respondent was charged. It was further argued on behalf of the appellants that the last paragraph of s. 38 (2) of the Children Act, 1908, enabled the learned magistrate to treat the respondent as a person liable under s. 12 of that statute, but the learned magistrate was of opinion that the mere fact of the respondent living with a woman and her illegitimate children did not constitute him a "person having actual possession or control" of such children, she being in law their sole lawful custodian or guardian. As above stated, the charge against the respondent was dismissed.

J. H. Layton for the appellants.—The respondent was liable to be convicted of the charge laid against him. By s. 23 (1) of the Prevention of Cruelty to Children Act, 1904, he was a person who was responsible in the case of wilful neglect, since that subsection applied to "any person cohabiting with the parent of the child." The subsection made him responsible just in the same way as the parent of the child was responsible. By s. 23 (3) of the Act of 1904: "Any person who is the parent of a child shall be presumed to have the custody of the child," and by s. 1 of the same Act any person over the age of sixteen years who has the custody, charge, or care of a child under sixteen is guilty of an offence if he wilfully neglects it. It was clear then that the respondent would have been liable to be convicted under the Act of 1904. Much of the Act of 1904 had been repealed and re-enacted, with additions and variations, by the Act of 1908. For example, s. 1 of the Act of 1904 had been replaced by s. 12 of the Act of 1908. The Act of 1908 was stated in the preamble to be a consolidating statute. But s. 23 (1) and (3) had not been repealed, as was shown by the schedule to the Act of 1908. As these subsections had not been repealed they must still have some meaning, and the only meaning that could be attached to the words at the beginning of s. 23 (1), namely, "The provisions of this Act," was "the provisions of this Act or of any subsequent Act which are substituted for the provisions of this Act." If that was so, the respondent was liable, as cohabiting with the parent of the child, as though he had been the parent and since the mother was liable for wilful neglect under s. 12 of the Act of 1908, the respondent was also liable to be convicted in the same way that she was. Again, by s. 38 (2) of the Act of 1908, the respondent was liable as having the actual possession or control of the child. This was a question of fact, and the learned magistrate had found that the respondent was actually maintaining the child. Where the learned magistrate made a mistake was in construing actual possession as meaning legal possession. This was taking too narrow a view of s. 12. *Butler* v. *Gregory* (1) was decided under the Prevention of Cruelty to Children Act, 1894, an Act which was repealed in toto by the Act of 1904, and did not apply to the present case at all.

No counsel appeared for the respondent.

LORD COLERIDGE, J.—This case has been referred to us for our decision upon the question of the responsibility of the father of an illegitimate child, when the father and mother are living together in the same house, and children are residing with the authors of their beings. Is the father liable to be convicted under s. 12 (1) of the Children Act, 1908, if he wilfully neglects it? It has been contended that all the responsibilities of a parent attach to the respondent because he was cohabiting with the parent of the child—the mother—and reliance has been placed upon s. 23 (1) of the Prevention of Cruelty to Children Act, 1904. That subsection says:

> "The provisions of this Act relating to the parent of a child shall apply . . . to any person cohabiting with the parent of the child,"

the provisions, of course, including responsibility for wilful neglect. We have been asked to say that this subsection to s. 38 (2) of the Children Act, 1908, and the fact of the cohabitation with the mother of the child makes the respondent a person having the custody of the child. The learned magistrate had the same argument addressed to him and he was of opinion that however applicable the contention might have been if the case had arisen under the Act of 1904, inasmuch as the summons was under the Act of 1908, the subsection of the Act of 1904 could not be called in aid. The Act of 1908 has been substituted for the Act of 1904. And when one examines the wording

of s. 23 (1) of the Act of 1904, it is seen that it is expressly limited in its application to "the provisions of this Act." I am of opinion that this subsection is entirely confined to the Act of 1904, and I think that the decision of the learned magistrate on this point was quite right.

There arises the question as to the proper construction to be placed upon the words of s. 12 (1) and s. 38 (2) of the Act of 1908. As far as I have been able to gather, the learned magistrate was of opinion that the person who had the custody, charge, or care, within the meaning of s. 12 (1) were limited to those who were presumed to have the custody, charge, or care under s. 38 (2). That being his opinion, he came to the conclusion that he could not convict the respondent, seeing that he was not the parent of the child or legally liable to maintain it—he had not been proved to be the father in law—and, further, that in view of the fact that the mother, who was the legal guardian of the child, was resident in the house, the respondent could not be said to have the actual possession or the control of it, in fact, that as the mother had the possession and the control the respondent was excluded from possession and control within the meaning of the statute. We think that the learned magistrate was mistaken in both respects. In the first place we are of opinion that s. 38 does not in any way cut down or limit the meaning of the words in s. 12; on the contrary, s. 38 is intended as an amplification of s. 12. But quite apart from s. 38, s. 12 says:

> "If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person . . . that person shall be guilty of a misdemeanour."

Whether a person has the custody, charge, or care of a child is a question of fact to be determined by the magistrate: and, secondly, a person is not to be excused because he does not happen to be the legal guardian of the child. The section has a much wider meaning than that. We do not think that the magistrate is precluded from determining that a person has the custody, charge, or care of a child because he happens to be co-habiting with the mother of the child, and because the mother has the legal custody, charge, or care of it. As to this question of custody, charge, or care, the facts as stated by the learned magistrate do not appear to us to be conclusive. I have already said that the fact as to custody, charge, or care is one to be considered by the magistrate, and the case must, therefore, go back to him to decide whether the respondent was or was not guilty of the offence charged against him.

AVORY, J.—I agree. I know the great care which is always taken by the learned stipendiary magistrate of Liverpool, and his opinions are always entitled to the greatest respect. In the present case he appears to have been led to take the view that he could not find the respondent guilty of the offence with which he was charged as a matter of law. He was led to take this view by supposing that s. 38 (2) of the Children Act, 1908, was an exhaustive definition of the persons who were liable to be proceeded against under s. 12 (1). The learned magistrate, in the first place, came to the conclusion that the respondent could not be presumed to have the custody of the child because he was neither the parent nor the guardian of the child and he was not legally liable to maintain it. If that was all I should entirely agree with his decision. But then he went on to hold that the respondent could not be a person having the actual possession or control of the child, because the mother, who was the child's sole legal custodian and guardian was living with it. In that conclusion I think the learned magistrate was incorrect. It is one of the main objects of s. 38 (2) to make persons who are neither the parents nor guardians of children, nor legally liable to maintain them subject to the provisions of s. 12, if in fact they have the custody, charge, or care of such children. But whether this custody, charge, or care really exists is a pure question of fact and must be decided according to the circumstances of the case. The fact that an illegitimate child lives with its mother does not exclude the actual possession and control of some other person, and actual possession is not to be confined in its meaning to legal possession. The question in the present case is whether the respondent had the custody, charge, or care, and I am of opinion that he may be such a person. Whether he is or is not such

a person is a matter of fact entirely for the learned magistrate, and I agree that the case should be remitted to him with the expression of our opinion.

ATKIN, J.—I am also of the same opinion. In my view a person may have the custody, charge, or care of a child, even though there are all the persons mentioned in s. 38 (2) in existence who are presumed to have the custody, charge, or care. It is a question of fact whether a person has or has not custody, charge, or care. I think, moreover, that the real effect of s. 38 (2) is that the persons there named as being presumed to have the custody, charge, or care of children may be convicted in certain circumstances under s. 12, even though they have not in fact such custody, charge, or care.

Appeal allowed.

Solicitors: *Clayton & R. Stewart-Brown*, Liverpool.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

MATSOUKIS *v.* PRIESTMAN & CO.

[KING'S BENCH DIVISION (Bailhache, J.), February 2, 3, 1915]

[Reported [1915] 1 K.B. 681; 84 L.J.K.B. 967; 113 L.T. 48; 13 Asp.M.L.C. 68; 20 Com. Cas. 252]

Contract—Exception clause—"Force majeure"—Delivery delayed in breach of agreement—Delay caused by indirect effect of general coal strike and breakdown of machinery, bad weather and absence of workman.

By a contract in writing the defendants agreed to build a steamer for the plaintiff, a Roumanian national, to be delivered on a named date. It was a term of the agreement that the defendants would pay the plaintiff £10 for each day delivery was delayed "excepted only the cause of force majeure, strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor." The steamer was delivered 175 days late. A general coal strike had dislocated the defendants' business and had caused a delay of 70 days in the steamer being laid down in the berth. Other causes of the delay were: a breakdown of machinery, a shipwrights' strike, bad weather, and the absence of the defendants' workmen when attending football matches and the funeral of their manager. The plaintiff who had paid the full amount of the contract price under protest now claimed £1750 or £10 per day for each day delivery was delayed.

Held: (i) as the universal coal strike had completely dislocated all the businesses in the north of England it could come within the reasonable meaning of force majeure having regard to the way in which the ship was built, the berthing, and the fact that the words were inserted by a foreign national who was familiar with the meaning of the words on the Continent; (ii) breakdowns in machinery also came within the force majeure exception, but bad weather and absence of workmen attending football matches and a funeral did not; (iii) the shipwrights' strike came within the exception relating to strikes; and, therefore, the plaintiff had partially succeeded and was entitled to £1000 damages.

As to force majeure clauses, see 8 HALSBURY'S LAWS (3rd Edn.) 181-2; and for cases see 12 DIGEST (Repl.) 429-430 and 39 DIGEST 429.

Notes. Distinguished: *Lebeaupin* v. *Richard Crispin & Co.*, [1920] All E.R.Rep. 353.

Action in the Commercial List tried by BAILHACHE, J., with a jury.

The plaintiff, Jean Gerassime Matsoukis, of Roumania, claimed damages for delay in the delivery of a steamship built by the defendants at their yard in Sunderland at the request of the plaintiff. The plaintiff pleaded that by an agreement in writing made between the Bank of Athens, as agents for the plaintiff, and the defendants, the latter agreed to build a steamer and deliver her at Sunderland afloat and ready for sea on or before Feb. 20, 1913. It was provided that if the steamer was not delivered entirely ready at the time mentioned the defendants were to pay to the plaintiff the sum of £10 for each day of delay and in deduction of the price stipulated in the contract. He said the defendants did not deliver the steamer on the date agreed, and failed to deliver her until Aug. 22, 1913. The plaintiff paid the price stipulated for in the contract without deduction in respect of the delay under protest in order to get delivery of the steamer, and he claimed as damages, or as money had and received £1,750, being £10 per day for every day's delay in delivery after Feb. 28, 1913, and, in addition, £518 interest at 5 per cent. By their points of defence the defendants admitted that the steamer was not delivered until Aug. 22, but they denied that any breach of the agreement was committed, and that the delay was wholly due to causes within the exception clause of the contract, which was as follows:

> "If the steamer is not delivered entirely ready to purchaser on or before Feb. 28, 1913, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of £10 for each day of delay, and in deduction of the price stipulated in this contract, being excepted only the cause of force majeure, strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor. In case of strikes or any cause of delay, as above, the builders are to advise immediately the purchaser and at the beginning of the strike."

Among the items causing the delay were the following: Bad weather caused sixteen days' delay, shipwrights' strike two days, breakdown of machinery in Sunderland works three and three-quarter days, delay in supply of materials eleven days, football matches and holidays seven days, funeral of a Mr. Knox one day, miners' strike 182 days, making a grand total, according to the defendants, of 222 days.

Hudson, K.C., and *Dunlop* for the plaintiff.
Roche, K.C., and *Lewis Noad* for the defendants.

BAILHACHE, J.—This action was brought by Mr. Matsoukis, who is a Roumanian gentleman, against Messrs. Priestman & Co., who are shipbuilders in this country, on a contract to build a ship, which is dated Feb. 21, 1912. The action was tried before myself and a City of London special jury, and there was one question of fact left to them. It was this: Assuming that Mr. Priestman was entitled to an allowance for the delay occasioned indirectly by the Welsh coal strike, how much time ought he to be allowed in respect of this? The jury found in respect of this he should be allowed seventy days. The total amount of the delay was 175 days; seventy from 175 leaves 105. He was to be liable for this in any case, but for the fact that there were two other exceptions, in respect of which I think he is entitled to time. This in respect of the shipwrights' strike and breakdown of machinery. Allowing seven days for this, this would bring the total amount which was due to £980. A question of interest has been agreed between the parties at £20, and this is the only question which has been agreed between the parties.

The only question about which I have found a great deal of difficulty in the case turns upon this: Whether the consequential result of the Welsh coal strike, which, according to the verdict of the jury, delayed the vessel by seventy days, can it be said to be covered by exceptions in the contract. The contract is to deliver the ship on Feb. 28, 1913, and unless Mr. Priestman can bring this Welsh coal strike within the exceptions, then he is

not entitled to the allowance of the seventy days which the jury by their finding have given him. It turns upon the construction of the contract. The contract says that if the steamer is not delivered on the due date, the plaintiff agrees to be paid as liquidated damages £10 a day in deduction of the price stipulated in the contract. Then comes the clause, which is written in English, it is true, but obviously by a gentleman who is not familiar with English idiom, but, still, it is plain enough. It goes on to except the cause of force majeure, strikes of workmen in building yard where the ship is being built, or in the machinery shops, or works of sub-contractors; and the question is, what is the meaning of the words force majeure in the contract. Counsel for the plaintiff, has argued that the words force majeure can never in any circumstances cover the strike or consequence of a strike, and that in particular they cannot do it in this case because, if I take the whole of the clause and read it together, I shall find that strikes are excepted as a special cause of extension of time, and that I shall find these strikes are excluded by the fact that strikes are specifically referred to as a cause of extension. My own opinion about the matter has fluctuated a great deal in the case, although the clause as it stands seems simple enough. The words force majeure are not words which are appropriate to an English contract, and they are not common in an English contract. They are taken from the Code of Napoleon, and they were inserted in this contract by a Roumanian gentleman or by his advisers, who no doubt were familiar with the words as used in the Code of Napoleon and as used on the Continent. We have had the opinion of a Belgian lawyer, and he says the words as understood in Belgium and on the Continent are in case you cannot prevent or avoid and for which you are not responsible. Counsel for the plaintiff argued that the words practically meant the same as vis major, which in substance means very nearly the same as act of God. In my construction of the words I am influenced to some extent by the fact that they were inserted by this foreign gentleman, who was familiar with the meaning of the words upon the Continent. But I am not sure that on this account I should be entitled or bound to give them the full meaning they have on the Continent. I am not going to attempt to give any definition of the words force majeure. But I am quite satisfied I ought to give them a meaning which is more extensive than the meaning we give to the words "act of God," or the words vis major. The trouble is how much more extension, and where shall I stop? I think the strike was anticipated in this sense, that it was obvious a strike might take place, although it was common knowledge everybody was expecting that such disaster would be avoided, such a national strike. The result was that, as far as Mr. Priestman was concerned, the yards from which he had contracted to get his materials for other ships, not this one, got very much behindhand in their supplies. We all know that shipbuilding in shipyards can only be done upon certain ways or berths, and Mr. Priestman had four berths, but had other ships to build besides this, and he had in contemplation to build this ship in berth No. 2. But this ship was to follow No. 239.

The result of the coal strike, and his inability to obtain materials and coal, was this. Ship No. 239 occupied the berth for a great deal longer than it otherwise would have done. The result was that the berth was detained, and No. 231 ship could not be laid down in the berth until some time in October. As a matter of fact, it was not laid down until December. Now would, under such circumstances, the delay be described as coming under the words force majeure if it had been a direct result of the coal strike? It was not the operation of this strike directly at No. 231 which caused the delay. What did cause it was a general dislocation not only in all of Mr. Priestman's business, but all businesses in the North of England, such as makers of steel plates and things of this kind and a general dislocation of the whole businesses in the North of England. In my opinion —although, as I say, my opinion has fluctuated from time to time during the arguments in the case—I think I should be right in saying, justified in saying, that, under the circumstances, this had constituted the case of force majeure. If I were to give the words force majeure the full meaning which the Belgian gentleman said they had on the contract, there would be no doubt about it at all. I think the events which happened, this calamity of a universal coal strike, could completely dislocate all the businesses in the North, and could come within the reasonable meaning of the words force majeure. I think, therefore, Mr. Priestman to this extent is absolved from delay. This delay did

not operate directly on ship 231, and if it had been a case of building a ship which is to be built at a berth in turn, I should have had great doubt whether the words force majeure could be held to apply to a case of this kind. But, having regard to the way in which the ship was built and to the berthing, and to Mr. Priestman's right to carry on his business that way, I think I am justified in holding that these are circumstances I can take into consideration.

Then Mr. Priestman wanted an allowance in respect of bad weather, shipwrights' strike, breakdown in machinery, football, and a funeral. So far as the shipwrights' strike is concerned, this comes in the clause. I think the words force majeure cover breakdowns in the machinery. But when I come to bad weather, football matches, and funerals, then I think the words force majeure cannot in any circumstances be held to cover such things. So far as weather is concerned, I have no doubt that Mr. Priestman, in making the contract, took into account the ordinary weather one experiences in Sunderland, and took care to allow himself some time for this. The time he stipulated for to build the ship was twelve months and a week, when the actual operation of the building of the ship does not take more than six or seven months. I shall give effect to the finding of the jury, and allow him seventy days, which they have held was due to the general dislocation of the business in the North of England in consequence of the Welsh coal strike. Then there are seven days for the shipwrights' strike and breakdown in the machinery shop. I am told this leaves the number of days as ninety-eight, and for this the sum of £980 is due. Then counsel for the plaintiff wants interest in respect of a certain sum, and the parties have sensibly agreed at £20 interest. Add this to £980, and you have £1,000, and I give judgment for this amount for the plaintiff, with costs.

Solicitors: *Rowland Payne*, Cardiff; *Downing, Handcock, Middleton & Lewis*, for *Bolam, Middleton & Co.*, Sunderland.

[*Reported by* Leonard C. Thomas, Esq., *Barrister-at-Law.*]

Re PROPERTY INSURANCE CO., LTD.

[Chancery Division (Astbury, J.), March 10, 1914]

[Reported [1914] 1 Ch. 775; 83 L.J.Ch. 525; 110 L.T. 973; 58 Sol. Jo. 472]

Company—Winding-up—Examination of persons as to affairs of company—Examination in open court—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 174.

A liquidator in a voluntary winding-up drew attention in his report to serious irregularities in the company's affairs, but did not allege fraud. In order to investigate these matters the liquidator stated that it would be necessary to examine the applicants who were past directors of the company. He suggested that this examination should be in open court and the registrar subsequently made an order on those terms. The applicants, who had no objection to a private examination, objected to a public examination.

Held: an examination in open court under s. 174 of the Companies (Consolidation) Act, 1908 [now s. 268 of the Companies Act, 1948], should only be ordered in very exceptional circumstances, and, as there was no charge of fraud against the applicants, the registrar ought not to have ordered them to be examined in open court.

Quære: whether there was power in any circumstances to order an examination in open court under s. 174 of the Act of 1908.

Notes. As to the examination of persons on a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 617 et seq; and for cases see 10 DIGEST (Repl.) 934 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307; 67 L.T. 770; 40 W.R. 625; 8 T.L.R. 688; 36 Sol. Jo. 644; 2 R. 11; sub nom. *Re Great Kruger Gold Mining Co., Ltd., Ex parte Barnard, Re Trust & Investment Corpn. of South Africa, Ltd., Re Bertram Luipaard's Vlei Gold Mining Co., Ltd.*, 62 L.J.Ch. 22, C.A., 10 Digest (Repl.) 911, *6204*.

(2) *Re London and Northern Bank, Ltd., Haddock's Case, Hoyle's Case*, [1902] 2 Ch. 73; 86 L.T. 430; 50 W.R. 386; 18 T.L.R. 403; 46 Sol. Jo. 358; 10 Digest (Repl.) 939, *6438*.

(3) *Re John Tweddle & Co., Ltd.*, [1910] 2 K.B. 697; 80 L.J.K.B. 20; 103 L.T. 257; 26 T.L.R. 583, C.A.; 10 Digest (Repl.) 912, *6220*.

(4) *Ex parte Barnes*, [1896] A.C. 146; 65 L.J.Ch. 394; 74 L.T. 153; 44 W.R. 433; 12 T.L.R. 239, H.L.; 10 Digest (Repl.) 911, *6206*.

(5) *Re New Zealand Loan and Mercantile Agency Co., Ltd.* (1894), 71 L.T. 130; 10 T.L.R. 371; 38 Sol. Jo. 339; 1 Mans. 300; 8 R. 302; varied on appeal, 71 L.T. 132, C.A.; 10 Digest (Repl.) 911, *6213*.

Motions by two directors and a former director of the Property Insurance Co., Ltd., to discharge an order made by the registrar for their examination in open court under ss. 174 and 193 of the Companies (Consolidation) Act, 1908.

The company was incorporated on Apr. 27, 1898, and the applicants were appointed directors on Aug. 25, 1909. The third applicant resigned on Jan. 8, 1913. A resolution for voluntary winding-up was passed on Nov. 17, 1913, and a liquidator appointed, and a supervision order was made on Dec. 16, 1913. The liquidator made a report on Feb. 2, 1914 drawing attention to serious irregularities, but not alleging fraud. He stated that these matters could not be investigated without the applicants and others being examined and suggested that the examination should be in open court. An ex parte summons for leave to examine the applicants and others in open court under s. 174 was issued on Feb. 3, 1914, by the liquidator, and the registrar on Feb. 16, 1914, made an ex parte order directing the applicant and others to attend before a registrar to be examined in open court under ss. 174 and 193.

By the Companies (Consolidation) Act, 1908, s. 174 (1): The court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, affairs, or property of the company. (2) The court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them. (3) The court may require him to produce any books and papers in his custody or power relating to the company; but when he claims any lien on books or papers produced by him the production shall be without prejudice to that lien, and the court shall have jurisdiction in the winding-up to determine all questions relating to that lien. (4) If any person so summoned after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, not having a lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause him to be apprehended, and brought before the court for examination.

By the Companies (Consolidation) Act, 1908, s. 193 (1): Where a company is being wound up voluntarily the liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court. (2)

The court, if satisfied that the determination of the question of the required exercise of power will be just and beneficial, may accede wholly or partially to the application, on such terms and conditions as the court thinks fit, or may make such other order on the application as the court thinks just.

H. G. Wright for two of the applicants.
Wheeler for the third applicant.
Micklem, K.C., and *H. Johnston* for the liquidator.

ASTBURY, J., stated the facts and read ss. 174, 175, and 193, and said: In the present case the voluntary liquidator has made a very serious report in connection with the affairs of the company, and has obtained an ex parte order under ss. 174 and 193 for the examination of the applicants and others in open court. The question is whether this order ought to have been made. Rule 5 (2) of the Companies (Winding-up) Rules, 1909 [now rule 5 (2) of the Companies (Winding-up) Rules, 1949], provides that "examinations of persons summoned before the High Court under s. 174 of the Act shall be held in court or chambers as the court shall direct." The Companies (Winding-up) Rules, 1903, r. 5 (2), contained precisely similar language as to examinations under s. 115 of the Companies Act, 1862, while the Companies (Winding-up) Rules, 1892, r. 3 (2), provided that:

"Examinations of persons summoned before the High Court under s. 115 of the Companies Act, 1862, shall, unless the judge of the High Court shall otherwise direct, be held before the registrar in chambers."

Rule 61 of 1909 provides that the consideration of the official receiver's report "shall be before the judge of the court personally in chambers" and in practice, orders for public examination under s. 175, are always made by the judge personally. Rule 73 (2) provides that the notes of the depositions of a person examined under s. 174

"shall not be filed, or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless the court shall so direct."

Examinations under s. 115 of the Companies Act, 1862, have been treated over and over again as being private. In *Re Great Kruger Gold Mining Co.* (1) LINDLEY, L.J., referred to the power of ordering a public examination under the Companies Winding-up Act, 1890, and said ([1892] 3 Ch. at p. 325):

"Now it is obvious that the power here given to the court goes much further than the power which was conferred by s. 115 of the Companies Act, 1862. It not only in terms applies to persons who have been connected in any way with the promotion or formation of the company, as to which there may a doubt under s. 115, but it alters the whole character of the examination. The examination under s. 115 was an examination in private. This is an examination in public, and it is an examination in which any creditor or contributory may take part. It is, therefore, a very serious matter. It is all very well to say that it does not hurt a man to be examined, but we know perfectly well to what length these examinations go, and it is a very serious matter indeed to be examined under this section."

In *Haddock's Case* (2) BYRNE, J., said ([1902] 2 Ch. at p. 76):

"The Companies Winding-up Rule of Nov., 1895, provides that the notes of the deposition of a person examined under s. 115, or any order of the court, before the court or before any officer of the court, or person appointed to take such an examination, shall not be placed on the file of proceedings or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the court shall so direct; and the court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes, and the furnishing of copies and extracts therefrom. That goes to emphasise the importance of secrecy in these proceedings, except where the seal of secrecy is removed for particular purposes."

In *Re John Twiddle & Co.* (3) COZENS-HARDY, M.R., said ([1910] 2 K.B. at p. 702):

"Now it has been decided by the House of Lords in *Ex parte Barnes* (4) that there is no power to direct a person to attend to be examined unless the official receiver has pledged himself to this extent that he must say, 'In my opinion I think that A.B. and C.D., who are directors and officers of the company, have been guilty of fraud in the promotion of the company'; then the court may make an order requiring the directors to attend."

In *Re New Zealand Loan and Mercantile Agency Co., Ltd.* (5) VAUGHAN WILLIAMS, J., made an order for the public examination of certain former directors, and refused a motion to discharge the order. The directors were anxious to be examined under s. 115 of the Companies Act, 1862, and in public to get rid of the stigma of fraud cast upon them by the order under s. 8. A consent order was made discharging the order under s. 8, and directing a public examination with liberty for the official receiver and any creditor or contributory to take part putting such questions only as should be allowed by the court.

It is not necessary to decide whether there is power in any circumstances to order an examination in open court under s. 174. I am quite satisfied that an examination in open court under that section should only be ordered in very exceptional circumstances. Here there is no report by a public official. The registrar has acted on the report of the voluntary liquidator, who has stated that there are numerous matters requiring investigation, and that it is impossible to investigate them without examining the applicants and others. But there is no charge of fraud against the applicants, and the registrar ought not to have ordered them to be examined in open court, and to that extent his order will be discharged.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Roney & Co.*; *Redfern, Hunt & Co.*

[Reported by G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

POOLE *v.* STOKES

[KING'S BENCH DIVISION (Channell, Scrutton and Bailhache, JJ.), March 5, 1914]

[Reported 110 L.T. 1020; 78 J.P. 231; 30 T.L.R. 371; 24 Cox, C.C. 169; 12 L.G.R. 629]

Child—Wilful neglect—Person having custody, charge or care—Husband and wife separated—Children living with wife, husband providing maintenance—Neglect by wife with knowledge of husband—Liability of husband—Children Act, 1908 (8 *Edw.* 7, *c.* 67), s. 12, *s.* 38.

By s. 12 (1) of the Children Act, 1908 [see now s. 1 of the Children and Young Persons Act, 1933]: "If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person . . . that person shall be guilty of a misdemeanour."

By s. 38 (2) of the Act [s. 17 of the Children and Young Persons Act, 1933]: "Any person who is the parent or legal guardian of a child or young person or who is legally liable to maintain a child or young person shall be presumed to have the custody of the child or young person . . . Any other person having actual possession or control of a child or young person shall be presumed to have the care of the child or young person."

A husband and wife agreed to live apart, and the wife had the custody of their children. The husband paid the wife regularly a weekly sum sufficient for the

maintenance of herself and the children, but the wife neglected the children and failed to provide proper food and clothing for them. The husband knew of the wife's neglect and had several times complained to the National Society for the Prevention of Cruelty to Children. Both husband and wife having been summoned for wilful neglect of the children, the wife only was convicted, and the prosecutor appealed contending that the husband should also have been convicted.

Held: the husband had delegated to his wife as his agent the duty of providing clothing and food for the children; he knew that his agent was not performing the duty; and therefore, he had failed to do his duty and should have been convicted.

Notes. Section 12 of the Children Act, 1908, has been replaced by s. 1 of the Children and Young Persons Act, 1933, and s. 38 of the 1908 Act has been replaced by s. 17 of the 1933 Act.

Considered: *Brooks* v. *Blount*, [1922] All E.R.Rep. 699.

As to cruelty to children, see 10 HALSBURY'S LAWS (3rd Edn.) 759–763; and for cases see 15 DIGEST (Repl.) 1033–1037. For the Children and Young Persons Act, 1933, see 12 HALSBURY'S STATUTES (2nd Edn.) 974.

Case Stated by justices for the city of Nottingham.

At a petty sessions held at the Guildhall in the city of Nottingham on Feb. 5, 1913, one Henry Stokes (the respondent) was charged in and by a certain information made by William Poole (the appellant), an officer of the National Society for the Prevention of Cruelty to Children, that the respondent on Jan. 25, 1913, and on divers days prior thereto in the city of Nottingham, then having the custody of six children and one young person aged respectively fifteen years, thirteen years, twelve years, nine years, seven years, six years, and four years, unlawfully and wilfully did neglect such children and young person in a manner likely to cause such children and young person unnecessary suffering or injury to their health, contrary to the Children Act, 1908, s. 12. The respondent's wife Margaret Stokes was charged before the justices by an information made by the appellant that she on Jan. 25, 1913, and on divers days prior thereto in the city of Nottingham, then having the custody of the same six children and one young person, unlawfully and wilfully did neglect them in a manner likely to cause them unnecessary suffering or injury to health. On the hearing of this information it was proved to the justices that Margaret Stokes was then living with and had the custody of the six children and one young person, of which children and young person the respondent was the father, and that Margaret Stokes had wilfully neglected such children and young person in a manner likely to cause them unnecessary suffering and injury to health, and the justices convicted her of so doing, and sentenced her to one calendar month's imprisonment with hard labour. It was proved to the justices that the respondent had not been living with his wife since 1909, when he and his wife entered into an agreement to live separately and apart from one another, and that he had been paying her regularly a weekly sum of 20s. for the maintenance of herself and the above-mentioned children and young person under such agreement, and had also on occasion sent clothing for the children. The respondent said to the justices that he was a dealer in old metals, but there was not any evidence to show how much he earned on an average weekly. It was also proved to the justices that the respondent knew of the condition of the children, that the appellant had read over to him s. 38 (2) of the Children Act, 1908, and that the respondent had himself several times invoked the assistance of the National Society for the Prevention of Cruelty to Children because of his wife's neglect of the children. It was also proved before the justices, and admitted by the appellant that the respondent had to travel about to earn his living and that he could not supervise his children, and that the appellant first visited the children in consequence of the respondent's complaint to him of his wife's neglect. It was contended before the justices on behalf of the appellant that the respondent could not get rid of his responsibility to see to his children's welfare merely by making money payments, and that it was his further duty to see that the payments made were properly applied to the maintenance of the children, and that under s. 38 of the Children Act, 1908, he should be presumed to have the custody of the children and should not be deemed to have ceased to have the custody of them on the

ground that he did not reside with the mother and children. It was contended on behalf of the respondent that as he was not living with the mother and children and paid towards their maintenance he could not be presumed to have the custody of the children under s. 38 of the Children Act, 1908, and that if he had such custody such neglect had arisen in spite of the respondent's efforts, and that by consulting the officers of the National Society for the Prevention of Cruelty to Children he had taken reasonable steps to avoid his children suffering from neglect. The justices were of opinion that upon the above facts the respondent had done all he could to see that the children were not neglected in a manner likely to cause them unnecessary suffering and injury to health, and had thereby carried out his legal responsibility, and they therefore discharged the information against him. The question for the opinion of the court was whether on the facts proved before the justices the respondent was guilty of an offence under s. 12 of the Children Act, 1908.

Upon the case coming on for hearing on Oct. 15, 1913, the court made an order that the Case be remitted to the justices to be re-stated by showing (i) whether the moneys provided by the respondent were sufficient to provide for the maintenance of the wife and children and young person, and (ii) in what respect the wife of the respondent was guilty of negligence under s. 12 of the Children Act, 1908. Pursuant to the order of the court the justices stated, supplemental to the Case stated by them that they were of opinion that the moneys provided by the respondent were sufficient to provide for the maintenance of the wife and children and young person. On Jan. 25, 1913, it was proved to them that there was not any food in the house, but there was in the house a postal order for 20s. The wife of the respondent was guilty of negligence in that the children, though fairly nourished, were verminous and poorly clad, that the rooms in the house were dirty and smelt foul, and that there was not any proper bed clothing for the children.

Barrington Ward for the appellant.

The respondent did not appear.

CHANNELL, J.—The question we are asked is whether on the facts proved the respondent was guilty of an offence under s. 12 of the Children Act, 1908 [now s. 1 of the Children and Young Person Act, 1933]. We are all of opinion that upon these facts he was guilty of an offence, and therefore the case will go back to the justices, and they will deal with it properly. It is very probable that there are facts which have not been stated, but which will be known to the justices, and will affect the way in which they may deal with the case, and therefore it would not be right to say more than that upon the facts stated the case does not appear to me to be one for any considerable or substantial punishment. It may even turn out to be a case in which the justices might say under the Summary Jurisdiction Acts that there ought to be no further proceedings or punishment in the matter. That might or might not be so. It is, however, clear that under this statute the respondent has committed an offence. [HIS LORDSHIP read s. 38 (2) [now s. 17 of the Children and Young Persons Act, 1933] and continued:] The respondent and his wife had entered into a separation agreement. There was a voluntary separation and a voluntary payment by the husband, and he had been paying her 20s. a week under that agreement for the maintenance of herself and her children. The justices have found in the supplemental Case that this sum was sufficient and therefore he has provided her with a sum of money and he has sent that money to her. The respondent intrusted to his wife the spending of that money, and delegated to her the duty of providing clothing and food for them. That might be satisfactory for a time, but it is clear that he became aware of the fact that his wife was not properly using the money and that she was not providing for the children, and consequently he was in the position of having employed an agent to perform his duty and of having knowledge that that agent was not performing the duty. The consequence is that he was not doing his duty, and he has failed to do his duty. He was sending the money to his agent to do it, and that agent did not do it. He has failed to provide adequate food for the children, and therefore he is clearly liable. What he did was to go to the Society for the Prevention of Cruelty to Children and to draw their attention to the facts; but the fact that he

went to the society, apparently for the purpose of protecting the children, does not relieve him from the obligation to perform his duty himself. There was nothing, as far as we can see, to prevent him from taking his children away from his wife. Section 12 (1) of the Act says that a parent who is legally liable to maintain a child shall be deemed to have neglected him if he fails to provide adequate food, clothing, and so forth. I understand that to mean that he is to be punished as if he were guilty, although there may be no moral blame attaching to him.

SCRUTTON, J.—I agree.

BAILHACHE, J.—I agree.

Case remitted with direction to convict.

Solicitor: *Edward Downes*, for *C. E. Wells Lucas*, Nottingham.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

Re HAVANA EXPLORATION CO., LTD. NATHAN'S CLAIM

[Court of Appeal (Lord Cozens-Hardy, M.R., Bankes and Warrington, L.JJ.), October 25, 1915]

[Reported [1916] 1 Ch. 8; 85 L.J.Ch. 174; 114 L.T. 16; [1916] H.B.R. 37]

Company—Winding-up—Preferential creditor—Clerk or servant's claim for wages—Services rendered during four months before statutory date—Voluntary winding-up followed by compulsory winding-up—Claim for wages for services rendered within four months before voluntary winding-up, but outside that period before compulsory winding-up—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209.

A company passed a resolution for a voluntary winding-up, and the plaintiff, who was a servant of the company, sent in a claim to the liquidator as a preferential creditor for salary earned four months before the winding-up. The liquidator included him in the list of creditors. A year later a petition was presented for the compulsory winding-up of the company and the Official Receiver, who was appointed liquidator, disallowed the plaintiff's claim on the grounds that the services in respect of which he claimed were not rendered within four months of the commencement of the compulsory winding-up.

Held: the winding-up was a continuous process which began with the commencement of the voluntary winding-up; there was nothing to indicate that persons who had already acquired statutory preferential claims were to be deprived of them on a subsequent compulsory winding-up; and, therefore, the plaintiff was entitled to be admitted as a preferential creditor.

Re Taurine Co. (1) (1883), 25 Ch. 118, and *Midland Counties District Bank, Ltd. v. Attwood* (2), [1905] 1 Ch. 357, distinguished.

Notes. The Companies (Consolidation) Act, 1908, has been repealed and is replaced by the Companies Act, 1948. Section 319 of the 1948 Act corresponds with s. 209 of the 1908 Act, but is not in identical terms.

As to the payment of the wages of clerks and servants on a winding-up, see 6 Halsbury's Laws (3rd Edn.) 663; and for cases see 10 Digest (Repl.) 994 et seq. For the Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *Re Taurine Co.* (1883), 25 Ch.D. 118; 53 L.J.Ch. 271; 32 W.R. 129; sub nom. *Re Taurine Co., Ltd., Beckwith and Robinson's Case*, 49 L.T. 514, C.A.; 10 Digest (Repl.) 902, *6127*.

(2) *Midland Counties District Bank, Ltd.* v. *Attwood*, [1905] 1 Ch. 357; 74 L.J.Ch. 286; 92 L.T. 360; 21 T.L.R. 175; 12 Mans. 20; 9 Digest (Repl.) 566, *3734*.

Also referred to in argument:

Re Smith, Ex parte Fox (1886), 17 Q.B.D. 4; 34 W.R. 535; sub nom. *Re Smith, Ex parte Trustee*, 55 L.J.Q.B. 288; 3 Morr. 63; sub nom. *Re Smith, Trustee* v. *Official Receiver*, 54 L.T. 307; 10 Digest (Repl.) 910, *6199*.

Re Artistic Colour Printing Co. (1880), 14 Ch.D. 502; 49 L.J.Ch. 526; 42 L.T. 802; 28 W.R. 943; 10 Digest (Repl.) 1026, *7080*.

Summons taken out in the liquidation of the Havana Exploration Co., Ltd., against the official receiver, who was liquidator of the company, asking that the decision of the liquidator in rejecting a claim of the applicant's for preferential payment in the liquidation might be reversed.

The applicant was a servant of the company and was engaged under an agreement recorded in writing in a minute dated Feb. 15, 1911, for a period of three years from Feb. 1, 1911, at a salary of £600, £700, and £800 per annum for the three years respectively. On June 23, 1913, the company went into voluntary liquidation and the voluntary liquidator admitted the applicant as a preferential creditor for £50 for salary earned four months before the resolution to wind-up voluntarily, and this was entered in the directors' statement of affairs. On July 9, 1914, a petition was presented for the compulsory winding-up of the company, and on July 21 an order was made for compulsory winding-up. The applicant claimed £50, preferential payment, and lodged a proof in the compulsory winding-up for £750, being the balance of salary due to him. On May 22, 1915, the official receiver gave notice disallowing the applicant's claim for preferential payment of the £50 on the ground that the service in respect of which his claim of £50 was made was not rendered to the company within four months before the date of the "commencement of the winding-up" by the court.

The summons was adjourned into court and came on to be heard before Neville, J., on June 22, 1915. Neville, J., held that the commencement of the winding-up meant the time of the presentation of the petition for compulsory winding-up, and not the resolution to wind-up voluntarily; and that the preferential claim must be disallowed. From that decision the applicant appealed.

By s. 209 of the Companies (Consolidation) Act, 1908 [now s. 319 of the Companies Act, 1948]:

"(1) In a winding-up there shall be paid in priority to all other debts . . . (b) All wages or salary of any clerk or servant in respect of services rendered to the company during four months before [the date specified in the section], not exceeding fifty pounds. . . . (5) The date hereinbefore in this section referrred to is (a) in the case of a company ordered to be wound-up compulsorily which had not previously commenced to be wound-up voluntarily, the date of the winding-up orders and (b) in any other case, the date of the commencement of the winding-up."

F. Wheeler for the applicant.
Croom-Johnson for the liquidator.

LORD COZENS-HARDY, M.R.—This case raises a curious point which, I think, has not been previously raised in any reported case.

The material facts are very short. The company was resolved to be voluntarily wound-up in June, 1913, and a liquidator, of course, was appointed. At that date the applicant, who is the present appellant, was a clerk or a servant in the employment of the company. And he says that under s. 209 of the Companies (Consolidation) Act, 1908, he is entitled to the extent of £50 to be paid in priority to everyone else. He says that he has that right because of the opening words of s. 209:

"(1) In a winding-up there shall be paid in priority to all other debts . . . (b), all

wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding fifty pounds."

The applicant sent in his claim to the voluntary liquidator. The money was not paid, but the voluntary liquidator included him in the list of creditors, and, so far as he could, he admitted the claim. Has anything happened to deprive the applicant of that right, which is a statutory right? It is said that the circumstances are these: In July of the following year, July, 1914, there was a compulsory order made by the court and the effect of that undoubtedly is that the voluntary liquidator was ousted. The existing winding-up order is undoubtedly a compulsory order, and the liquidator under the compulsory order happens to be the official receiver here. He is the person whose duty it now is to get in the assets of the company and to administer them according to law, and the question which then arises is: What is the right given by s. 209? In order to answer that question, I must look at one or two other sections. Section 209 (1) (a), dealing with parochial rates, says: "All parochial or other local rates due from the company at the date hereinafter mentioned." They are the same words as those mentioned in sub-s. (b), the words being "before the said date," which carries you back to "at the date hereinafter mentioned." When you get to s. 209 (5) there are two cases dealt with:

"The date hereinbefore in this section referred to is (a) in the case of a company ordered to be wound-up compulsorily which had not previously commenced to be wound-up voluntarily, the date of the winding-up order."

It is quite clear that this company is not within s. 209 (5) (a) because it had commenced to be wound-up voluntarily for a year. That voluntarily winding-up order, which had commenced according to the language of the section, seems to me to exactly meet what you find in s. 209 (5) (b), "in any other case" which has not been mentioned, and this is one of them, "the date of the commencement of the winding-up." What is the date of the commencement of the winding-up in this case? It seems to me to be that which in s. 209 (5) (a) is contemplated as that of a company previously commenced to be wound-up. That being so, the only thing that this means is that the official receiver, the liquidator under the compulsory order, is not bound by the decision of the voluntary liquidator if his decision is disputed. But here it is not, because the facts are agreed. If it is disputed, the applicant must come in and prove it. Then if his position as a clerk or servant of the company during the four months is either proved or admitted, the compulsory liquidator is bound, in the administration of the assets by him, to pay the claim to the extent of £50 as one of the preferential debts of the company. That seems to me really to be the whole of this case. Every point that could be urged has been put before us by counsel for the liquidator. But I am bound to say, with great respect to the learned judge in the court below, that I have not been able to appreciate the difficulties of the case.

It is said, however, that there are two authorities which bind us as well as the learned judge to decide otherwise. One arose under s. 38 of the Companies Act, 1862 (s. 123 of the 1908 Act). It was held by a majority of the court in *Re Taurine Co.* (1); that when the sequence of events is that which happened here—a voluntary winding-up being followed by a compulsory winding-up—the date ranks from the second, the compulsory order, and not from the voluntary winding-up. That seems to me to have very little bearing on the present case. The language was quite different. There is nothing equivalent to cl. 5 here. There is no such vested right as it is sought to take away from the creditor in the present case. The other case—*Midland Counties District Bank, Ltd.* v. *Attwood* (2)—is the comparatively recent decision of SWINFEN EADY, J. That case again seems to me to create no difficulty. That was a case under the following section, s. 210, which is sometimes referred to as the fraudulent preference section; and s. 210 (2) there is in language which I should have thought was quite clear:

"For the purposes of this section the presentation of a petition for winding-up in the case of a winding-up by or subject to the supervision of the court, and a resolution for winding-up in the case of a voluntary winding-up, shall be deemed to correspond with the act of bankruptcy in the case of an individual."

There was no such language there as is found in the present case—namely, a statutory contemplation of the event that there may be first a voluntary winding-up and next a compulsory winding-up and what is to happen in that case. In my opinion the view of the learned judge in the court below was wrong, and the appeal must be allowed, and the appellant must be admitted to the position of a preferred creditor to the extent of £50.

BANKES, L.J.—I agree. In my opinion, the authorities to which we have been referred really do not touch the question which we have to decide in the present case. That depends upon the proper construction to be put upon s. 209 of the Companies (Consolidation) Act, 1908. In order to do that, it is necessary to consider not only the language of the section, but the object with which it was passed. The object with which the section was passed is quite plain. It was passed to create certain statutory preferential claims in favour of the persons mentioned in the section, in the event of the ordinary carrying on of the business of the company being interrupted by a winding-up. That was the object of the section, and the persons intended to be benefited were persons who come within the various sub-sections which are appended to the section. The section itself deals with the winding-up of a company, and I think it is plain that it deals with that winding-up as a process, and a continuous process. It may be commenced as a voluntary winding-up, and it may be continued as a compulsory winding-up. But the section speaks of it as one continuous process, because when you are dealing with s. 209 (5) (a) it speaks of the case of a company ordered to be wound-up compulsorily, which had not previously commenced to be wound-up voluntarily. Therefore it contemplates the winding-up commencing in one way and being continued in another, but for the purpose of the section being one continuous process. It is in a process of that kind, in a winding-up of that kind, that there shall be priority to all debts given to these that are mentioned. And in order to define what particular classes of persons and debts come within the preference created by the section, it speaks of them as either wages or salary or parochial or other local rates, or whatever it may be which either become due at the date hereinafter mentioned or in respect of services rendered to the company during a certain period before a certain date, and so forth. You have to look at the end of the section to see what the date referred to is, and you find that in s. 209 (5), which is split up into two sub-sections; and if you read the second sub-section in full as applicable to this case, it seems to me impossible to accept the argument that is presented to us on behalf of the respondents, because if the section was written out in full it would be: "In the case of a company ordered to be wound-up compulsorily and which had previously commenced to be wound-up voluntarily, the date of the winding-up."

Now, which winding-up? Which of those two? They are both mentioned. Why should the compulsory winding-up be accepted rather than the voluntary, when the whole scheme of the section is to benefit the persons who are in a particular position at the date of the commencement of the process of winding-up, and to whom the section has given the statutory preferential claim? What is there in the section to indicate that, in the events which happened here—namely, the commencement of the winding-up voluntarily—the persons who had already acquired those statutory preferential claims were to be deprived of them, possibly in favour of other people who had come into the service of the company after the commencement of the winding-up and after it had altered its status? I entirely fail to see any ground upon which the learned judge's view of the section can be supported, and I think this appeal ought to be allowed.

WARRINGTON, L.J.—I agree. Section 209 (b) of the Companies (Consolidation) Act, 1908 gives to a clerk or servant a priority to the extent of £50 in respect of services rendered to the company during four months before a certain date. That date is defined by s. 209 (5) in these words:

> "The date hereinbefore in this section referred to (a) in the case of a company ordered to be wound-up compulsorily which had not previously commenced to be wound-up voluntarily, the date of the winding-up; (b) in any other case, the date of the commencement of the winding-up."

That is to say, "and in a case in which the company has been ordered to be wound-up compulsorily and has previously commenced to be wound-up voluntarily, the date of the commencement of the winding-up." In my opinion, I cannot see any other construction which can be put upon s. 209 (5) (b) except that the winding-up there referred to is the winding-up which has previously been referred to under the words "previously commenced to be wound-up," treating the whole winding-up as, for this section, one continuous winding-up. What we are deciding is on this section only, and the authorities which have been cited to us refer to other sections, and seem to me neither to affect our judgment nor to be affected by it.

LORD COZENS-HARDY, M.R.—The declaration will be that the applicant is entitled to be admitted as a preferential creditor to the extent of £50, and he will get the costs both here and in the court below out of the assets of the company.

Appeal allowed.

Solicitors: *Maddison, Stirling, Humm & Davies; Gush, Phillips Walters & Williams.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

BRISTOW *v.* PIPER

[KING'S BENCH DIVISION (Ridley, Avory and Lush, JJ.), November 24, 1914]

[Reported [1915] 1 K.B. 271; 84 L.J.K.B. 607; 112 L.T. 426; 79 J.P. 177; 31 T.L.R. 80; 59 Sol. Jo. 178, 221; 24 Cox, C.C. 553]

Licensing—Permitted hours—Beer paid for and deposited outside premises during permitted hours—Collected by customer outside permitted hours—Completion of transaction during permitted hours—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, c. 24, *s.* 61).

Under the Licensing (Consolidation) Act, 1910, Sched. 6, para. C, the respondent's public house had to be closed on Sunday night between the hours of 10 p.m. and 6 a.m. on the following morning. A customer called at the public house at about eight o'clock on a Sunday evening and left a bottle which he asked should be filled with beer and be put in the stable yard that evening so that he could collect it and take it with him to his work the following morning. This was done, and the customer collected the bottle of beer before 6 a.m. on the Monday. The respondent was charged with having unlawfully opened his licensed premises for the sale of intoxicating liquors during prohibited hours, contrary to s. 61 of the Licensing (Consolidation) Act, 1910.

Held: (AVORY, J., dissenting), if a material part of the transaction of sale had remained to be carried out as a part of the whole bargain between the parties within prohibited hours, there would have been an offence within the section, but here the whole transaction was carried out and completed on the Sunday evening when the property in the beer passed to the customer, and not only was the beer sold in the strictest sense of the word, but it was delivered by being put in the yard.

Notes. Section 61 of the Licensing (Consolidation) Act, 1910, has been replaced by s. 100 of the Licensing Act, 1953.

As to permitted hours in general, see 22 HALSBURY'S LAWS (3rd Edn.) 653 et seq.; and for cases see 30 DIGEST (Repl.) 106 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Cases referred to:

(1) *Jeffrey* v. *Weaver*, [1899] 2 Q.B. 449; 68 L.J.Q.B. 817; 81 L.T. 193; 63 J.P. 663; 47 W.R. 638; 15 T.L.R. 422; 43 Sol. Jo. 588; 19 Cox, C.C. 386, D.C.; 30 Digest (Repl.) 109, *796*.

(2) *Pletts* v. *Beattie*, [1896] 1 Q.B. 519; 65 L.J.M.C. 86; 74 L.T. 148; 60 J.P. 185; 12 T.L.R. 227; 40 Sol. Jo. 297; 18 Cox, C.C. 264, D.C.; 30 Digest (Repl.) 87, *665*.

(3) *Noblett* v. *Hopkinson*, [1905] 2 K.B. 214; 74 L.J.K.B. 544; 92 L.T. 462; 69 J.P. 269; 53 W.R. 637; 21 T.L.R. 448; 49 Sol. Jo. 459, D.C.; 30 Digest (Repl.) 107, *787*.

(4) *Saunders* v. *Thorney* (1898), 78 L.T. 627; 62 J.P. 404; 14 T.L.R. 346; 42 Sol. Jo. 451, D.C.; 30 Digest (Repl.) 107, *785*.

(5) *Brewer* v. *Shepherd* (1872), 37 J.P. 102; 30 Digest (Repl.) 109, *797*.

Case Stated by Midhurst, Sussex, justices.

An information was preferred by Thomas Bristow, a superintendent of the West Sussex Constabulary (hereinafter called the appellant) under the Licensing (Consolidation) Act, 1910, against George Piper, the respondent, for that he, on May 25, 1914, in the parish of Rogate in the county of Sussex, being the holder of a licence for the sale of intoxicating liquors by retail in his house and premises there situate, did unlawfully open his licensed premises for the sale of intoxicating liquor during part of the time that his licensed premises were required to be closed by the Act. Upon the hearing of the information the following facts were proved: George Piper was the holder of a justices' licence in respect of the premises known as the Wyndham Arms, Rogate, in the county of Sussex, the hours of closing of which licensed premises were according to para. C of Sched. 6 to the Licensing (Consolidation) Act, 1910; on the evening of May 24, 1914, about 8 p.m., a man named Benjamin Brider called at the Wyndham Arms and handed to the respondent a quart bottle which he asked should be filled with beer and put out in the stable yard that night so that he could call for it and take it away with him to work next morning before the house opened, and such beer was paid for at the time that it was ordered; the bottle was so filled by the respondent and placed in the stable yard the same evening; the stable yard was within the curtilage of the premises known as the Wyndham Arms; and at 5.37 a.m. on May 25, 1914 the man Benjamin Brider came and took away the quart bottle of beer from the stable yard. The justices, being of opinion that there was a doubt whether the sale and delivery was not complete on Sunday, May 24, 1914, gave the respondent the benefit of the doubt and dismissed the information.

By s. 61 of the Licensing (Consolidation) Act, 1910, [see now s. 100, of the Licensing Act, 1953,]:

> "If any person during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in those premises any intoxicating liquor, or opens or keeps open those premises for the sale of intoxicating liquors, or allows any intoxicating liquors although purchased before the hours of closing to be consumed on those premises, that person shall be liable in respect of each offence to a fine not exceeding in the case of the first offence ten pounds, and in the case of any subsequent offence twenty pounds. . . ."

By Sched. 6, para. C, of the Act the hours of closing for the premises in question were:

> "(a) On Saturday night from 10 p.m. until 12.30 p.m. on Sunday; (b) on Sunday afternoon from 2.30 p.m. until 6 p.m.; (c) on Sunday night from 10 p.m. until 6 a.m. on the following morning; (d) on the nights of all other days from 10 p.m. until 6 a.m. on the following morning."

George Elliott, K.C., and *John Flowers* for the appellant.
du Parcq for the respondent.

AVORY, J.—As I have the misfortune to differ from my learned brothers in the conclusion at which they have arrived, I am delivering my judgment first. The question

that is raised is whether the respondent's premises were open during prohibited hours within the meaning of s. 61 of the Licensing (Consolidation) Act, 1910. According to the Act the premises could not be opened before 6 a.m., and the time when the purchaser fetched away the beer from the stable yard was 5.37 a.m. It appears to me that it is beyond doubt that the premises were open within the meaning of this section. I adopt entirely the words of BRUCE, J., in *Jeffrey* v. *Weaver* (1) where the question discussed was whether a public house was kept open during prohibited hours under s. 9 of the Licensing Act, 1874—the section which has now been replaced by s. 61, of the Act of 1910—and I think they are an excellent test in a matter like the present. The learned judge there said ([1899] 2 Q.B. at p. 454):

> "It is really a question of means of access to the interior of the premises from the outside, and if there are no such means of access, then the premises are not open or kept open within that section."

In the present case it is found as a fact that the stable yard is within the curtilage of the licensed premises, which I understand to mean that it forms a part of the licensed premises, and as the purchaser fetched away the beer from the stable yard, it seems to me quite clear that the licensed premises were open during prohibited hours on the day in question.

Then arises the question whether the premises were open for the sale of intoxicating liquor. In *Pletts* v. *Beattie* (2), WILLS, J., said ([1896] 1 Q.B. at p. 523):

> "A 'sale' may be something incomplete in itself, and the expression 'sale' may be satisfied although the actual delivery of the goods still remains to be carried out. The provisions of the Licensing Act were not framed with a regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered; these provisions are satisfied if the substantial elements of a sale take place on the licensed premises, though the beer is consumed or delivered off them."

And in the same case WRIGHT, J., said (ibid. at p. 524):

> "Enough has been done to satisfy the language of the statute, which is not to be construed with excessive legal nicety as to what constitutes a sale."

Applying the principle there laid down to the present case, I am satisfied that the transaction altogether constituted a sale; and as I have already stated that I think the premises were open during prohibited hours for the sale of intoxicating liquor contrary to s. 61 of the Act of 1910.

It has been suggested that there is a difference between the present case and that of *Noblett* v. *Hopkinson* (3). True, the facts are different, as there never have been two cases which are identically the same as to the facts. But as to the law which is applicable I can see no distinction at all between the two cases. In *Noblett* v. *Hopkinson* (3) the beer was in fact delivered by the barman who took it from the premises to some other place and there gave it to the purchaser, whereas in the present case the purchaser fetched the beer from the stable yard. As I have just said I see no distinction in law between the two cases. The present transaction is one which falls precisely within the words used by CHANNELL, J., in *Saunders* v. *Thorney* (4) (78 L.T. at p. 629):

> "A person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale."

I have not overlooked the fact that the judgment of LORD RUSSELL, C.J., in that case turned upon the question whether there had been an appropriation of the goods, but in the words which he used CHANNELL, J., expressed his view as to the meaning which ought to be put upon the section. Perhaps if it had stood alone it might have been said that this was merely an obiter dictum and not necessary for the decision; but these words were expressly adopted and quoted with approval by the majority of this court in *Noblett* v. *Hopkinson* (3). In that case LORD ALVERSTONE, C.J., said ([1905] 2 K.B. at p. 219):

> "This point (i.e., the opening of licensed houses during prohibited hours) depends on the question whether we are to adopt the test laid down by CHANNELL, J., in *Saunders* v. *Thorney* (4),"

and after quoting the words which I have already read, he proceeded (ibid.):

> "Personally, I adopt that view, and think that if any part of the bargain of sale involves the opening or keeping open of the premises for delivery of the goods on Sunday the case falls within the mischief of the section."

It appears to me that in the present case not only was it a material part of the transaction of the sale of the beer that the purchaser should fetch it from the premises during the hours when they ought to have been closed, but that it was a term of the contract of sale that he should do so. In answer to this it is asserted that the delivery of the goods was in fact complete on the Sunday night when the bottle was put in the stable yard. No doubt if the question was raised as to the exact time when the property in the beer passed or as to the exact moment when there was a delivery such as would satisfy the requirements of the Sale of Goods Act, 1893, that answer would be relevant and correct; but in my opinion it is not correct to say that for the purpose of sale under the Licensing (Consolidation) Act, 1910, the whole transaction was complete and the whole delivery complete when in point of fact the purchaser did not obtain possession until the Monday morning, at an hour when the licensed premises were required by law to be closed. For the reasons which I have given I feel bound by the decision of the majority of the court in *Noblett* v. *Hopkinson* (3) to hold that the premises of the respondent were in fact open for the sale of intoxicating liquor during prohibited hours within the meaning of s. 61 of the Act of 1910. I may also add that I also feel bound by the judgment of KENNEDY, J., in the same case on the question of appropriation when he says ([1905] 2 K.B. at p. 222):

> "I confess that I should go further, and, as at present advised, should be prepared to hold that, if on a Saturday night a man were to point to one in a row of bottles in the bar of a public-house and say that he wanted that particular bottle and would pay for it now but it must be delivered to-morrow during prohibited hours, the so delivering it would be carrying out an essential part of the transaction of sale and the case would be within the section, although in such a case there would be an appropriation of the chattel."

In my opinion the justices ought to have convicted the respondent and the appeal ought to be allowed.

LUSH, J.—The question which we are called upon to decide in the present case may be put briefly as follows: Were the justices bound upon the facts stated in the Case to convict the respondent of an offence under s. 61 of the Licensing (Consolidation) Act, 1910? The justices have said that they did not convict because there was a doubt in their minds as to whether the sale and delivery were not complete on the Sunday night, May 24, 1914, and they gave the respondent the benefit of the doubt. The question which they have submitted to this court is in a somewhat curious form—namely, whether they came to a correct determination and decision in point of law that it was doubtful if it could not be held that the sale and delivery were complete on May 24. I think that the justices mean by their question that if this court is of opinion that upon the facts as they were found they ought to have convicted, we are asked to say so and to remit the Case to them for conviction; but if, on the other hand, we hold that the facts were such that it was open to them not to convict, then the matter rests where it is and the information is dismissed.

Numerous cases have been cited in the course of the argument, and I think that the language of s. 61 of the Act affords a clue as to the various decisions. A difficulty arises as to the use of the word "sale," which has an ambiguous meaning in certain cases, and more especially when it is used in the Licensing Acts. The word "sale" may refer to a transaction in which the property in the goods intended to be transferred passes without anything more. In such a case delivery has nothing to do with the matter, or rather delivery is not a condition precedent to the vendor having a right to demand payment for the goods from the purchaser, and, if the purchaser does not pay, the vendor, as plaintiff, can bring an action for the price of goods upon a bargain and sale of the same.

The word "sale" is also used in its most ordinary sense—namely, a contract of sale completed by delivery. If there is any failure on the part of the purchaser to pay for the goods, the vendor brings his action for goods sold and delivered, and in this case delivery must be proved. Bearing these distinct meanings in mind, it is necessary to inquire how the word "sale" has been interpreted when used in s. 61 of the Licensing (Consolidation) Act, 1910, or in the corresponding section of a previous Licensing Act which the Act of 1910 has replaced.

I will first of all take *Brewer* v. *Shepherd* (5). The facts in that case were shortly these. A man was seen to enter into a public-house after closing hours and to leave the same carrying a bottle of beer. He afterwards explained that he had left the bottle at the public-house before ten o'clock, the time for closing, ordered it to be filled with beer, and then went to get shaved, after which he only called at the public-house to get the bottle of beer. The court held that there was some evidence upon which the justices might have come to the conclusion that the public-house was kept open for the sale of beer after closing hours. On that ground the court affirmed the conviction; but on reading the judgment it seems to me to be difficult to avoid coming to the conclusion that if the man had gone to the public-house with no other intention than that of fetching the bottle of beer which he had already bought there would have been no offence committed, and I take it that all that was decided was that there was some evidence that the purchase was actually made after closing hours.

The next case is that of *Saunders* v. *Thorney* (4), and it is important to examine the facts of it in order to appreciate the judgment of CHANNELL, J. There a person ordered some bottles of beer from a publican on a Saturday evening and paid for the same. It was arranged that the beer should be delivered to the purchaser on the Saturday, but for some reason or other this was not done. On the following day, Sunday, during closing hours, the purchaser sent for the beer and it was delivered to his servant. It was held that an offence had been committed in that the licensed premises had been opened for the sale of intoxicating liquors during prohibited hours. In order to appreciate and to understand the judgments it is necessary to observe that it was there held by the court that the property in the bottles of beer had not passed—a very different thing from delivery. There had been no appropriation of any specific goods, and consequently there was no sale at all until the Sunday morning. It was because there had been no appropriation on the Saturday that LORD RUSSELL, C.J., held that there had also been no sale on that day, and that the sale had taken place during prohibited hours on the Sunday. It is also important to notice the following words used by LORD RUSSELL, C.J., because they are a limitation on the judgment (78 L.T. at p. 629):

> "It is perfectly clear that if publicans were to be at liberty to say, 'It is true we opened our house on the Sunday, but we did so only under and for the purpose of carrying out antecedent contracts'—contracts made without any specific appropriation of the goods—that would open a very wide door to evade what we must take to be the real object of the legislature in these licensing matters."

In other words, if it is found that there has been no passing of property, no appropriation of goods during open hours, it would open a very wide door to an evasion of the Act. In my view it is vital, in order to appreciate the judgment of CHANNELL, J., who agreed with LORD RUSSELL, C.J., to recognise the fact that there had been no sale at all—no appropriation of the goods during the hours when the licensed premises were open. That being so, CHANNELL, J., said,

> "I think a person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale."

Inasmuch as the house in that case was open during prohibited hours on the Sunday in order that the bottles of beer might be appropriated, it is manifest that there had been no sale at all until the Sunday, and it was in reference to that fact that CHANNELL, J. gave his judgment.

That judgment received the approval of this court and was acted upon in *Noblett* v. *Hopkinson* (3). The statement of facts in this last-named case makes it quite clear that it was a term of the contract of sale that the delivery of the beer should be carried out on the Sunday. It is quite true that that is consistent with the property in the beer having passed on the Saturday night, but it was a term of the contract that the delivery should take place during prohibited hours, and this court dealt with the case upon that footing. Although it seems that the statement of LORD ALVERSTONE, C.J., in his judgment that the purchasers were to call for the beer on the Sunday morning is not altogether consistent with the statement of fact in the case that the beer was to be sent to them, the Lord Chief Justice came to the same conclusion as had been arrived at in the earlier case of *Saunders* v. *Thorney* (4), namely, that the property had not passed on the Saturday, that there had been no appropriation, and consequently that there had been no sale at all on that day. In order to deal with the question what would be the law if there had been an appropriation and a passing of property, LORD ALVERSTONE, C.J., and the other judges proceeded to consider whether, if the delivery under the contract was to take place by the licensee during prohibited hours, there would or would not be an offence against the section. In other words, the court were considering the question whether the word "sale" was used in the strictest sense or in the widest sense. Upon that question LORD ALVERSTONE, C.J., came to the conclusion that if the delivery of the beer was to be effected during prohibited hours an offence was committed under the section. KENNEDY, J., agreed with that view, and in the passage which has been read by my brother AVORY he said no more than that. It is as well to point out, in regard to the illustration which he gave of bottles of beer being left in a row in the bar, that he expressly said that if the purchaser said that he wanted a particular bottle, that he would pay for it on the spot, and that it must be delivered on the following day during prohibited hours there would be an offence; and this clearly points to this, to my mind that the word "sale" must be read in the wider sense, and that if part of the contract is that delivery is to be made during prohibited hours there is an offence. That judgment does not go any further than this, that the section is contravened if the purchaser buys the beer, as far as the passing of the property is concerned, but stipulates that the delivery shall be effected during prohibited hours.

Let us now turn to the facts of the present case. Was it a term of the contract that the vendor should deliver the beer to the purchaser during prohibited hours? Where was the delivery to be made? That is, to my mind, an all-important matter, because I have not the slightest doubt that the property in the beer passed to the purchaser on the Sunday night. I quite agree that the word "sale" is not to be construed with the strictness which it receives under the Sale of Goods Act, 1893, but there must be some limitation on the word even in the Licensing Acts. Some regard must be had as to what delivery means. The stipulation in the present case between the vendor and the purchaser was that the bottle of beer should be placed in the stable yard to be fetched away by the purchaser, and there is no doubt that it was in the stable yard at the risk of the purchaser. That being so, I am of opinion that not only was the beer sold in the strictest sense of the word, but it was also delivered by being put in the stable yard. Can it be said that any part of the transaction of sale was left incomplete? I do not think so. The case is precisely the same as if the purchaser had taken the bottle of beer into the yard himself, had left it there, and had called and taken it away on the following morning. According to my view of the whole circumstances of the case, I do not see how any person could contend that the beer was delivered on the Monday morning, and it seems to me that the whole transaction was carried out and completed on the Sunday evening during the hours when the licensed premises were properly open. As it was quite open to the justices to arrive at the conclusion—namely, that the whole matter was concluded on the Sunday night—and that no part of it had any reference to the Monday morning, I think that they were right in dismissing the information. In my opinion, therefore, this appeal ought to be dismissed.

RIDLEY, J.—I agree entirely with the judgment of my brother LUSH, and I think that the justices came to a correct decision in dismissing the information. If there had

been no previous cases dealing with the question of the sale of intoxicating liquor during prohibited hours. I cannot conceive how any doubt could have arisen about the matter at all. But there are several cases, and they have been cited to us. They run into great niceties, and distinctions have been drawn which have gone quite far enough. It is, therefore, necessary for us to examine them, and to see whether we are in any way bound by the governing principles which have been laid down in them.

One of the most important of these cases is that of *Noblett* v. *Hopkinson* (3). It is important, in considering whether there has been a sale or not, to ascertain whether or not there has been an appropriation of goods. I stated that in *Noblett* v. *Hopkinson* (3), and I think that that was the principle upon which *Saunders* v. *Thorney* (4) proceeded. In each of these cases there had been no appropriation of the beer on the Saturday: there was none until the Sunday. As LORD RUSSELL, C.J., said in *Saunders* v. *Thorney* (4) (78 L.T. at p. 629):

> "The matter rested, therefore, entirely in contract, and no property passed under or by virtue of that contract. Then on the Sunday the house was opened for the delivery of goods in respect of which there had been no appropriation and no property had passed."

The Lord Chief Justice held that that was sufficient to justify the justices in coming to the conclusion that the house had been opened for sale during prohibited hours, because the vendor was appropriating and delivering goods under the contract previously made. CHANNELL, J., said (ibid.):

> "I think a person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale."

It is important to observe that it was a material part of the transaction of sale that the goods should be appropriated in respect of the contract already made. No one would deny that, and that is the subject-matter with which he was dealing. Although the bargain began on the previous day, still a material part of the transaction of sale remained to be completed, and therefore there was, within the meaning of the section, an opening of the premises for the purpose of the sale of intoxicating liquor.

The decision in *Saunders* v. *Thorney* (4) was followed in *Noblett* v. *Hopkinson* (3). There LORD ALVERSTONE, C.J., said this ([1905] 2 K.B. at pp. 219, 220):

> "Personally I adopt that view [i.e., the view expressed by CHANNELL, J.], and think that if any part of the bargain of sale involves the opening or keeping open of the premises for delivery of the goods on Sunday, the case falls within the mischief of the section."

He adopted the principle and applied it to the facts before him in *Noblett* v. *Hopkinson* (3) which were not exactly the same as they are here and not exactly the same as in *Saunders* v. *Thorney* (4). In the former of these two cases an arrangement was made whereby the bottle having been bought on Saturday night was to be taken by the barman to the brewhouse stable within the curtilage, and he was to deliver it, as he did, in the morning within prohibited hours. That was the bargain, and that bargain was not complete until the bottle was actually handed over on the Sunday morning. As KENNEDY, J., said (ibid. at p. 222):

> "There was merely a contract for the sale of a certain quantity of beer to be delivered from the premises during prohibited hours."

According to my view that cannot be said to correspond with the facts in the present case. Here the purchaser of the beer gave the respondent a bottle and asked that it might be filled with beer and placed in the stable yard so that he might call for it and take it away early in the morning. The whole business transaction between the purchaser of the beer and the respondent was completed on the Sunday evening. I cannot assent to the view which has been advanced that because what subsequently happened took place before six o'clock on the Monday morning and in a part of the licensed premises there was something done during prohibited hours which was a material part of the whole transaction. The decision in *Noblett* v. *Hopkinson* (3) went perhaps as far as it is desirable

A that cases of this kind should go. We have said, and I adhere to it, that if a material part of the transaction of sale remains to be carried out as a part of the whole bargain between the parties within prohibited hours, then there is an offence committed under the section; but if the facts of the case are such as to show that the sale has been completed during legitimate hours, then the case does not come within the principle of *Saunders* v. *Thorney* (4) and *Noblett* v. *Hopkinson* (3) but falls into a different category. For the B reasons which I have given I think that the justices arrived at a correct decision and that the present appeal should be dismissed.

Appeal dismissed.

Solicitors: *Walmsley & Stansbury*, for *J. E. Dell*, Brighton; *Woodham Smith & Borradaile*, for *J. A. Morris Bew*, Chichester.

C [*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

D

WOOD *v.* CONWAY CORPORATION

[COURT OF APPEAL (Cozens-Hardy, M.R., Buckley, L.J., and Channell, J.), March 9, 10, 11, 1914]

E [Reported [1914] 2 Ch. 47; 83 L.J.Ch. 498; 110 L.T. 917; 78 J.P. 249; 12 L.G.R. 571]

Nuisance—Injunction—Fumes—Gasworks—Threat of extension—Impossibility of estimating future damage to property—Consideration of possible future use of property.

Where an owner of property, be it a house, garden, park, or anything else, not F necessarily a house or structure, is substantially injured in the reasonable enjoyment of his property, or by the value of the property being affected, and so is entitled to an injunction to restrain the continuance of the nuisance [or, **semble**, damages in a suitable case], the property is not to be considered only in its present condition. The owner has a right to the protection of his property, not only as it is now, but as it would be in any form in which he is entitled to use it in the future.

G A gas undertaking, in the execution of its statutory powers, discharged noxious fumes and smells over the plaintiff's land, and admitted that they intended to enlarge their plant so as to manufacture such increased quantity of gas as might be required to meet the demand for gas in their original area of supply and also in an extension thereof.

Held: the effect of an order for damages in lieu of an injunction would be to give H the plaintiff compensation in advance for the continuance of the nuisance: if the defendants' works were altered, or the process of manufacturing gas were changed, the question would always arise whether the damage then being done was that for which compensation had been given by the order of the court; and, therefore, it being impossible to foresee what might be done in the future to cause damage, it was also impossible to assess damages, and the proper remedy was an injunction.

I **Notes.** As to the grant of an injunction to restrain a nuisance, see 28 HALSBURY'S LAWS 165–168, and as to injunctions generally and damages in lieu thereof, see ibid., vol. 21, 352 et seq. For cases see 36 DIGEST (Repl.) 327 et seq., and 28 DIGEST (Repl.) 766 et seq.

Cases referred to:

(1) *Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jr.N.S. 1319; 11 E.R. 239, H.L.; 28 Digest (Repl.) 768, *211*.

(2) *Sturges* v. *Bridgman* (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 28 W.R. 200, C.A.; 36 Digest (Repl.) 251, *32*.

(3) *Jackson* v. *Duke of Newcastle* (1864), 3 De G. J. & Sm. 275; 4 New Rep. 448; 33 L.J.Ch. 698; 10 L.T. 635, 802; 28 J.P. 516; 10 Jur.N.S. 688, 810; 12 W.R. 1066; 46 E.R. 642, L.C.; 28 Digest (Repl.) 740, *17*.

Also referred to in argument:

A.-G. v. *Manchester Corpn.*, [1893] 2 Ch. 87; 62 L.J.Ch. 459; 68 L.T. 608; 41 W.R. 459; 9 T.L.R. 315; 37 Sol. Jo. 325; 3 R. 427; sub nom. *Crofton* v. *Manchester Corpn.*, *Withington Local Board* v. *Same*, *A.-G.* v. *Same*, 57 J.P. 340; 36 Digest (Repl.) 330, *745*.

Hepburn v. *Lordan* (1865), 2 Hem. & M. 345; 5 New Rep. 301; 34 L.J.Ch. 293; 13 L.T. 59; 29 J.P. 228; 11 Jur.N.S. 132; 13 W.R. 368; 71 E.R. 497; on appeal, 11 Jur.N.S. 254; 13 W.R. 1004.

Crowder v. *Tinkler* (1816), 19 Ves. 617; 34 E.R. 645, L.C.; 28 Digest (Repl.) 785, *349*.

Salvin v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705; 44 L.J.Ch. 149; 31 L.T. 154; 22 W.R. 904, L.JJ.; 28 Digest (Repl.) 889, *1183*.

Aynsley v. *Glover* (1874), L.R. 18 Eq. 544; 43 L.J.Ch. 777; 31 L.T. 219; 39 J.P. 36; 23 W.R. 147; on appeal (1875), 10 Ch. App. 283; 44 L.J.Ch. 523; 32 L.T. 345; 23 W.R. 459; 28 Digest (Repl.) 789, *387*.

National Provincial Plate Glass Insurance Co. v. *Prudential Assurance Co.* (1877), 6 Ch.D. 757; 46 L.J.Ch. 871; 37 L.T. 91; 26 W.R. 26; 28 Digest (Repl.) 794, *433*.

Shelfer v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; subsequent proceedings, [1895] 2 Ch. 388; 64 L.J.Ch. 736; 73 L.T. 42; 44 W.R. 198; 39 Sol. Jo. 583; 12 R. 441, C.A.; 28 Digest (Repl.) 895, *1263*.

Colls v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 28 Digest (Repl.) 889, *1181*.

Kine v. *Jolly*, [1905] 1 Ch. 480; 74 L.J.Ch. 174; 92 L.T. 209; 53 W.R. 462; 21 T.L.R. 128; 49 Sol. Jo. 164 C.A.; affirmed sub nom. *Jolly* v. *Kine*, [1907] A.C. 1; 76 L.J.Ch. 1; 95 L.T. 656; 23 T.L.R. 1; 51 Sol. Jo. 11, H.L.; 36 Digest (Repl.) 256, *75*.

St. Helen's Smelting Co. v. *Tipping* (1865), 11 H.L.Cas. 642; 35 L.J.Q.B. 66; 12 L.T. 776; 29 J.P. 579; 11 Jur.N.S. 785; 13 W.R. 1083; 11 E.R. 1483, H.L.; 36 Digest (Repl.) 263, *127*.

Wilson v. *Tounend* (1860), 1 Drew. & Sm. 324; 30 L.J.Ch. 25; 3 L.T. 352; 25 J.P. 116; 6 Jur.N.S. 1109; 9 W.R. 30; 62 E.R. 403; 28 Digest (Repl.) 762, *174*.

Fletcher v. *Bealey* (1885), 28 Ch.D. 688; 54 L.J.Ch. 424; 52 L.T. 541; 33 W.R. 745; 1 T.L.R. 233; 28 Digest (Repl.) 784, *344*.

Simpson v. *Savage* (1856), 1 C.B.N.S. 347; 26 L.J.C.P. 50; 28 L.T.O.S. 204; 21 J.P. 279; 3 Jur.N.S. 161; 5 W.R. 147; 140 E.R. 143; 36 Digest (Repl.) 306, *531*.

Jones v. *Chappell* (1875), L.R. 20 Eq. 539; 44 L.J.Ch. 658; 36 Digest (Repl.) 307.

Appeal by the defendants from a decision of JOYCE, J.

The plaintiff, Albert Wood, had been for many years, and was, the owner in fee simple in possession and occupier of a freehold property situate in the borough of Conway, in the county of Carnarvon, and known as Bodlondeb. The property, which comprised 60 acres or thereabouts, consisted of a dwelling-house, used by the plaintiff as his residence, and the gardens, park, woods and pleasure grounds, lodges and cottages occupied therewith, including a gardener's cottage, called Twthill. The defendants had been at all material times and were the owners of a gasworks undertaking for the supply of gas both within and without the limits of the borough. Such undertaking was constituted under the Conway Gas Order, 1880 (being a provisional order under the Gas and Waterworks Facilities Act, 1870), as confirmed by the Local Government

Board's (Gas) Provisional Orders Confirmation Act, 1880, and under the Conway Gas Act, 1909. The gasworks of the defendants in connection with their undertaking had been for some years past upon a piece of land acquired by the defendants for that purpose under the powers of the Conway Gas Order, 1880, and situate to the west of, and adjoining the plaintiff's said property. The gasworks consisted until shortly before the action of (i) a retort house, with four benches of six retorts, each having six openings each 5 ft. high by 3 ft. wide in the outside wall next to the plaintiff's property, and also having a large louvre or ventilator in the roof, and a chimney or shaft about 38 ft. high above the ground; (ii) a purifier house, containing four purifiers, with oxide and lime house adjoining; (iii) a valve house; (iv) an engine and exhauster house; (v) two gasholders, one of a capacity of 60,000 cubic ft. or thereabouts, and the other of a capacity of 120,000 cubic ft. or thereabouts; (vi) tar and liquor well; and (vii) divers other outbuildings and offices connected with such works. On Feb. 11, 1909, the plaintiff commenced against the defendants, in the King's Bench Division, an action for damages in respect of injury which the defendants had by means of noxious and offensive fumes and vapours from their gasworks caused to the trees, shrubs, and grass on his property, and for an injunction to restrain the defendants from continuing or repeating such injury, or committing any injury of a like kind. By an agreement, dated Oct. 8, 1909, and made between the plaintiff and defendants, it was agreed that the action should be discontinued; that the defendants at their own expense forthwith would close the openings in the walls of the retort house on the side next to the plaintiff's property and close the louvre or ventilator in the roof on the same side of the retort house; that in lieu of such opening and ventilator the defendants would construct metal ventilating shafts in the roof of the retort house and enlarge or reconstruct the louvre or ventilator on the south-west or opposite side of the retort house for the purpose of discharging into the air and diffusing by means of the shafts at a higher level and in a less direct method than the then method (so far as regarded the plaintiff's property) vapours or fumes which, according to the then construction of the retort house would pass through the circular openings and louvre so to be closed as aforesaid; and that the defendants would take other specified steps to abate the nuisance. Pursuant to that agreement that action was discontinued, the costs of the plaintiff thereof as between solicitor and client being paid by the defendants. At the date of the commencement of that action and at the date of the agreement a serious nuisance was being caused to the plaintiff and his property by reason of the noxious and offensive fumes and vapours which were being discharged by the defendants in connection with their gasworks over the plaintiff's property. The plaintiff alleged—but the defendants denied—that the defendants had failed or neglected to carry out the agreement in a number of respects. The plaintiff also alleged that since the agreement the defendants had been continuously and to an ever-increasing extent discharging from the gasworks over the plaintiff's property noxious and offensive fumes, vapours, and smoke, which, diffusing themselves over the plaintiff's property damaged and destroyed the trees, shrubs, and grass thereon, and destroyed or diminished the amenity of the property, and interfered with the ordinary comfort, and were dangerous to the health, of the occupiers of the premises. The defendants' area of supply was extended by the Conway Gas Act, 1909, and the defendants, with a view to meeting the increasing demand for gas which had arisen within their original area of supply, and to the extension of such area by that Act, were altering and enlarging their gasworks so as to enable them to manufacture gas in quantities nearly double, as the plaintiff alleged, the quantity which the gasworks in their present condition were capable of manufacturing. The alteration and enlargement was being proceeded with rapidly, and, the plaintiff alleged, the defendants intended so soon as the same was completed to manufacture gas in much increased quantities, with the result that the nuisance already being caused would be seriously increased. In the circumstances aforesaid serious loss and damage had been, was being, and would be suffered by the plaintiff. The plaintiff accordingly brought this action against the defendants, claiming by his statement of claim an injunction to restrain the defendants, their officers, servants, workmen, and agents from carrying on or permitting to be carried on upon the gasworks the business or undertaking of manufacturers of gas so as or in such manner as by the

discharge of noxious or offensive fumes or vapours or otherwise to cause a nuisance or injury to the plaintiff's property or to the plaintiff or the members of his family or his servants occupying the same. The plaintiff also claimed damages. By their defence the defendants admitted that they intended so soon as the alteration and enlargement of the gasworks were completed to manufacture such increased quantity of gas as might be required for the purpose of meeting the demand for gas in their original area of supply and their extended area of supply. But they denied that any nuisance had been or was now being occasioned or would be caused or occasioned to the plaintiff or his property or at all by anything done or omitted to be done by them, or that serious or any loss or damage either had been or was being or would be suffered by the plaintiff by reason of anything done or omitted to be done by them. The defendants also stated that as the owners of the gasworks undertaking they had exercised and carried out and were exercising and carrying out and intended to exercise and carry out their statutory powers and duties in a reasonable and proper manner and with due care and skill and without any negligence, and that if in fact any injury or damage had been or was being or would be caused to the plaintiff by reason of anything done or omitted to be done by the defendants (which was denied) the defendants would submit that such injury or damage could not have been and could not now or in the future be avoided by any reasonably practicable care on the part of the defendants; and that the plaintiff had no right or cause of action based on such alleged injury or damage if any. JOYCE, J., granted to the plaintiff an injunction to restrain the defendants from carrying on their gasworks in such a manner as to cause a nuisance to the plaintiff or his property. The defendants appealed.

Hughes, K.C., and *Owen Thompson* for the defendants.
Cunliffe, K.C., and *Tomlin, K.C.*, for the plaintiff.

COZENS-HARDY, M.R.—This is an appeal from a judgment of JOYCE, J., who has granted an injunction in the usual form restraining the defendant corporation, who have acquired certain gas works, from so conducting their works as to cause a nuisance to the plaintiff's property.

The plaintiff is the owner and occupier of a house called Bodlondeb at Conway. So far as I can see it is in a little park. The house itself is at a distance of some 400 yards or 500 yards from the gasworks. Some time ago a plantation of trees was planted, obviously to screen off the gasworks from the house. The plantation, or belt of trees goes right up to the fence or wall dividing the plaintiff's property from the gasworks. Originally the gasworks had a small number of the retorts which occasion the most injurious part of the nuisance complained of by the plaintiff, and the retort house was situated at a corner most distant from the plaintiff's property. Afterwards the defendants changed the position of the retort house, but it was still small. They have recently enlarged it, and have done that on the part of their premises immediately adjacent to the plaintiff's property and the plantation. The enlarged retort house will accommodate, and will in practice, when everything is finished, be worked by, I think, forty retorts. That is a very much larger number than the old house could contain. There were disputes some two or three years ago between the parties, and an agreement was then come to, reference to which might possibly have been objected to on the ground of its having been without prejudice to the rights of the parties in the event of further disputes. But it has been referred to by both sides, and it is quite clear that the effect of that agreement was that any claim for wrong before the date of it was given up, and the defendants thereby undertook to do certain things, which, to put it quite plainly, they have not done. They have enlarged the retort house, have not stopped up the louvres, but have left them quite open on to the plaintiff's ground, and they have not, I think, by any manner of means erected the ventilating shafts which by the agreement they undertook to erect. Before these extension works were commenced, or after they had been slightly proceeded with, the plaintiff complained of the nuisance, and said that the space was not sufficient; that the defendants' extension would be immediately next to his boundary and his plantation; and that the defendants ought to do their objectionable

work elsewhere, as they had plenty of other land available. I only mention that to show that there was no undue conduct on the part of the plaintiff, which ought to deprive him of such rights as he has.

According to the finding of the learned judge in the court below, and according to the facts which have been either admitted at the Bar, or established by the evidence, how does the case stand? The facts are that the fumes, the smell, and the vapour come, as obviously they must, in large quantities from the gasworks on to the plantation or belt of trees immediately adjoining the plaintiff's house, the prevailing wind being from the west, and, therefore, blowing directly on to the plaintiff's property. It is said that there are days when the wind does not blow from the west. Of course there are, but the prevailing wind being in the direction which takes the fumes and smell and smoke on to the plantation, the evidence is quite clear that the belt of trees is to some extent injured. There are some trees actually dead; others are dying, and others are so decayed that unless something is done to stop the nuisance I am satisfied that this plantation will cease to be a plantation in the course of a few years. One of the defendant's own witnesses in his evidence in chief admitted that this belt of trees was in a very sickly condition. He said that he did not like the look of the trees and would not himself like a belt of that kind to be in that condition, and that these trees looked very different from any other trees in the neighbourhood. I cannot bring myself to doubt that the effect of the defendant's gasworks upon the plantation and upon the trees, is at the present moment by no means unsubstantial, and unless it is stopped in some way it will become so substantial as in fact to destroy the plantation as a plantation. Then it is said, and we have heard a great deal of argument on this point, that the nuisance does not extend to the house where the plaintiff resides. Of course it does not. The plaintiff has never alleged that it did. But it is in evidence that the fumes, the smoke and the smell come far over the belt of trees. I care not for the present purpose whether the distance covered is 100 yards or 200 yards, because when the wind is favourable the emanations must come right over the plantation, and to some extent into the plaintiff's park. The grass in the park is let to a tenant, and in that sense the plaintiff is, of course, not in actual occupation of the grass land. But he is in actual occupation of the plantation. If and when he goes to that part of his property he will personally feel the effects of the smell and the dirt which will be found there, and it seems to me one cannot disregard that. But some of the most eloquent pieces of evidence that we have had are the actual exhibits. They have not been challenged at all, and anybody who looks at these exhibits would be rather surprised that junior counsel for the defendants, arguing with great courage, should have objected to the word "black" as applied to the trees, or in fact, to the words "very very black." I should be disposed myself to adopt all three of those epithets as applicable to these trees, the exhibits being, as I presume, fair specimens of the trees, in that portion of the belt.

I cannot doubt, and I do not think that anyone can doubt, that there is by reason of the acts of the defendants a serious, growing, and permanent injury to the plaintiff's property. We have heard a great deal about it being temporary. That argument seems to me to have nothing whatever to do with the case. This is not the case of the man who might give up his business next week. It is the case of a corporation who are the successors of a Parliamentary gas company, and, as is quite clear when one looks at the Act of Parliament, it is a corporation which is under Parliamentary obligation to supply gas by its works to its customers.

It is said that importance must be attached to the hardship that will be caused to the defendants if the plaintiff's claim is given effect to. First of all they say that they cannot cure or abate the nuisance. The learned judge in the court below in his judgment stated that he did not believe that. He thought that the defendants could abate the nuisance, and I share his belief. But whether they can or cannot is, to my mind, an irrelevant observation. They are now committing that which is a legal wrong. They are threatening and intending to continue it. There is no element of temporary nuisance here. It is about as permanent a nuisance, according to the defendants' own case, as I ever heard of. That being so, the case seems to me to resolve itself into this: Ought this court to exercise the discretion given to it by Lord Cairns' Act

[Chancery Amendment Act, 1858: repealed, but jurisdiction preserved by Statute Law Revision and Civil Procedure Act, 1883, s. 5; Statute Law Revision Act, 1898, s. 1; and Supreme Court of Judicature Act, 1873, s. 16, now Supreme Court of Judicature (Consolidation) Act, 1925, s. 18]—or by the new procedure which is treated for all purposes as identical with Lord Cairns' Act—in favour of the defendants, and say that they ought to be at liberty to buy the right to continue this nuisance to an indefinite extent and for an indefinite time? Or ought this court to say that the settled principle of the court before Lord Cairns' Act ought to be applied—namely, that where there is a legal wrong threatened to be continued the court ought as a matter of course to grant an injunction? JOYCE, J., has thought it is a proper case for an injunction. The 40s. that he gave as damages was obviously not the measure of the damage which the plaintiff had suffered. I can see no reason whatever why we should differ from that view. I do not see how it is possible to measure the damage in a case of this kind with any certainty or with any satisfaction. The plaintiff might bring a fresh action, and a fresh question might arise on each occasion of this kind: Is the damage which is now occasioned, it may be by an increase of the works, covered or not by the sum of money which was paid by the defendants to the plaintiff under the order of the court in satisfaction of the entire nuisance and depreciation of the plaintiff's property? I think that the observations made by LORD CAMPBELL in the House of Lords in *Imperial Gas Light and Coke Co.* v. *Broadbent* (1) (7 H.L.Cas. at p. 610) are not very much in point here. He indicates the exceeding difficulty of having a succession of actions whenever a nuisance exists—yearly or two yearly actions. Although to some extent that difficulty is got over by the power the court now has to assess the present damages to the property by the works, I do not think that does by any means entirely remove the force of those observations. I think that the learned judge in the court below was perfectly justified in the view that he took in this case, and that this appeal should be dismissed with costs.

BUCKLEY, L.J.—In my opinion this appeal fails. I only wish to add a word on the question of law which has been argued, and upon the decision in *Sturges* v. *Bridgman* (2) which has been used as the foundation of the argument. Setting aside for a moment the question of injury to the herbage, and setting the two little cottages at Twthill out of consideration, counsel for the defendants has argued that, assuming the noxious fumes are discharged upon the plaintiff's land, there is no cause of action, because there is no house within, say, 200 yards of the gasworks, and consequently there is no occupier who can suffer by the nuisance. That argument to my mind, is wholly unsound. The true rule of law, I apprehend, is that if any owner of property, be it a house, or a garden, or a park, or anything else, not necessarily a house or structure at all, is so substantially injured in the reasonable enjoyment of his property that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction to restrain the continuance of that nuisance.

It will be obvious that if the argument for the defendants is sound these things follow. Suppose that a man loses all his tenants by reason of the existence of a nuisance and cannot get another tenant he is without remedy, because there is no occupier, meaning that there is no person resident in the house with a nose to smell or with ears capable of being offended by noise. This also follows, that if he has no house upon his land, and erects a house and tries to get a tenant and cannot, then he is without remedy because he is without an occupier of his house, and because he could not get an occupier by reason of the existence of the nuisance. That argument is based on the decision in *Sturges* v. *Bridgman* (2). Now the decision in that case was this. It is perfectly true that this court there said that the nuisance up to the time when the physician built his consulting room at the bottom of the garden in Wimpole Street was not actionable. On that counsel for the defendants has founded himself. That I think rested upon this—that so long as the back garden in Wimpole Street was used as a garden the vibration was no nuisance, and the vibration was immaterial. The point of the case was not that the consulting room was a house, and that you could not have a nuisance except in connection with a house. The point was that until a house existed there was no nuisance, because the vibration and the noise were not such as, upon property which was used as a garden, constituted a legal nuisance at all.

It is, however, quite obvious that that is not the present case. If the facts are that persons who walk in the plaintiff's meadow or in his spinney or plantation, which is adjacent to the gasworks, are offended now in their noses or otherwise by the noxious fumes sent over the land, the owner of the property and the occupier of the property are injured, and none the less because there is not a house there. It is not necessary to have a house to be offended by a smell. The right to an injunction results, if the reasonable enjoyment of the property is affected by the nuisance. Moreover, I have no doubt myself that the owner, as distinguished from the occupier, may sue, and obtain an injunction in respect of a nuisance which substantially affects the value of his property. You are not necessarily to regard the property only in the condition in which it is now. It is quite settled in cases of light, as will be remembered in LORD WESTBURY'S decision in *Jackson* v. *Duke of Newcastle* (3) that the question whether the enjoyment of light was only such enjoyment as the plaintiff had been utilising in the occupation of his house is not the test. He may alter the user of his house and may want to enjoy lights for larger and for special purposes, and he is entitled to do so. It is true that that is a case in which the plaintiff is asserting affirmatively a right of property, and no doubt there is a distinction in that respect between that case and this, where the plaintiff is asserting negatively a right to protect his property from sulphur. But I do not think that there is any difference in point of principle. In point of principle the plaintiff is entitled to say that this is his property as it is now, or as he is entitled to use it hereafter, and that it is one which is injuriously affected by the nuisance that the defendants are committing, and in respect of that the value of his property is affected. In respect of that, I think, the plaintiff is entitled to sue.

On the facts, I do not think that I want to say anything. It is quite indisputable that there are noxious fumes or smells from these gasworks. It is not disputed that the effect upon the trees is substantial, but as a matter of money the damage is not a large amount. That, however, is not the measure of the damage at all. The fact is that these fumes are so discharged over the land that the land is rendered less capable of beneficial enjoyment for the purposes for which the plaintiff is entitled to enjoy it, and in respect of that it seems to me he is entitled to enjoy, and in respect of that it seems to me he is entitled to sue. I may also add that as regards the reasonable action by the plaintiff, it is quite plain that from 1909 onwards he has been raising objections to the way in which these works were conducted, that notwithstanding the agreement that was come to in 1909 the defendants did not comply with the obligations which they then undertook to discharge with regard to stopping or abating the nuisance. They, after his protest, deliberately built the additional retort house, leaving the louvres open so that the fumes from the old retort house and the enlarged retort house, which now form one building, could escape through the louvres. They enlarged their building with notice of his objection, and thereby so brought about the present state of things. It does not lie in their mouth to say that they will be exposed to considerable expense, after erecting their additional buildings, and it may be they have to go elsewhere. If the result is an unfortunate one for them they have brought it on themselves. Upon the facts therefore it seems to me there is an abundant case of nuisance made out; and I think the plaintiff is entitled to sue and is entitled to the injunction which he has obtained.

CHANNELL, J.—I entirely agree with the judgments that have been delivered. I should like to say a few words upon the point that impressed me most in the present case. I entirely accept the findings of the learned judge in the court below upon the facts, and as far as the evidence has been read to us, I think that it supports those findings and certainly shows no ground whatever for differing from them. Assuming those facts, the only real question that seems to me to be fairly open to doubt is whether it is a case in which the court could properly exercise its discretion and give damages in lieu of an injunction. As to that, the effect of such an order when it is made is that the court gives compensation in advance for the continuance of the injury or damage complained of which it is declining to prevent by refusing an injunction. It is easy to do that when you have got a case of a building which obstructs light, or a wall or a sewer or something

of that sort, which encroaches on a neighbour's land. Those cases are easy to deal with. But here what is complained of is a nuisance arising by the process of making gas, and if the works are altered, or if the process of manufacturing gas was changed, the question will always arise whether the damage that is then being done after the alteration, is the damage which was compensated for under the order of the court. It seems to me that in a case such as the present, it is not only impossible fairly to assess the damages, but it is also impossible to foresee exactly what will be done in the future that will cause damage; and, secondly, it is a case in which you cannot reasonably act upon the discretion of the court. In the present case one would be inclined to do it if it were practicable, because I think that it is the fact that the damage that will be done to the defendants by this injunction is, measured pecuniarily, far in excess of the damage to the plaintiff by the continuance of the nuisance. But that is not at all enough to enable the court to make such an order as this to do justice between the parties. On those grounds which have impressed me principally, I think that it is impossible to accede to suggestion that the court should make such an order. I agree, therefore, that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, for *J. W. Hughes*, Conway; *Sharpe, Pritchard & Co.*, for *Porter, Amphlett & Co.*, Conway.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

THAMES AND MERSEY MARINE INSURANCE CO. *v.* SOCIETA DI NAVIGAZIONE A VAPORE DEL LLOYD AUSTRIACO

[COURT OF APPEAL (Cozens-Hardy, M.R., Buckley, L.J., and Channell, J.), March 31, April 7, 1914]

[Reported 111 L.T. 97; 30 T.L.R. 475; 12 Asp.M.L.C. 491]

Practice—Service on foreign company—Carrying on of business by foreign corporation in this country—Test—Agents in England booking freight and selling passenger tickets—Remuneration by commission—Service on agents—Validity—R.S.C., Ord. 9, r. 8.

The test whether a foreign corporation is carrying on business in this country through an agent is whether the agent, in carrying on the corporation's business, makes a contract for the corporation, or whether the agent, in carrying on his own business, sells a contract with the foreign corporation. In the former case the foreign corporation is, and in the latter case it is not, carrying on business in this country.

A firm in England issued tickets, made contracts for the carriage of passengers and their luggage and goods, and booked freight for goods in steamers belonging to a foreign corporation. They were paid by the corporation on a commission basis plus an annual lump sum to cover rent, clerks and office expenses. An English writ against the foreign corporation having been served on a member of the firm in England, the foreign corporation applied to set it aside on the ground that it (the corporation) did not reside or carry on business within the jurisdiction.

Held: the foreign corporation was carrying on business within the jurisdiction because the English firm made contracts for the foreign corporation, and the writ had been properly served within R.S.C., Ord. 9, r. 8, since the foreign corporation was served by service on the firm or on a member of the firm.

Notes. Explained and distinguished: *The Lalandia*, [1932] All E.R.Rep. 391. Referred to: *Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to what acts of an agent here will constitute the carrying on of business in England by a foreign corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 93–95; and for cases see 13 DIGEST (Repl.) 349 et seq.

Case referred to:

(1) *Okura & Co., Ltd.* v. *Forsbacka Jernverks Akt.*, [1914] 1 K.B. 715; 83 L.J.K.B. 561; 110 L.T. 464; 30 T.L.R. 242; 58 Sol. Jo. 232, C.A.; 13 Digest (Repl.) 351, *1591.*

Also referred to in argument:

Saccharin Corpn., Ltd. v. *Chemische Fabrik von Heyden Akt.*, [1911] 2 K.B. 516; 80 L.J.K.B. 1117; 104 L.T. 886, C.A.; 13 Digest (Repl.) 351, *1589.*

Compagnie Générale Trans-Atlantique v. *Thomas Law & Co., La Bourgogne*, [1899] A.C. 431; 68 L.J.P. 104; 80 L.T. 845; 15 T.L.R. 424; 8 Asp.M.L.C. 550, H.L.; 13 Digest (Repl.) 352, *1597.*

The Princesse Clementine, [1897] P. 18; 66 L.J.P. 23; 75 L.T. 695; 8 Asp.M.L.C. 222; 1 Digest (Repl.) 205, *924.*

Act. Dampskib Hercules v. *Grand Trunk Pacific Rail. Co.*, [1912] 1 K.B. 222; 105 L.T. 695; 28 T.L.R. 28; 56 Sol. Jo. 51; sub nom. *Akt. Dampskib Hercules* v. *Grand Trunk Pacific Railway*, 81 L.J.K.B. 189, C.A.; 13 Digest (Repl.) 353, *1605.*

Walter Nutter & Co. v. *Messageries Maritimes de France* (1885), 54 L.J.Q.B. 527; 1 T.L.R. 644; 13 Digest (Repl.) 354, *1610.*

Russell v. *Cambefort* (1899), 23 Q.B.D. 526; 58 L.J.Q.B. 498; 61 L.T. 751; 37 W.R. 701, C.A.; 36 Digest (Repl.) 519, *827.*

Dunlop Pneumatic Tyre Co. v. *Act. für Motor und Motorfahrzeugban vorm. Cudell & Co.*, [1902] 1 K.B. 342; 71 L.J.K.B. 284; 86 L.T. 472; 50 W.R. 226, C.A.; 13 Digest (Repl.) 351, *1587.*

Werle & Co. v. *Colquhoun* (1888), 20 Q.B.D. 753; 57 L.J.Q.B. 323; 58 L.T. 756; 52 J.P. 644; 36 W.R. 613; 4 T.L.R. 396; 2 Tax Cas. 402, C.A.; 28 Digest (Repl.) 258, *1147.*

Newby v. *Von Oppen and Colt's Patent Firearms Manufacturing Co.* (1872), L.R. 7 Q.B. 293; 41 L.J.Q.B. 148; 26 L.T. 164; 20 W.R. 383; 13 Digest (Repl.) 349, *1581.*

Haggin v. *Comptoir d'Escompte de Paris, Mason and Barry* v. *Same* (1889), 23 Q.B. 519; 58 L.J.Q.B. 508; 61 L.T. 748; 37 W.R. 703; 5 T.L.R. 606, C.A.; 13 Digest (Repl.) 350, *1582.*

Appeal by the defendants from an order of LORD COLERIDGE, J., sitting at chambers, reversing an order of MASTER CHITTY. The plaintiffs served a writ on the defendants in an action against the defendants at the place of business in London of the defendants' agents, Marcus Samuel & Co. on a member of that firm, M. Levy. On an application by the defendants to have the service set aside, COLERIDGE, J., held that they were carrying on business at the premises of their agents. The facts are set out in the judgment of BUCKLEY, L.J.

Leck, K.C., and *Alexander Neilson* for the defendants.

Leslie Scott, K.C., and *Dunlop* for the plaintiffs.

Cur. adv. vult.

April 7, 1914. **BUCKLEY, L.J.,** read the following judgment: If contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or a person there, without referring each time to the foreign corporation for instructions, and with the result that the foreign corporation has become bound to another party, then the foreign corporation for the present purpose carries on business at that place. This, in my opinion, is the result of the decisions, of which most have been cited in this case. A foreign corporation can be served within the jurisdiction if it is found here. It is found here if it is carrying on business here. The difficult question in all these cases is to say whether the corporation is carrying on business here or not. I expressed my opinion on this matter so recently in *Okura & Co., Ltd.* v. *Forsbacka Jernverks Akt.* (1) that I shall not repeat that which I there said. I think it unnecessary to deal with the cases again.

The facts here are that for ten years (which is a substantial time) at a defined place (namely, Nos. 25 and 27, Bishopsgate Street) Messrs. Marcus Samuel & Co. in a separate part of the building, by a separate staff of clerks, and with the use of special notepaper bearing the name of the Austrian Lloyd Company, have issued tickets and made contracts for the carriage of passengers and their luggage and goods by steamers belonging to the Austrian Lloyd Company, and have on behalf of and in the name of the Austrian Lloyd Company insured luggage or goods, and have advertised in England the sailings of the Austrian Lloyd steamers. In the defendants' handbook, under the head of "General Agencies, London," the address of 25 and 27, Bishopsgate Street is given, not mentioning Marcus Samuel & Co.'s name. That address is there treated as the address of the general agency of the defendants in London. By way of contrast there will be found at p. 38, under the head of "Ticket Agencies," the names of Thos. Cook & Son, Hickie, Borman & Co., and the International Sleeping Car Co., who, on the face of the document, appear to have a limited authority as agents to issue tickets as distinguished from the general agency, which is in Marcus Samuel & Co. The letter of appointment of Oct. 29, 1904, constituted Marcus Samuel & Co. agents general for the defendants at a 5 per cent. commission on tickets sold in Marcus Samuel & Co.'s office, and 2 per cent. on tickets sold by other passenger agencies in England, and a lump sum of £480 a year was payable for rent, clerks, and office expenses. Messrs. Hickie, Borman & Co. are in that letter mentioned as persons who are to continue as passenger agents, and it is provided that their accounts shall be rendered and settled monthly with Marcus Samuel & Co. Under the relations between Marcus Samuel & Co. and the defendants, a very large business has for ten years past been carried on at Nos. 25 and 27, Bishopsgate Street in making contracts between passengers and merchants on the one hand, and the defendants on the other.

Under these circumstances, I hold as a matter of fact that this business, as carried on at Nos. 25 and 27, Bishopsgate Street, has been not the business of Marcus Samuel & Co., but the business of the defendants, conducted by that firm as their agents. If this is right, it follows that the defendants, a foreign corporation, carry on business here. There are cases, no doubt, in which a railway company or a shipping company, or a theatre or other place of entertainment may sell tickets at numerous places without its resulting that they carry on their business at those places. Each case must be judged on its own facts. The test in each case is to find the answer to the following question: Does the agent, in carrying on the foreign corporation's business, make a contract for the foreign corporation, or does the agent, in carrying on the agent's own business, sell a contract with the foreign corporation? In the former case the corporation is and in the latter it is not carrying on business at that place. Marcus Samuel & Co. do the former; Thomas Cook & Son do the latter.

As a second point it was argued that, assuming that the defendants were carrying on business in Bishopsgate Street, the person served was not the "head officer" within Order 9, r. 8. There seems to me here to be a misapprehension. If Marcus Samuel & Co. were the agents carrying on the business, they were the proper persons to be served. The service on one member of the firm is service on the firm, for each member is agent for every other. In such a case, there is no question of "head officer" as distinguished from subordinate officer. The foreign corporation is served by service on the firm, or some member of the firm. The members of the firm are for this purpose the natural persons who in this country represent the foreign corporation. The service on Mr. Levy, I think, was right. The result, therefore, is that this appeal must be dismissed.

COZENS-HARDY, M.R.—I agree. The appeal will be dismissed with costs.

CHANNELL, J.—I agree.

Appeal dismissed.

Solicitors: *Waltons & Co.*; *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

A

Re ROBERT STEPHENSON & CO., LTD. POOLE *v.* THE COMPANY

[CHANCERY DIVISION (Sargant, J.), March 11, 24, 1915]

B [Reported [1915] 1 Ch. 802; 84 L.J.Ch. 563; 113 L.T. 230; 31 T.L.R. 331; 59 Sol. Jo. 429]

Landlord and Tenant—Lease—Assignment—Covenant not to assign or sub-let without consent—Covenant running with the land.

By a sub-lease made in 1899 the lessors demised to the lessees certain ground and
C premises for the residue of a term of ninety-nine years less ten days, and the lessees covenanted, inter alia, that they would not "at any time during the said term assign or sub-let the said demised premises or any part thereof." Under the sub-lease, the expression "the lessors" was to include their executors, administrators and assigns, and the expression "the lessees" was to include their executors and administrators. Later in 1899, the lessees, having obtained a licence to assign from
D the lessors, assigned the demised premises to the S. company. In 1915 that company desired to assign the demised premises to another company.

Held: there was a general presumption that a covenant restricting assignment ran with the land, and, although "assigns" of the lessees were not mentioned in the covenant in the sub-lease, there was not sufficient indication of intention that the covenant should not run with the land; accordingly, the S. company could not assign
E the demised premises without the consent of the lessors.

Notes. As to covenants running with the land, see 23 HALSBURY'S LAWS (3rd Edn.) 644 et seq.; and for cases see 31 DIGEST (Repl.) 149 et seq.

Cases referred to:

(1) *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739; 9 B. & S. 740; 37 L.J.Q.B. 231; 19
F L.T. 238; 33 J.P. 86; 16 W.R. 1041; 31 Digest (Repl.) 410, *5399*.

(2) *Spencer's Case* (1583), 5 Co. Rep. 61a; 77 E.R. 72; 31 Digest (Repl.) 153, *2907*.

(3) *Minshull* v. *Oakes* (1858), 2 H. & N. 793; 27 L.J.Ex. 194; 4 Jur.N.S. 169; 157 E.R. 327; 31 Digest (Repl.) 151, *2891*.

(4) *Tatem* v. *Chaplin* (1793), 2 Hy. Bl. 133; 126 E.R. 470; 31 Digest (Repl.) 162, *2988*.

G (5) *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767; 66 L.J.Ch. 387; 76 L.T. 273; 45 W.R. 434; 13 T.L.R. 310; 41 Sol. Jo. 384, C.A.; 31 Digest (Repl.) 115, *2556*.

(6) *Goldstein* v. *Sanders*, [1915] 1 Ch. 549; 84 L.J.Ch. 386; 112 L.T. 932; 31 Digest (Repl.) 424, *5518*.

(7) *Fox* v. *Whitchcocke* (1616), 2 Bulst. 290; 80 E.R. 1129; sub nom. *Whitchcot* v. *Fox*, Cro. Jac. 398; 1 Roll. Rep. 389; 31 Digest (Repl.) 411, *5406*.

H (8) *Bally* v. *Wells* (1769), Wilm. 341; 3 Wils. 25; 97 E.R. 130; 31 Digest (Repl.) 154, *2919*.

Also referred to in argument:

West v. *Dobb* (1869), L.R. 4 Q.B. 634; 9 B. & S. 755; 38 L.J.Q.B. 289; 17 W.R. 879; affirmed (1870), L.R. 5 Q.B. 460; 10 B. & S. 987; 39 L.J.Q.B. 190; 23 L.T. 76;
I 18 W.R. 1167, Ex. Ch.; 31 Digest (Repl.) 412, *5418*.

Doe d. Cheere v. *Smith* (1814), 5 Taunt. 795; 1 Marsh. 359; 128 E.R. 905; 31 Digest (Repl.) 434, *5616*.

Paul v. *Nurse* (1828), 8 B. & C. 486; 2 Man. & Ry. K.B. 525; 7 L.J.O.S.K.B. 12; 108 E.R. 1123; 31 Digest (Repl.) 456, *5825*.

Goring v. *Warner* (1724), 2 Eq. Cas. Abr. 100; 22 E.R. 86, L.C.; 31 Digest (Repl.) 435, *5621*.

Philpot v. *Hoare and Robertson* (1741), Amb. 480; 2 Atk. 219, 27 E.R. 314, L.C.; 31 Digest (Repl.) 435, *5619*.

Roe d. Gregson v. *Harrison* (1788), 2 Term Rep. 425; 100 E.R. 229; 31 Digest (Repl.) 434, *5603.*

Seers v. *Hind* (1791), 1 Ves. 294; 1 Hov. Supp. 128; 30 E.R. 351, L.C.; 31 Digest (Repl.) 433, *5601.*

McEacharn v. *Colton*, [1902] A.C. 104; 71 L.J.P.C. 20; 85 L.T. 594, P.C.; 31 Digest (Repl.) 410, *5400.*

Originating Summons. This was a summons in an action for executing the trusts of a debenture stock deed executed by Robert Stephenson & Co., Ltd., seeking a declaration that the defendant company, Robert Stephenson & Co., Ltd., might assign a sub-lease dated July 24, 1899, and made between the lessors, J. Hall, deceased and Hilton Philipson, deceased, of the one part and the lessees, Sir J. W. Pease, Bart., M.P., and Sir Christopher Furness, Kt., both since deceased, of the other part without the licence or consent of the lessors or their respective executors, administrators, and assigns. Under the sub-lease, certain ground and premises were demised to the lessees for the residue of a term of ninety-nine years from March, 1881, granted by a lease dated May 1, 1883, less the last ten days thereof. By cl. 9 of the sub-lease:—

"The lessees will not at any time during the said term assign or sub-let the said demised premises or any part thereof or use the same as an inn, beerhouse, or spirit shop, or for the retail sale of any intoxicating liquor, nor shall any gunpowder, petroleum, or other explosive thing be manufactured or stored, &c."

And by cl. 13: "The expression 'the lessors' used herein shall, where the context so admits, include besides the said J. Hall and H. Philipson, their respective executors, administrators, and assigns, and the expression 'the lessees' used in these parts shall, where the context so admits, include, besides the said Sir Joseph Whitwell Pease, Bart., M.P., and Sir Christopher Furness, Kt., their respective executors and administrators."

By an indenture dated Aug. 21, 1899 (hereinafter called "the assignment"), and made between the lessees of the one part and Robert Stephenson & Co., Ltd. (hereinafter called "the company"), of the other part, the lessees assigned to the company the hereditaments and premises comprised in and demised by the sub-lease for all the residue then unexpired of the term of ninety years less the last ten days thereof, subject to the rent reserved by the sub-lease and to the covenants, reservations, and conditions therein contained, and on the part of the lessees to be observed and performed. The lessors by a licence dated Aug. 21, 1899, consented to the assignment, provided that that consent should not authorise any further or other assigning or sub-letting of the demised premises or any part thereof without their consent in writing, or prejudice or affect the personal liability of the lessees, their executors and administrators under any of the covenants, conditions, or provisions contained in the sub-lease. By an indenture dated Feb. 19, 1900 (hereinafter called "the sub-demise"), and made between the company of the one part and Sir David Dale and Sir Lindsay Wood (hereinafter called "the trustees") of the other part, the company demised unto the trustees (inter alia) the leasehold hereditaments comprised in the sub-lease for all the residue then unexpired of the term of ninety years granted by the sub-lease less the last twelve days thereof, subject (inter alia) to the covenants, reservations, and conditions therein contained. The lessors, by a licence dated Aug. 21, 1899, consented to the sub-demise, provided that the consent should not authorise any further or other assigning or sub-letting of the demised premises or any part thereof without their consent in writing. The sub-demise was granted to the trustees in the capacity of trustees for the holder of an issue of £250,000 debenture stock created by the company. By an order made on July 9, 1909, in the action a receiver was appointed on behalf of the holders of the stock of certain property and assets of the company, including (inter alia) the leasehold hereditaments and premises comprised in the term granted by the sub-lease. Palmer's Shipbuilding and Iron Co., Ltd. (herein called "the shipbuilding company") entered into a tenancy agreement with the receiver, dated Oct. 7, 1910, for a tenancy for two and a half years of the shipyard works and dock belonging to the company, with an

option of purchasing certain assets of the company including the premises comprised in the sub-lease for a sum payable in cash or, at the option of the shipbuilding company, a larger sum payable by the issue of debenture stock of a company to be incorporated under the Companies (Consolidation) Act, 1898. By an order dated Nov. 14, 1910, the tenancy agreement was sanctioned by the court. On Sept. 28, 1912, the shipbuilding company gave notice of exercising the option of purchasing the premises for the larger sum, payable by the issue of debenture stock of a company incorporated on June 5, 1912, in pursuance of the agreement, and called Palmer's Hebburn Co., Ltd. (hereinafter referred to as "the Hebburn Co."). The completion of the sale was delayed by reason of a question which arose with regard to the proposed assignment to the Hebburn Co. of the residue of the term of the sub-lease. The legal personal representatives of the lessors claimed that the company could not assign the residue of the term of the sub-lease without committing a breach of the covenant against assigning. The company contended that the covenant did not affect them, and was limited to the lessees and their respective executors and administrators. The owner of the reversion expectant on the determination of the sub-lease consented to grant his license to assign or sub-demise the premises to the Hebburn Company.

Mark Romer, K.C., and *G. M. Simmonds* for the plaintiff.
Percy F. Wheeler for Palmer's Shipbuilding Co., Ltd.
E. D. Chetham Strode for Palmer's Hebburn Co., Ltd.
A. L. Ellis for the legal personal representatives of the original lessees.

Cur. adv. vult.

Mar. 23, 1915. **SARGANT, J.**—This summons, as amended, raises the question whether the assignees of the leasehold interest under an indenture of sub-lease, dated July 24, 1899, are entitled to assign that interest without the licence or consent of their under lessors for the time being. [HIS LORDSHIP stated the facts, and also certain facts as to a deed of waiver to which the original lessors were parties. After stating the argument as to this, which, he said, was not borne out by the terms of the documents referred to, HIS LORDSHIP continued:] So far as the covenant against assignment is concerned, the rights of the lessors and lessees for the time being under the sub-lease have to be ascertained merely from the terms of the sub-lease itself.

The argument of counsel for the plaintiff was, as I understood it, first, that in general a covenant restricting assignment where the assigns of the lessee are not expressly mentioned does not run with the land; and, secondly, that, however this may be in general, the language of this sub-lease contained sufficient indications of intention that the covenant should be personal only, and not run with the land. As to the first point, *Williams* v. *Earle* (1) is, of course, an express and binding authority at the present day that a covenant restricting assignment, where the assigns of the lessee are expressly mentioned, does run with the land. And it would be necessary, therefore, for the success of counsel's first argument, to throw covenants restricting assignment into that very narrow class of covenants supposed to have been indicated by the first two rules in *Spencer's Case* (2), which just sufficiently touch the land to run with it if assigns are mentioned, but to fail to run with it if assigns are not mentioned. But the only covenants of that class mentioned in the first two rules in *Spencer's Case* (2), are covenants with regard to things not in esse at the time of the demise, such as buildings to be erected afterwards; and, since *Minshull* v. *Oakes* (3), this distinction itself must be considered as having been obliterated, as being unreasonable. Further, though the actual decision in *Williams* v. *Earle* (1), was only with regard to covenants restricting assignment in which assigns are mentioned, the reasoning of BLACKBURN, J., deals with the broad question whether a covenant restricting assignment touches and concerns the land, and this reasoning is, therefore, applicable to either form of covenant. Certainly covenants restricting assignment touch and concern the land as much as covenants to reside on the premises (*Tatem* v. *Chaplin* (4)), or covenants to buy liquors from a particular firm (*White* v. *Southend Hotel Co.* (5)); and these covenants have been held to run with the land, although assigns were not expressly named. Further, in *Goldstein* v. *Sanders* (6), EVE, J., has expressed the view that, on the balance of the authorities, a covenant not

to assign without the consent of the landlord runs with the land, and binds the assigns though not mentioned.

But although covenants restricting assignment may in general be capable of running, and be construed as running, with the land, it will be otherwise if the parties indicate an intention that they should not so run. Here it is said that such an intention is indicated, first, because the covenant does not merely restrict, but absolutely prohibits assignment, so that there can never have been in the contemplation of the parties any assignee to be bound; and, secondly, because, in the definition in the sub-lease, the word "lessees," as contrasted with the word "lessors," is not stated to include assigns. In support of the former of these two arguments, *Whitchcot* v. *Fox* (7), was cited. In that case, however, the covenant was to assign only to particular members of the original lessor's family, so that the covenant was obviously personal to the lessee himself, and not applicable after he had assigned; and the case, therefore, is no authority here. And some general remarks of WILMOT, C.J., in *Bally* v. *Wells* (8), at pp. 351–352, of that learned judge's OPINIONS AND JUDGMENTS, have, since *Williams* v. *Earle* (1), less importance than otherwise would be attached to them.

I have, therefore, to decide this matter on my view of the meaning of the sub-lease. And here it seems to me that the indications above mentioned against the covenant running with the land are entirely outweighed by other considerations. The sub-lease was for a period of some seventy-two years; and the special language from which it is sought to show that the covenant against assignment did not run with the land applies equally to all the other covenants in the sub-lease, such as those to pay rent, to pay outgoings, to repair, to allow entry, and so on. It is inconceivable that, under such circumstances, the parties intended that there should never be any assignment or under-leasing at all during the whole of the seventy-two years; or that, in case of assignment, the assignee should be free from the whole of the obligations of the lease, unless he undertook them de novo. No doubt it was contemplated that the lessees would from time to time apply to the lessors to waive the prohibition against assignment; and that thus the same results would follow as if the more usual form preventing assignments without consent had been used which merely prohibits assignments without consent; and, no doubt, also the word "assigns" was omitted from the definition of "lessees" in the lease in view of this prohibition, and on the same ground on which the phrase "permitted assigns" is sometimes introduced into such clauses—namely, a not unnatural, but unfounded, apprehension that the recognition of the possibility of there being assigns might be held to be inconsistent with the prohibition or restriction of assignment.

In my judgment, therefore, there is not enough in the special language of the sub-lease to negative what I have found to be the general presumption—namely, that a covenant restricting assignment runs with the land; and I declare that the lessees are not entitled to assign or sub-let without consent of their lessors.

Solicitors: *Slaughter & May; Rawle, Johnstone & Co.*, for *Cooper & Godger*, Newcastle-upon-Tyne; *Roney & Co.*

[*Reported by* MORGAN L. MAY, ESQ., *Barrister-at-Law.*]

BESTERMANN *v.* BRITISH MOTOR CAB CO., LTD., AND ANOTHER

[COURT OF APPEAL (Vaughan Williams, Kennedy and Swinfen Eady, L.JJ.), February 13, 1914]

[Reported [1914] 3 K.B. 181; 83 L.J.K.B. 1014; 110 L.T. 754; 30 T.L.R. 319; 58 Sol. Jo. 319]

Costs—"Bullock order"—Two defendants—Plaintiff successful against one defendant—Test whether unsuccessful defendant should be ordered to pay costs of successful defendant—Reasonableness of joinder of defendants.

The plaintiff claimed damages from the two defendants for personal injuries incurred in a collision between a cab and an omnibus. The jury found in favour of the plaintiff against the first defendants, and in favour of the second defendants against the plaintiff. The first defendants had before the trial informed the second defendants, but not the plaintiff, that they would hold the second defendants liable; by their defence they did not, but at the trial they did, try to throw the blame on the second defendants. LORD COLERIDGE, J., held that the plaintiff was entitled to recover from the first defendants the costs which he was liable to pay to the second defendants.

Held: it was not necessary, for an unsuccessful defendant to escape the obligation to pay a successful co-defendant's costs, to have declared that he did not intend to throw any blame on his co-defendant; the proper test whether an unsuccessful defendant should bear the costs payable by the plaintiff to a successful defendant was whether in the circumstances of the case the plaintiff had acted reasonably in joining both defendants; in the present case LORD COLERIDGE, J., had exercised his discretion rightly, and his order must stand.

Notes. As to costs in actions against two or more defendants, see 30 HALSBURY'S LAWS (3rd Edn.) 318; and for cases see DIGEST (Practice) 877–880.

Cases referred to:

(1) *Mulhern* v. *National Motor Cab Co., Ltd.* (1913), 29 T.L.R. 677; Digest (Practice) 878, *4187*.

(2) *Vine* v. *National Motor Cab Co., Ltd.* (1913), 29 T.L.R. 311; Digest (Practice) 879, *4188*.

(3) *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264; 76 L.J.K.B. 127; 95 L.T. 905; 23 T.L.R. 62; 51 Sol. Jo. 66, C.A.; Digest (Practice) 878, *4185*.

(4) *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K.B. 533; 72 L.J.K.B. 761; 89 L.T. 159; 52 W.R. 33, C.A.; Digest (Practice) 878, *4184*.

Appeal by the defendants, the British Motor Cab Co., Ltd., from a decision of LORD COLERIDGE, J.

The plaintiff issued a writ, dated Feb. 19, 1912, against the British Motor Cab Co., Ltd., and the London General Omnibus Co., Ltd., claiming damages for injury to the plaintiff by the negligent driving of the defendants or their servants. By his statement of claim the plaintiff alleged that he had suffered damage by personal injuries caused by the negligence of the defendants' servants, or of the servants of one or other of the defendants, while driving motor vehicles on Jan. 20, 1912. As particulars of negligence he alleged that the first-named defendants' servant drove a motor cab in which the plaintiff was a passenger at a furious rate and in a reckless manner down Ludgate Hill and into Ludgate Circus and kept no proper look-out at the intersection of the above-named thoroughfares, driving at a rate unsuitable and dangerous, and ran into a motor omnibus belonging to the second-named defendants. The servants of the defendants the London General Omnibus Co., Ltd., failed to keep a proper look-out while crossing the intersection of Ludgate Hill and Ludgate Circus, and the servants of each defendant were negligent in not avoiding the vehicle of the other defendant. The defendants the

British Motor Cab Co., by their defence, denied that their servant was guilty of negligence, but made no reference to the other defendants. The defendants the London General Omnibus Co., by their defence, denied that they or their servants were guilty of negligence. They admitted the allegations contained in the statement of claim save in so far as they contained statements alleging negligence against or imputing liability to them. On Jan. 22, 1912, the general manager of the cab company wrote to the omnibus company saying that the cab company would hold the omnibus company liable for the damage done to the cab. On the same day the omnibus company informed the cab company that they would hold the cab company responsible for the damage done to the omnibus. On Jan. 23, the plaintiff's solicitor wrote to the cab company that he would hold them responsible, and on Jan. 26, he sent a similar letter to the omnibus company. On Mar. 7, the plaintiff's solicitor wrote to the cab company's solicitor asking whether he would admit liability, in which case he would discontinue the action against the other defendants. The cab company's solicitor answered that nothing had taken place which could occasion the question to be put whether his client admitted liability. At the trial of the action each defendant attempted to throw the blame for the collision on the other The jury returned a verdict for the plaintiff as against the cab company with £750 damages, but found in favour of the omnibus company. After argument, LORD COLERIDGE, J., directed that judgment should be entered for the plaintiff against the cab company for £750 with costs, such costs to include all costs incurred against the cab company by reason of there being two defendants, and, further, the costs the plaintiff might have to pay the omnibus company. He further directed that judgment should be entered for the omnibus company with costs against the plaintiff. The cab company appealed.

McCall, K.C., and *J. B. Matthews, K.C.*, for the British Motor Cab Co.
Sanderson, K.C., and *Martin O'Connor* for the plaintiff.

VAUGHAN WILLIAMS, L.J.—We have had cited to us two recently reported cases, in one of which—namely, *Mulhern* v. *National Motor Cab Co., Ltd.* (1)—there is a judgment of BANKES, J., which deals with the question of costs payable to a successful defendant by an unsuccessful defendant. BANKES, J., says that:

> "After the accident the plaintiff first complained to the London General Omnibus Co., and his solicitor applied for compensation from them, but they denied liability and said that the accident had been caused solely by the negligence of the taxi-cab driver. That being so, if in the end the jury had found that it was attributable to the negligence of the omnibus company, that company would have been within the recent authorities as to costs where there were co-defendants, because they had in effect invited the plaintiffs to join the motor cab company as co-defendants. On the refusal of the omnibus company to admit liability the plaintiff applied to the cab company, and they, while denying any liability on their own part, abstained from throwing the responsibility on the omnibus company. Was that mere abstention enough to take them out of the recent rule as to costs? In his Lordship's opinion it was not. He thought that for a defendant to escape the obligation to pay the plaintiff's costs against a co-defendant he must do something more than merely deny negligence on his own part; he must go so far as to say that he does not intend to throw any responsibility on the other defendant. If he made it clear that he did not intend to throw responsibility on the other defendant he could not be said to have invited the plaintiff to go on against the other defendant, but in the absence of a clear disclaimer the plaintiff was left in the same position as if the one defendant had contended that the other was to blame. The plaintiff, therefore, was entitled here to add to the costs which he recovered against the motor cab company the costs which he had to pay to the successful defendants, the omnibus company."

I say of that judgment the same that I say of the argument before us. They are really both of them based upon the old obligation to declare whether or not one person means to throw the blame on the other. So far as that is concerned, I do not think there is any such rule, and I do not believe that any such rule could be supported.

I looked at the other recent case, *Vine* v. *National Motor Cab Co., Ltd.* (2). That is a decision of BUCKNILL, J. He says that:

> "The question he had to consider was whether the proper order to make was that the plaintiff should recover from the unsuccessful defendants the costs which he would be compelled to pay to the London General Omnibus Co. who had been successful in the action as against him. In order to determine this question, he must consider what was the attitude taken up by the unsuccessful defendants. His Lordship reviewed the circumstances of the case, and said that when the plaintiff's solicitors wrote before action to the National Motor Cab Co. the latter in replying should have said something which would have been a guide to the plaintiff as to whether he ought to join the London General Omnibus Co. as the defendants or not. The plaintiff with his limited knowledge of the facts was entitled to bring an action against both the defendants, but the first defendants, when they were applied to by the plaintiff, ought to have said whether they alleged negligence against the omnibus company or not. There would be judgment for the plaintiff against the National Motor Cab Co. for £250 and costs, and judgment for the London General Omnibus Co. against the plaintiff with costs; such costs, however, must be paid to the plaintiff by the National Motor Cab Co."

Again, I say I cannot recognise any such duty as is put upon them there. This is based, as was the argument for the plaintiff in the present case, upon a hypothesis that you are entitled to ask a question and have information as to what is the view of one defendant, and what is the course to be taken in respect of the other defendant's liability. I recognise no such duty of any sort or kind. I gave, in the course of the argument, an instance to show that it would be utterly unreasonable; but I do not think my instance was quite as good as the instance which was given by counsel for the Motor Cab Co., who took the instance of a company, who could have only hearsay knowledge as to what took place, and necessarily must wait until the trial came, in order to know whether there was any ground for throwing liability upon the other defendant or not. I entirely reject the idea that there is the right to ask the question or the obligation to answer it.

That being so, I have to deal with this matter upon the basis of the judgment in the Court of Appeal in *Bullock* v. *London General Omnibus Co.* (3). I am going to read the judgment of the present Master of the Rolls in that case, because I think that puts—I will not call it a rule, because there is no positive rule—the test whether or not the unsuccessful defendant should have to bear the costs payable to the successful defendant by the plaintiff upon what I understand to be proper grounds. What COZENS-HARDY, L.J., said ([1907] 1 K.B. at p. 272) was:

> "The facts of the case are that there was a judgment for the plaintiff against the General Omnibus Co. and a judgment in favour of the other defendants. Costs followed in each case, but the question is what is the meaning that the learned judge was entitled to give to the term 'costs' in s. 5 of the Judicature Act, 1890? The Master of the Rolls has referred to the opinion of STIRLING, L.J., in giving judgment in *Sanderson* v. *Blyth Theatre Co.* ([1903] 2 K.B. at p. 543) that it includes costs which a particular party may be ordered to pay in the first instance, and then to have over against another; but I may refer also to the judgment of ROMER, L.J., in the same case in which he said (ibid. at p. 539):
>
> 'This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground that, in such an action as I am considering, those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant.'
>
> That was the principle adopted by the learned judge in this case, and, in my opinion, he had ample jurisdiction to make the order and good ground for the exercise of his discretion."

That seems to me to be perfectly right; it has nothing to do with this fancied obligation. There had been a collision, and it arose under such circumstances that the

injured person would naturally not have full information as to whose fault it was, but that it might have well been the fault of one or other or of both these people. Those being the circumstances of the case, it turns out after the trial that there was only one wrongdoer, and that that wrongdoer had been sued and successfully sued. Under these circumstances, was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrongdoer to join the other defendant in order that the matter might be thoroughly threshed out? If, in the circumstances of the case, it was a reasonable thing to do, then he was entitled to add as part of the costs in bringing this reasonable action in which he reasonably joined this other person the costs of that other person who is found not to be at fault. Of course, the fact that there were two people who, upon the face of the transaction, might, either of them, have been guilty is what made it reasonable in the plaintiff when he brought this action to join both of these defendants, and, as it was part of the reasonable course of the action that he properly brought his action against a man who, it turned out, was a wrong defendant, I agree, under the circumstances, he ought to get the reasonable costs in that action in which both defendants were reasonably joined, although only one turned out to be the real defendant.

I would wish in most emphatic terms to protest against this idea of the right to ask the question: "Are you going to blame your co-defendant?" or the alternative is just as bad—though you do not ask him, he is under some sort of duty to express his view. The proper way is, not to join any defendant unreasonably. If the facts are such that it is reasonable to join two defendants, and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is reasonable that the costs of the action that you have launched against one of those defendants who has succeeded in defending himself should be borne by the one who is to blame. There is no rule in the matter; each case must turn upon its own circumstances. If it were said to me: "This is a discretion exercised by the judge and we must not interfere with his discretion," I do not agree at all. It turns on the facts of each case; and, in my judgment, if the facts of the case do not show any reasonable ground for suing both defendants and the learned judge makes the order that has been made in this case, it seems to me that, without interfering with his discretion at all in the facts of the case, I should have to overrule that order. In this particular case we have ample evidence from both defendants that it was reasonable to join them both, because each blamed the other. I do not say that they gave notice of their blaming, but, in fact, each, when the trial came off, tried to put the blame on the other. Under these circumstances I think it was a reasonable order, and I do not base this judgment on the ground of any rule referring to the costs.

KENNEDY, L.J.—I am of the same opinion that this appeal fails on this question of costs. I think that the matter is simple, and without any great difficulty. The question is: Was the discretion, which the judge has in dealing with these costs, rightly exercised? When I say "rightly exercised," it has been now settled law for years that the Court of Appeal will not interfere where there is a discretionary power which is committed to the judge of first instance if there is material upon which that discretion may be judicially exercised and he has judicially exercised the discretion in the matter upon such materials. Here it is unquestionable, to my mind, that the question how these costs should be borne was a matter with which LORD COLERIDGE, J., had to deal, and in respect of which he had to exercise a discretion. They were costs in which he had a right to say: "Good cause has been shown to me why the plaintiff is entitled to add the costs which he is liable to pay to the successful defendant to the costs that he will recover against the unsuccessful defendant."

Was there material upon which he could come to the conclusion to which he came, using his discretion judicially? I think there was. I think, as my Lord has said—and, as I think, the facts show quite plainly—in a case of this kind of a night accident collision, with a man who is rendered insensible, as I understand, by the collision at the time, it is reasonable to join both defendants. I entirely agree that there is no rule. To my mind, directly you use the word "discretion," there cannot be a rule properly so called. There is no rule as to what in all cases all defendants should do. At the same

A time, I can quite conceive a case in which a not unimportant element in considering whether the judge has rightly exercised his discretion is whether or not one of the defendants has or has not made a particular statement with regard to liability. Take the case, for example, which is the easiest and the commonest case, of a man who has represented himself to be an authorised agent when in fact he is not. To my mind, business reasons as well as fairness would require in that case, if the matter was repudiated by B the principal, that the agent should be asked by the person with whom he has made a contract in the name of the principal: "Do you or do you not say that your principal gave you authority? Am I to be quite clear, if I go to trial against your principal in this case, that you are prepared to say that he, and not you, is liable?" But it is impossible to say that there is a rule according to which you can say what will compose reasonableness, as the result will vary in every case, and I strongly suspect that both my brethren C in the cases cited were really meaning to say on the facts in each particular case that it was a reasonable thing to do. Whether they were right or wrong, we are not considering, because, happily, neither of those cases are under appeal; but one must not press dicta quoted in that way beyond a reasonable limit, and I am quite willing to believe that that was the view really expressed in the language quoted to us. But, in my view, to lay down a rule in a matter of discretion is not right, and I do not think D that the learned judges intended to put forward that proposition. In the present case, as I have said, there was a night collision, and, in fact, when the judge had to deal with this question of costs, we find that each of the parties had been trying the case before him upon the basis that their success depended upon their proving the other side to have been to blame, and not on any question of inevitable accident, or anything of that kind. He also found that long before that they had intended to do that which they carried E out.

One word only with regard to *Bullock* v. *London General Omnibus Co.* (3). It is quite true that in that case COLLINS, M.R., said in terms ([1907] 1 K.B. at p. 269):

> "The common sense underlying this order is clear, because the learned judge when he made it had before him evidence that, owing to the attitude taken up by the General Omnibus Co., it was reasonable for the plaintiff to join the other defendants."

F The contention on behalf of the Motor Cab Co., is that, unless you can find something on the part of the defendant who is sought to be saddled with the costs which he has done or written or said to mislead the other side, he cannot be reasonably called upon to pay the costs which he has incurred in his defence, and that *Bullock* v. *London General Omnibus Co.* (3) is distinguishable. With great respect, I do not agree that in that case G the Master of the Rolls says that that is an artificial condition upon which exercising discretion in this way can alone be justified, and I should point out that in *Bullock* v. *London General Omnibus Co.* (3), the main question was whether there was or was not jurisdiction. That is expressly stated by the same learned judge, who was then Master of the Rolls (ibid. at p. 270):

> "In my opinion, the objection taken upon the ground of want of jurisdiction to H the order of the learned judge fails. Upon the merits, the order seems to me to be clearly right, and no argument has been brought before us to show that there was not."

So that it was not really a case which depended upon the merits, or, in other words, on good grounds for the exercise of the discretion, but was, as the Master of the Rolls—who has used the words to which I have just referred in regard to the merits—said:

I

> "I heard no argument to contest the proposition that the merits were quite in favour of the exercise of the learned judge's discretion."

In my opinion, this appeal fails.

SWINFEN EADY, L.J.—I am entirely of the same opinion. Under the Judicature Act and the rules the court has full discretion over the costs of such an action as the present, and it has jurisdiction to order the plaintiff to pay the costs of a defendant against whom the action fails, and to recover the costs so paid from the defendant against

whom the action has succeeded, and whose conduct has necessitated the action. That was a jurisdiction which was exercised in Chancery, and the old method of exercising it was by ordering the plaintiff to pay the costs of the successful defendant and then recover the costs so paid, together with his own, from the unsuccessful defendant. Subsequently, to avoid circuity, orders were made whereby one defendant was directly ordered to pay the costs of a co-defendant. But there were difficulties in the way of so doing that where the action was tried with a jury, and, therefore, it was open to a judge to follow the old practice—which has been done in the present case—to order the plaintiff to pay the costs of the defendant who succeeded, and then direct him to recover them over as his own costs against the defendant who has failed.

The ground upon which it was put by ROMER, L.J., in *Sanderson* v. *Blyth Theatre Co.* (4), was that the costs were in no true sense damages. The costs are ordered to be paid by the unsuccessful defendant on the ground that, in such an action as I am considering, those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant. It was pointed out by the present Master of the Rolls that that was really the ground upon which *Bullock* v. *London General Omnibus Co.* (3), proceeded, because in *Bullock's Case* (3), COZENS-HARDY, L.J., quotes with approval the passage I have just read from *Sanderson* v. *Blyth Theatre Co.* (4), and says this ([1907] 14 B. at p. 272):

> "That was the principle adopted by the learned judge in this case, and, in my opinion, he had ample jurisdiction to make the order and good ground for the exercise of his discretion in making it."

Applying that to the facts of this particular case, it is a case in which there was a collision between a motor cab and a bus, and the plaintiff was injured. Each—that is to say, the motor cab company and the bus company—blamed the other for the collision. They wrote letters the same day, which have been read to us, each blaming the other for the collision, and, after certain repairs had been done to the cab, the cab company sent in a formal claim against the bus company to repay the expenses so incurred. At the trial, when the matter was tried out, each side threw the blame on the other, and alleged that it was the negligence of the servants of the other company which had caused the accident. Under these circumstances the learned judge had the facts before him, and said that the costs were to be paid by the defendant whose conduct had necessitated the action. In substance, that is what his order was—the unsuccessful defendant was to pay the costs of the plaintiff and of the successful defendant. It does seem to me that that was essentially a just and proper order to make. There was a collision, the plaintiff said; in his claim he alleged injury to him so caused by the negligence of the defendants, or one of them. It was obviously convenient that those two claims should be combined in one action arising out of the same set of circumstances and be tried together, and, in my opinion, it is in the interests of justice that the person who fails in an action brought under these circumstances should pay the costs occasioned by his negligence, including the costs reasonably and properly incurred by bringing the other defendant before the court.

Appeal dismissed.

Solicitors: *A. Oldrid Clarke; D. H. Pettitt.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

HOLLINSHEAD *v.* HAZLETON

[House of Lords (Lord Atkinson, Lord Shaw, Lord Parker of Waddington and Lord Sumner), November 11, 12, 19, December 10, 1915]

B [Reported [1916] 1 A.C. 428; 85 L.J.P.C. 60; 114 L.T. 292; 32 T.L.R. 177; [1916] H.B.R. 85]

Bankruptcy—Property available for distribution—Salary of member of Parliament—Attachment for benefit of creditors—Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 *Vict., c.* 58), *s.* 51.

C On June 17, 1914, judgment was obtained against the respondent for £2156, being the taxed costs, with interest, of an election petition, which resulted in the respondent being unseated in 1911 as member of Parliament for North Louth. He was subsequently elected member of Parliament for North Galway, but resigned his seat, and on June 5, 1914, was, on his own petition, adjudicated bankrupt. On July 28, 1915, he was re-elected for North Galway, while still undischarged. In bankruptcy proceedings instituted by the election petitioners, who were the only creditors, it was D ordered that the respondent should pay out of his salary as a member of Parliament £200 per annum in quarterly instalments to the appellant, the official assignee in bankruptcy, to be applied for the benefit of the judgment creditors. On appeal.

Held: the annual payment made to a member of Parliament was "salary or income" within the Bankruptcy (Ireland) Amendment Act, 1872, s. 51, and, therefore, the court had power to appropriate part of it for the benefit of his creditors.

E **Notes.** Considered: *Re Landau, Ex parte The Trustee* v. *Bankrupt*, [1934] All E.R. Rep. 130. Referred to: *Re Tennant's Application*, [1956] 2 All E.R. 753; *Taylor (formerly Kräupl)* v. *National Assistance Board and Law Society*, [1956] 2 All E.R. 455.

As to appropriation of salary or income, see 2 Halsbury's Laws (3rd Edn.) 456 et seq.; and for cases see 5 Digest (Repl.) 994 et seq.

F Cases referred to:

(1) *River Wear Comrs.* v. *Adamson* (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 17 Digest (Repl.) 259, *633*.

(2) *Lucas* v. *Harris* (1886), 18 Q.B.D. 127; 56 L.J.Q.B. 15; 55 L.T. 658; 51 J.P. 261; 35 W.R. 112; 3 T.L.R. 106, C.A.; 21 Digest 634, *2157*.

G (3) *Flarty* v. *Odlum* (1790), 3 Term Rep. 681; 100 E.R. 801; 8 Digest (Repl.) 564, *163*.

(4) *Lidderdale* v. *Duke of Montrose* (1791), 4 Term Rep. 248; 100 E.R. 1000; 8 Digest (Repl.) 864, *165*.

(5) *Wells* v. *Foster* (1841), 8 M. & W. 149; 10 L.J.Ex. 216; 5 Jur. 464; 151 E.R. 987; 8 Digest (Repl.) 567, *190*.

(6) *Dunn* v. *R.*, [1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695; 60 J.P. 117; 44 W.R. 243; 12 T.L.R. 101; 40 Sol. Jo. 129, C.A.; 11 Digest (Repl.) 571, *85*.

H (7) *Gould* v. *Stuart*, [1896] A.C. 575; 65 L.J.P.C. 82; 75 L.T. 110; 12 T.L.R. 595, P.C.; 11 Digest (Repl.) 570, *80*.

(8) *Re Saunders, Ex parte Saunders*, [1895] 2 Q.B. 117, 424; 64 L.J.Q.B. 739; 73 L.T. 172; 59 J.P. 740; 44 W.R. 30; 11 T.L.R. 434, 505; 39 Sol. Jo. 640; 2 Mans. 361; 14 R. 567, C.A.; 5 Digest (Repl.) 996, *8035*.

I (9) *Re Huggins, Ex parte Huggins* (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 30 W.R. 878, C.A.; 5 Digest (Repl.) 995, *8023*.

(10) *Re Wicks, Ex parte Wicks* (1881), 17 Ch.D. 70; 50 L.J.Ch. 620; 44 L.T. 836; 29 W.R. 525, C.A.; 5 Digest (Repl.) 995, *8026*.

(11) *Cooper* v. *R.* (1880), 14 Ch.D. 311; 49 L.J.Ch. 490; 42 L.T. 617; 28 W.R. 611; 16 Digest 240, *360*.

(12) *Re Shine, Ex parte Shine*, [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146; 40 W.R. 386; 8 T.L.R. 279; 36 Sol. Jo. 295; 9 Morr. 40, C.A.; 5 Digest (Repl.) 994, *8020*.

(13) *Kinloch* v. *Secretary of State for India* (1882), 7 App. Cas. 619; 51 L.J.Ch. 885; 47 L.T. 133; 30 W.R. 845, H.L.; 11 Digest (Repl.) 620, *475.*

(14) *R.* v. *Treasury Lords Comrs.* (1872), L.R. 7 Q.B. 387; 41 L.J.Q.B. 178; 26 L.T. 64; 36 J.P. 661; 20 W.R. 336; 12 Cox, C.C. 277; 16 Digest 303, *1160.*

(15) *R.* v. *I.R. Comrs., Re Nathan* (1884), 12 Q.B.D. 461; 53 L.J.Q.B. 229; 51 L.T. 46; 48 J.P. 452; 32 W.R. 543, C.A.; 16 Digest 276, *894.*

(16) *Re Ward, Ex parte Ward*, [1897] 1 Q.B. 266; 66 L.J.Q.B. 310; 76 L.T. 37; 45 W.R. 329; 13 T.L.R. 106; 41 Sol. Jo. 228; 4 Mans. 23, C.A.; 5 Digest (Repl.) 996, *8043.*

(17) *Re Hutton, Ex parte Benwell* (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 33 W.R. 242; sub nom. *Ex parte Hutton*, 1 T.L.R. 148, C.A.; 5 Digest (Repl.) 995, *8025.*

Also referred to in argument:

Beckham v. *Drake* (1849), 2 H.L. Cas. 579; 13 Jur. 921; 9 E.R. 1213, H.L.; 5 Digest (Repl.) 679, *5973.*

Emden v. *Carte* (1881), 17 Ch.D. 768; 51 L.J.Ch. 41; 44 L.T. 636; 29 W.R. 600, C.A.; 5 Digest (Repl.) 1045, *8452.*

Wadling v. *Oliphant* (1875), 1 Q.B.D. 145; 45 L.J.Q.B. 173; 33 L.T. 837; 24 W.R. 246; 5 Digest (Repl.) 794, *6722.*

Re Webber, Ex parte Webber (1886), 18 Q.B.D. 111; 56 L.J.Q.B. 209; 55 L.T. 816; 35 W.R. 308; 3 T.L.R. 138; 3 Morr. 288, D.C.; 5 Digest (Repl.) 995, *8027.*

Re Brindle, Ex parte Brindle (1887), 56 L.T. 498; 35 W.R. 596; 4 Morr. 104, D.C.; 5 Digest (Repl.) 994, *8021.*

Crow v. *Price* (1889), 22 Q.B.D. 429; 58 L.J.Q.B. 215; 60 L.T. 915; 53 J.P. 389; 37 W.R. 424; 5 T.L.R. 280, C.A.; 4 Digest (Repl.) 214, *1920.*

Re Graydon, Ex parte Official Receiver, [1896] 1 Q.B. 417; 65 L.J.Q.B. 328; 74 L.T. 175; 44 W.R. 495; 12 T.L.R. 208; 40 Sol. Jo. 420; 3 Mans. 5; 5 Digest (Repl.) 790, *6700.*

Re Roberts, [1900] 1 Q.B. 122; 69 L.J.Q.B. 19; 81 L.T. 467; 48 W.R. 132; 16 T.L.R. 29; 44 Sol. Jo. 44; 7 Mans. 5, C.A.; 5 Digest (Repl.) 785, *6664.*

Re Rogers, Ex parte Collins, [1894] 1 Q.B. 425; 63 L.J.Q.B. 178; 70 L.T. 107; 10 T.L.R. 24; 1 Mans. 387; 10 R. 469; 5 Digest (Repl.) 784, *6656.*

Re Lupton, Ex parte Official Receiver, [1912] 1 K.B. 107; 81 L.J.K.B. 177; 105 L.T. 726; 28 T.L.R. 45; 56 Sol. Jo. 205; 19 Mans. 26, C.A.; 5 Digest (Repl.) 996, *8039.*

Rose v. *Buckett*, [1901] 2 K.B. 449; 70 L.J.K.B. 736; 84 L.T. 670; 50 W.R. 8; 17 T.L.R. 544; 8 Mans. 259, C.A.; 5 Digest (Repl.) 1043, *8431.*

Krill v. *Dumergue*, [1911] 2 Ch. 199; 80 L.J.Ch. 708; 105 L.T. 178; 27 T.L.R. 525; 55 Sol. Jo. 648, C.A.; 8 Digest (Repl.) 565, *170.*

Chippendall v. *Tomlinson* (1785), 4 Doug. K.B. 318; 1 Cooke's Bkpt. Laws, 8th Edn., p. 428; 99 E.R. 900; 5 Digest (Repl.) 783, *6647.*

Jones v. *Ogle* (1872), 8 Ch. App. 192; 42 L.J.Ch. 334; 28 L.T. 245; 21 W.R. 236, L.C. & L.JJ.; 20 Digest 282, *412.*

Re Elford, Elford v. *Elford*, [1910] 1 Ch. 814; 79 L.J.Ch. 385; 102 L.T. 488; 54 Sol. Jo. 542; 44 Digest 210, *377.*

Nizam State Rail. Co. v. *Wyatt* (1890), 24 Q.B.D. 548; 59 L.J.Q.B. 430; 62 L.T. 765; 2 Tax Cas. 584, D.C.; 28 Digest (Repl.) 128, *488.*

Bonsor v. *Bonsor*, [1897] P. 77; 66 L.J.P. 35; 76 L.T. 168; 45 W.R. 304; 13 T.L.R. 184; 27 Digest (Repl.) 610, *5718.*

O'Driscoll v. *Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83; 113 L.T. 683; 79 J.P. 553; 31 T.L.R. 532; 59 Sol. Jo. 597; 13 L.G.R. 1156, C.A.; 21 Digest 634, *2156.*

Appeal by the official assignee from an order of the Court of Appeal (Ireland) reversing an order of BOYD, J., in the King's Bench Division in Bankruptcy.

The question was whether the salary paid to members of Parliament could be attached at the instance of a creditor. BOYD, J., held that the salary of a bankrupt member of

Parliament was attachable. The Court of Appeal (O'BRIEN, L.C., O'CONNOR, M.R., and PALLES, L.C.B.) held that such salary could not be attached.

The facts are fully stated by LORD ATKINSON in his considered opinion, where also will be found the relevant sections of the Irish, and corresponding sections in the English, Bankruptcy Acts.

T. M. Healy, K.C. (of the Irish Bar and also of the English Bar), *Hanna, K.C.*, and *D. B. Sullivan* (for *Joseph Healy* now serving with His Majesty's Forces) (of the Irish Bar) for the appellant.

Denis S. Henry, K.C., *Hugh J. McCann* (both of the Irish Bar), and *Thomas Scanlan* of the English Bar for the respondent.

The House took time for consideration.

Dec. 10, 1915. The following opinions were read.

LORD ATKINSON.—This is an appeal from an order of the Court of Appeal in Ireland, dated May 10, 1915, discharging an order of the King's Bench Division (in Bankruptcy), dated Feb. 19, 1915. This latter order was made on the motion of the official assignee in the bankruptcy of the respondent, and directs that he (the respondent) should, out of his salary or income as a Member of Parliament for the division of North Galway, pay to the appellant, the official assignee of the court, the sum of £200 yearly, in four quarterly instalments of £50 each, on Jan. 1, Feb. 1, July 1, and Oct. 1 in each year, the first payment to be made by the respondent out of that portion of said salary or income payable to him on or about Apr. 1, 1915. The order purports to be made in exercise of the jurisdiction conferred by the Bankruptcy (Ireland) Amendment Act, 1872, s. 51, which is practically identical with the English Bankruptcy Act, 1869, s. 90, re-enacted in the English Bankruptcy Act, 1883, s. 53 (2), and again re-enacted in the Bankruptcy Act, 1914, s. 51 (2).

The English authorities, therefore, dealing with the construction of these several sections, appear to me to apply to the construction of the Irish enactment under which the order of Feb. 19, 1915, was made. It will be observed that this last-mentioned order does not purport to attach the quarterly payment of the respondent's salary (to give it its statutory name) before it reaches him, but merely directs him to pay out of the quarterly payments, when received, the sums mentioned. The dates in this case are instructive.

The respondent, who, in or about the month of Dec., 1910, was elected Parliamentary representative of the North Louth Division of the County of Louth, was unseated on petition by the order of the election judges, dated Feb. 27, 1911, and costs were awarded against him. These costs were taxed on March 18, 1914, to the amount of £1,910 8s. 1d., with interest at 4 per cent. per annum from Feb. 27, making together £2,156 15s. 7d. This sum was due to the four persons by whom the election petition was presented. It constitutes the only liability of the bankrupt. On May 20, 1914, a writ was issued by these four persons against the respondent to recover the above-mentioned sum of £2,156 15s. 7d. with interest till paid. The writ, together with the statement of claim, was served on him on May 22, 1914. An appearance was entered by him on May 29, and judgment was marked on June 17 for the amount claimed with costs. The respondent was, however, active in the meantime. He, on May 26, accepted the office of the Stewardship of the Chiltern Hundreds, thereby vacating the seat he then held as member of Parliament for the constituency of North Galway. On June 5, 1914, he presented his petition in bankruptcy at 11.45 in the morning on which a final order was made on the same day, by which he was adjudged a bankrupt. The business was quickly done.

It is admitted that, had the respondent's bankruptcy been an English bankruptcy, he would, under the Bankruptcy Act, 1893, s. 32, while his bankruptcy remained unannulled, or he had failed to obtain from the court a certificate to the effect that his bankruptcy was brought about by misfortune, without any misconduct on his part, have been disqualified for, amongst other things, being elected to, sitting, or voting in the House of Commons or any committee thereof; and that, if neither of these things took

place within six months from the date of the order declaring him a bankrupt, on the Court of Bankruptcy certifying that fact to the Speaker, his seat would have become vacant. But it is admitted, as I understood, that though the words of 32 (3) provide that the disqualifications imposed by the section shall extend to all parts of the United Kingdom, yet, as the statute only deals with proceedings in the Courts of Bankruptcy in England, these words do not apply to Irish bankruptcy proceedings, and the point is not raised in this appeal.

The Irish Act of 1872 is less stringent. Sect. 40 provides that

> "if a person having privilege of Parliament commits an act of bankruptcy he may be dealt with under that Act in like manner as if he had no such privilege."

A provision similar to this has been introduced into the Bankruptcy Act, 1914. Section 41 of the Irish Act provides that if a person, being a member of the Commons House of Parliament is adjudged bankrupt he shall be, and remain during one year from the date of the order for adjudication, incapable of sitting and voting in that House unless within that time either the order be annulled or the creditors who have proved be fully satisfied. If neither of these things should happen within that period, then on the Court of Bankruptcy certifying that fact to the Speaker the bankrupt's seat becomes vacant.

The respondent, obviously to evade the letter of this section (designed to exclude bankrupts from active co-operation in Parliamentary proceedings), having vacated his seat on May 26, got re-elected for the same constituency on July 28, and became a bankrupt on his own petition in the interval while he was not a member of Parliament. Accordingly, he is qualified to sit and vote in the House, bankrupt though in fact he be, and his counsel contend that there is a venerable principle of public policy which demands that he should be permitted to continue to receive the entire of his salary and devote it to his own purposes, since it was given to him to support the dignity of his position as a member of Parliament and to enable him to discharge the duties of that post.

There is, however, another principle of public policy which has found expression in the provisions of the bankruptcy codes of both England and Ireland for close on half a century, as estimable and as conducive to the welfare of the community as any. It is this, that in bankruptcy the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, was subject to be taken in execution legal or equitable, or the contrary, should, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors. It will be found, I think, that in these bankruptcy codes, whenever these two principles come in conflict, the latter prevails. Of this, s. 319 of the Irish Act of 1857 is a striking example.

On Aug. 10, 1911, the following resolution was passed by the House of Commons:

> "Resolved, that in the opinion of this House provision should be made for the payment of a salary at the rate of £400 a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of the House or as an officer of His Majesty's Household."

It is to be observed that no condition whatever is attached to the payment of this salary. The members may be qualified to sit and vote in the House or be disqualified to do either, as the respondent would have been had he become bankrupt while he was, in fact, a member. They may attend the sittings of the House or absent themselves continuously from them; they may be rich or poor; resident in some distant part of the three kingdoms or within five minutes' walk of the House itself. If, therefore, these salaries had, as is contended, been given to enable members to discharge, or to secure that they did discharge their duties, one would, not unnaturally, have expected to find some provision to the effect that a member should forfeit his salary for the six or twelve months, as the case might be, during which he was disqualified from sitting or voting in the House, or that the payment of his salary was made conditional on his attending in his place in the House for the whole, or a certain portion of each session. There is nothing of that kind to be found in it. It is an error, I think, to suppose that there is

now available any effective legal or parliamentary machinery to compel members to attend the sitting of the House. The only statute I have been able to find dealing with the matter is 6 Hen. 8, c. 16 (Parliament (Attendance of Members) (1514)). It provides that members who depart from Parliament without the leave of the Speaker and the members of the House will lose all the money they should have (I use the words of the statute) for their "wages," and that the counties and boroughs for which they have been elected, shall be discharged for ever from the liability to pay them wages. That was the only penalty.

What was the precise amount of these wages at the time this statute was passed I have not been able to ascertain. It is stated in MAY'S PARLIAMENTARY PRACTICE (6th Edn.), p. 25, that the wages were in the time of Edward III 4s. per day for a knight of the shire, and 2s. per day for a citizen or burgess. The statute 5 Ric. 2, Stat. 2, c. 4 (1382), which required any person summoned to Parliament to attend, or, in the absence of a reasonable and honest excuse, to be amerced, is now repealed. The practice of "calling" the House has long since ceased to find favour, and in no case has it been resorted to since 1836. A member may, no doubt, in justice to his constituents, be morally, though not legally, bound to attend the sitting of the House.

It is well established that in a court of law the motives which influenced the legislature in passing any particular enactment, or the purposes or objects it desired to effect, can only be legitimately ascertained from the language of the enactment itself viewed through the light of the circumstances on reference to which that language was used. See LORD BLACKBURN'S judgment in *River Wear Comrs.* v. *Adamson* (1). The reports of the debates leading up to the passing of it cannot be looked at. The same rule of construction must, I think, be applied to the resolutions passed by either House of Parliament. When these motives, purposes, or objects are not, expressly or impliedly, revealed in language of the legislature in its statute, or by either of the Houses of Parliament in that of its resolutions so viewed, it is, I think, wholly illegitimate to surmise or conjecture what those unrevealed motives, purposes, or objects may have been, and to construe and apply the statute or resolutions as if they had been indicated. There is nothing whatever contained in this resolution to suggest what was the special motive or object of the House of Commons in passing it. One simply finds that the House, in effect, granted a salary to each member unconditionally in all respects. That is all. I must therefore, for myself, decline to speculate on this point, and for the purposes of this judgment to accept or be guided by the speculations of the Court of Appeal on the subject.

The Appropriation Act for the year 1911 received the Royal Assent on Aug. 18, 1911, eight days after the passing of this resolution. In sched. B, part 7, class II, of the Civil Services, the item 1a appears. It runs thus:

> "For the salaries of members of the House of Commons not in receipt of salaries as Ministers, as officers of the House of Commons, or as officers of His Majesty's Household, £252,000."

In all subsequent Appropriation Acts this sum does not appear as an independent item, but is included—and, indeed, concealed—in one general item. As, for instance, in the Appropriation Act, 1913, where it runs thus: "Salaries and expenses of the House of Commons, £298,322," but a glance at the estimates shows that of this sum £252,000 is provided for members' salaries. When money is so voted and appropriated the Crown is bound to devote it to the object named in the statute, and under the Exchequer Act, 1886, s. 14, the mode of procedure adopted is this. By Royal Order under the Sovereign's Sign Manual, countersigned by the Treasury, he or she directs the Treasury to pay the sum so appropriated to the respective services named. This applies to all salaries voted by Parliament. In so doing the Treasury merely act as the servants and agents of the Crown. It is the Crown, not the House of Commons, that pays. The payment is compulsory, not voluntary. The House of Commons has passed the resolution once for all. It may rescind it, no doubt, any day. In that sense the payment of the salaries is contingent and not assured, but not more contingent or less assured than the payment of the salaries of all the officers of the Crown, who may be dismissed at pleasure.

PALLES, C.B., in his judgment, laid it down that this sum of £400 per annum is expressly given to each member of Parliament virtute officii, and is payable out of State funds to enable them to support the office with the degree of dignity due to it, and for that reason is unalienable. It is certainly given to the members because they are members, but with infinite respect to that most distinguished judge, I doubt very much whether membership of the House of Commons is, within the meaning of the principle of law and public policy to which he refers, an office of State at all. This, however, might be a matter of importance if the question to be determined in this case were whether these salaries could be assigned, or be taken in equitable execution; but it is, in my view, as the authorities show, wholly immaterial on the question whether they can be made available in whole or in part, under the bankruptcy laws, to satisfy the claims of creditors.

I turn to the consideration of the statutes themselves. By the Irish Bankruptcy Act, 1857, the Irish bankruptcy and insolvency laws were consolidated. The great majority of its sections are still in force. I shall only refer to those which are. Sect. 60 provides for the appointment of official assignees; s. 268 provides that any person adjudged a bankrupt, or on filing a petition of insolvency by an insolvent, if the court shall make an order thereon shall file his schedule, &c.:

> All the personal estate and effects of such person present and future wheresoever the same may be, and all property which he may purchase, or which may revert, descend, be demised or bequeathed, or come to him before such bankrupt shall have obtained his certificate, or before such insolvent shall have obtained his discharge in pursuance of the adjudication made on that behalf, and all debts shall become absolutely vested in the assignees for the time being for the benefit of creditors.

These words could scarcely be wider. They cover everything received which the bankrupt can retain and employ for his own use and benefit. This section is followed by what has been described as a compassionate section, s. 298, whereby a bankrupt or insolvent is declared to be entitled to retain such tools and household furniture as he may select not exceeding £20 in value, and the court is empowered to make such an allowance out of his estate as may be necessary for the support and maintenance of himself and his family. Then comes s. 319, on which much turns in this case. It provides that:

> The court may order such portion of the pay, half-pay, or salary, emoluments, or pension of any bankrupt or insolvent, as on communication from the court to the Secretary of War or the Admiralty, or the Commissioners of Customs and Excise, or the chief officer of the department to which such officer may belong, or under which such pay, half-pay, salary, or emoluments, or pension may be enjoyed by such bankrupt or insolvent, or to the court of directors of the East India Co., they respectively may under their hands or under the hands of their respective chief secretary, or other chief officer for the time being, consent in writing to be paid to the official assignee, in order that the same may be applied in discharge of the debts of the bankrupt or insolvent . . .

On the lodgment of the order of the court, with the consent before-mentioned, with the Paymaster-General or any other person appointed to pay the pay, half-pay, &c., as aforesaid, the sum mentioned is to be paid to the official assignee. It is obvious that this section, which is to the same effect as the English Bankruptcy Act, 1869, s. 89, applies to a large number, perhaps the majority, of the servants of the State, and it must be assumed, I think, that the salaries they receive are not excessive, having regard to the duties to be performed; but no matter how important those offices may be, how vital in the interest of the State the discharge of those duties, how necessary the receipt of the pay or salary to enable the duties to be discharged, the salary or pay or half-pay may be appropriated in whole or in part for the payment, in bankruptcy, of creditors. Thus the principle of public policy embodied in this and other sections of the bankruptcy codes prevails over any other principle of public policy, which would put these salaries, &c., beyond the reach of creditors. Pensions, when given exclusively for past services,

are alienable, half-pay is inalienable and cannot be taken into equitable execution. In *Lucas* v. *Harris* (2), Lindley, L.J., deals with all the authorities on this point; but both pensions and half-pay are expressly named in the section, though the public policy which is relied upon to keep the salaries of Members of Parliament safe from the claims of creditors in bankruptcy will be found to be the very same public policy which makes half-pay inalienable, but yet does not protect it from the claims of such creditors. The principle on which half-pay is rendered inalienable is laid down by Lord Kenyon in *Flarty* v. *Odlum* (3) and in *Lidderdale* v. *Duke of Montrose* (4), and approved of by Parke, B., in *Wells* v. *Foster* (5). In the first of these cases a military officer on half-pay made an assignment of his half-pay. Lord Kenyon said (3 Term Rep. at p. 682):

> "Emoluments of this sort are granted for the dignity of the State and for the decent support of those persons who are engaged in the service of it. It would be highly impolitic to permit them to be assigned; for persons who are liable to be called out on the service of their country ought not to be taken from a state of poverty. Besides, an officer has no certain interest in his half-pay, for at any time the government may strike him off the list."

In this last respect the officer on half-pay is not in any different or worse position than is every ordinary military or civil servant of the Crown. They all hold their offices at the pleasure of the Crown, and may, at law, be arbitrarily dismissed at any moment. Indeed, any contract entered into between an authority representing the Crown and a subject, though it purports to appoint the latter to an office for a definite period, must be held to have imported into it a condition that the Crown has this power of arbitrary dismissal, *Dunn* v. *R.* (6); *Gould* v. *Stuart* (7).

Wells v. *Foster* (5) was the case of a civil officer to whom compensation was granted on the reduction of offices in his department. Lord Abinger, C.B., in delivering judgment, said this pension is not assignable, it stands on the same footing as the half-pay of an officer in the army. It is fit that the public servant should retain the means of decent subsistence without being exposed to the temptations of poverty. Besides the dependant may be assigning what he has no right to receive, for his pension subsists only during pleasure, and it depends on Parliament whether it shall continue or not. Parke, B., said (8 M. & W. at pp. 151, 152, 153):

> "It is not necessary in this case to determine whether this is an allowance to which the defendant is entitled as a matter of indefeasable right, or whether it is payable only during pleasure; although I have a strong impression that it subsists only during the joint pleasure of the Treasury and of Parliament, by whom the fund for its payment, is provided. On the other hand, even if payable only during pleasure, it appears to me that it is not therefore, in point of law, the less assignable, however little its value would be in consequence of its being liable to be withdrawn at any moment. But viewing the matter on the ground of public policy, we are to look, not so much on the tenure of this pension, whether it is held for life or during pleasure, as whether it is, in either case, such as the law ought to be allowed to be assigned. The correct distinction made in the cases on this subject is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life or merely during the pleasure of others . . . But where the pension is granted not exclusively for past services but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of service which the party has already performed, it is against the policy of the law that it should be assigned. I think the true view of this case is that the defendant is still to be considered as in the public service although not performing any public duty in it, and that the compensation allotted to him under this Act is by way of salary, the object of which is to maintain such a provision in life as will save him from the necessity of risking his character by incurring those temptations which persons reduced to poverty are necessarily exposed to, and which would render him an unfit person to be again employed as a servant of the Crown. For this purpose public policy requires that he should not be permitted to assign it away."

This is the very same principle of public policy invoked to sustain the judgment appealed from.

In *Lucas* v. *Harris* (2) it was decided that the pension of Indian officers made inalienable by the joint operation of an Indian statute and the Army Act, 1841, s. 141, could not be taken in equitable execution, but in *Re Saunders, Ex parte Saunders* (8) it was pointed out by KAY, L.J., that *Lucas* v. *Harris* (2) was not a bankruptcy case at all, and did not touch, therefore, the operation of any section of the bankruptcy statutes. But wide as are the terms of s. 319 of the Irish Act of 1857, and of those of the corresponding section of the English Bankruptcy Act, 1869, they were not considered wide enough to afford adequate protection to the right of creditors, and accordingly by the following section (s. 90) of the English Act it was provided that—

> Where a bankrupt is in receipt of a salary or income, other than as aforesaid, the court, upon the application of the trustee, shall from time to time make such order as it thinks just for the payment of such salary or income or of any part thereof, to the trustees during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied as the court may direct.

This section is re-enacted as s. 53 (2) of the Bankruptcy Act, 1883, and as s. 51 (2), of the Bankruptcy Act, 1914. The law of Ireland was attempted to be assimilated by s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872. It provides that:

> When a bankrupt is in receipt of a salary or income other than is mentioned in s. 319 of the said Act [i.e., the Act of 1857], the court may from time to time make such order as it thinks fit for the payment of such salary or income, or any part thereof, to the official assignee or the trustee, to be applied by him in such manner as the court shall direct, and thereupon such portion of the salary or income as is specified in such order shall be paid to such official assignee until the court shall make order to the contrary."

This section is general in its terms. It is expressly made to apply to every case not coming within s. 319, and I am, with all respect, wholly unable to concur with O'CONNOR, M.R., in thinking that it must be held to be confined to persons not officers of State, because if it applied to such officers as salaried members of Parliament, there would be no person or body who could give the consent required by s. 319. It appears to me unsound to assume that any consent such as is required by that section is necessary in any case coming within s. 51. There is nothing in this last-mentioned section to suggest the necessity for any consent, and as it is expressly directed to cases falling without the scope or reach of s. 319, which does not require consent, I do not think that the necessary consent can be implied.

Re Saunders, Ex parte Saunders (8) is an important case. It has a direct bearing on each of the two points raised by the respondent in this appeal. First, the alleged want of jurisdiction of the bankruptcy judge to make the order he made, and second, the alleged oppressive exercise of his jurisdiction as to the amount of the pension ordered to be paid over to the official assignee. In *Re Saunders, Ex parte Saunders* (8) a major-general of the Madras Staff Corps who was liable to be recalled to service on an emergency had been granted a pension of £330 a year in respect of his military service in India. This pension was rendered inalienable by an Indian statute, as it certainly would also have been on the principle of public policy relied on by the respondent. An order was made by the county court judge of Wandsworth directing that a portion of the pension (it does not appear how much) should be paid to the trustee in bankruptcy of this military officer. On appeal to the Divisional Court, composed of VAUGHAN WILLIAMS and KENNEDY, JJ., this order was reversed on the ground that although there was jurisdiction to make the order, such an order should never be made in the case of an Indian pension, which was intended to be made inalienable by the Indian legislation. On appeal to the Court of Appeal, composed of LORD ESHER, M.R., KAY and A. L. SMITH, L.JJ., it was held that the county court judge had jurisdiction under the Bankruptcy Act, 1883, s. 53 (2), to make the order, that there was no rule of law that in the case of an Indian pension such an order should never, as an exercise of discretion, be

made, that the discretion to make the order was absolute, and should be exercised in each case according to the facts of that particular case. The appeal was dismissed, but, on the grounds put by KAY, L.J. ([1895] 2 C.B. at p. 427)—viz., that as the county court judge had exercised his discretion one way, and the Divisional Court their discretion in another way, they must look at the facts of the particular case, and without attempting to lay down any rule which would fetter another court in exercising its discretion under s. 53, must say how the discretion should be exercised in that particular case. The court ultimately held that as the bankrupt had no means other than his pension to maintain himself, his wife, and his family, and that as the only property his wife had was a freehold worth £500, it would not be a proper exercise of discretion to order any portion of the pension to be set aside for the trustee. It will be observed that this was not a proceeding under the Bankruptcy Act, 1883, s. 53 (1), which is analogous to s. 319 of the Irish Act of 1857, but a proceeding under sub-s. (2) of that section, which is analogous to s. 51 of the Irish Act of 1872, under which the order of BOYD, J., was made. If the reasoning of the judgment appealed from were sound it would have been competent for the bankrupt, Saunders, to have said, "I am a servant of State liable to be called up again for active service. My pension was not given to me solely for past services. It is presumably and is in fact only sufficient to support my dignity in that position and keep me fit to answer the call when made. Hands off. My pension is inalienable. You have no jurisdiction to touch it." But five most distinguished judges have decided that the county court judge had jurisdiction to touch it. They differed from him only as to the mode and manner in which his jurisdiction should be exercised.

Incidentally, too, the case answers the objection of the Master of the Rolls. The bankrupt was an officer of the army. He was dealt with under sub-s. (2) of s. 53, not sub-s. (1). No consent of any person or department was shown to have been given, for none was required. For myself I fail to see anything in the Irish statutes requiring that s. 51 of the Act of 1872 should receive a different construction from s. 52 (2) of the English statute of 1883.

A great number of cases were cited by counsel for the appellant. Many of them are merely illustrations of the application of the same principle. I do not intend to analyse more than a few of them. I begin with *Ex parte Huggins, Re Huggins* (9). The bankrupt was a retired judge of a Crown colony to whom the Secretary of State for the Colonies had granted a pension which was voted annually by the legislature of the colony, and was included in the annual Appropriation Ordinance of the colony. The bankrupt was not liable to be called on to fill again any public office or situation under the Crown. The Secretary of State declined to recognise assignments of such pensions, following therein the practice of the Treasury in England in relation to pensions granted to members of the civil service. Mr. Registrar BROUGHAM made an order restraining the bankrupt until further order from receiving the pension and directing that the trustees should until further order receive the quarterly payments of the pension as they should become due. The bankrupt appealed. The case turned upon the construction of s. 89 and s. 90 of the English Bankruptcy Act, 1869. It was decided by SIR GEORGE JESSEL, LINDLEY and BOWEN, L.JJ. It is therefore a case of high authority. The two points pressed in argument on behalf of the appellant were: (i) That the pension was inalienable, and (ii) that the payment of it could not be enforced at law, and was therefore a mere payment by way of bounty, and did not come within either of these sections, and *Ex parte Wicks* (10) and *Cooper* v. *R.* (11) were cited. SIR GEORGE JESSEL attached importance to the fact that the group of sections from s. 87 to s. 95 were headed "As to Property Devolving on Trustee." In the Irish statute of 1872 the group of sections from s. 50 to s. 55, both inclusive, are headed somewhat similarly, "Power of Court in Relation to Property." He says (21 Ch.D. at p. 91):

> "The vote of the legislature is merely the mode of ascertaining the only sum which the colony has to pay. Just the same as salaries and pensions of servants of the Crown in this country cannot be paid until they are voted by Parliament, and yet no one would say they are not 'property' of the person who receives them.

> There are, no doubt, some salaries and pensions which are not assignable, but when this is so it is always referable to one of two grounds. It is said to be contrary to public policy that payments made to induce persons to keep themselves ready for service to the Crown, as half-pay officers in the army or navy, or that payments for actual service rendered to the Crown should be assigned. The other class of cases is that of pensions, like the retiring allowance of a beneficed clergyman, which are by statute made not assignable. But still, I think they are all 'property.' The large definition of property given in s. 4 of the Bankruptcy Act goes far beyond choses in action. My view of the meaning of the Bankruptcy Act is that s. 15 and s. 16 vest all the property in the bankrupt in the trustee, saving some express exceptions."

Then he proceeds to say that this vesting is subject to the provisions in the group of sections from s. 87 to s. 95, and holds that the pension of the bankrupt is income, not salary within the meaning of s. 90 and therefore that the order of the registrar was right. LINDLEY, L.J., also held that the pension was "property" divisible amongst the bankrupt's creditors and vested in the trustee. He said (ibid. at p. 93):

> "The different kinds of property . . . vest in the trustee, but subject to the modifications and qualifications contained in this group of sections [i.e., s. 87 to s. 95]. Section 89 and s. 90 are the only ones which are material for the present purpose. Is this bankrupt in the receipt of a 'salary' or 'income' other than aforesaid? His pension is not salary, inasmuch as he is not bound to render any services in respect of it, but why is it not 'income'? Surely it is 'income.' It is not, as in *Ex parte Wicks* (10) a merely voluntary payment, revocable at any time. It is not an arbitrary allowance which can be stopped at any time at the will of the person who pays it. It is, in my opinion, within the true meaning of the word 'income' in s. 90."

I have already pointed out the very wide words of the vesting section in the Act of 1857, and I have not been able to find that *Re Huggins* (9), or *Re Saunders* (8) have ever been questioned, while they have been many times approved of. I do not think that the principle of public policy, which, in the case of officers on half-pay, is disregarded in bankruptcy, in order that the claims of creditors may be satisfied, can legitimately be invoked in such a case as the present, to defeat the claims of similar creditors. I am, therefore, clearly of opinion that if this sum of £400 be either "salary" or "income" within the meaning of s. 51 of the Irish Act of 1872, BOYD, J., had jurisdiction to make the order of Feb. 19, 1915.

The question then remains, What is the character of these payments? They are not merely gratuities, or arbitrary voluntary payments, which the authority making them, the Crown, can at any moment stop. That is clear, I think. The Crown is bound by statute to make them. They are expressly styled, both in the resolution and the Appropriation Act, 1911, "salaries." In *Re Shine* (12) FRY, L.J., endeavoured to give a definition of salary, which he admitted was not complete. He said ([1892] 1 Q.B. at p. 531):

> "Whenever a sum of money has these characteristics: First, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time; I am inclined to think that it is a salary, and not the less so because it is liable to determination at the will of the payer, or is subject to deductions."

The word "appointment" in this definition renders it a little difficult to apply it to the present case, unless the election of a member to serve in Parliament be considered an "appointment." But this is clear, I think, that this sum of £400 must necessarily be paid to members for one or other of four purposes: (i) To keep up their dignity, and as a remuneration, in advance or otherwise, for the discharge of their duties. (ii) To keep up their dignity, and enable them to discharge their duties. (iii) To keep up their dignity, altogether irrespective of the discharge of their duties, or their ability to dis-

charge them. (iv) As a solatium for their membership, irrespective altogether of either their dignity or duties. That is exhaustive. If the first, I should be inclined to hold that the sum paid was a salary. If any one of the other three, I should be inclined to hold it was "income" in the nature of a salary, but I think, as the judges thought in *Shine's Case* (12), it must be either the one or the other.

I observe that the Lord Chancellor of Ireland has likened this payment to an arbitrary and voluntary allowance, revocable at any moment at the will of the person paying it, such as is dealt with in *Re Wicks* (10). If that be so, then the pay of every officer in the army and navy and the pay of the bulk of the members of the Civil Service whose remuneration is not charged on the Consolidated Fund must equally be a voluntary allowance, and not either salary or income, since their pay is obtained in precisely the same way as these sums of £400, namely, by a vote passed in Committee of Supply followed by an Appropriation Act. Neither the Crown nor any of its officers could be sued by any naval or military officer or member of the Civil Service in any hostile proceeding in any court of law or equity to recover the salaries voted to them: *Kinlock* v. *Secretary of State for India* (13). Mandamus would not lie against the Treasury in respect of the salary voted: *R.* v. *Treasury Lords Comrs.* (14) and *R.* v. *I. R. Comrs.*, *Re Nathan* (15). A petition of right is merely an amicable litigation taken by the consent of the Crown against the Crown itself. In my opinion *Re Wicks* (10) has no more application to this case than, according to Lindley, L.J., it had to *Re Huggins* (9), or than according to Lord Esher, it had to *Re Ward* (16).

The Lord Chancellor of Ireland also considered, apparently, that *Re Hutton, Ex parte Benwell* (17) had some bearing on this case. There the trustee asked to have allocated to him for the payment of the bankrupt's creditors a part of the income which the bankrupt might possibly make in the future by the exercise of his personal skill as a surgeon, but might never make. It depended on the accident whether people would come to consult him, and on whether he would choose to be consulted. It was held that this man's capacity to earn money in the future was the only "property" he had, and that could not vest in the trustee, and therefore could not be income within s. 90.

It was contended in the present case that even if Boyd, J., had jurisdiction to make the order of Feb. 19, 1815, he exercised his discretion in such a way that the order should be set aside. The Court of Appeal did not deal with this point. It was unnecessary for them to do so. It was not suggested there that this order should be merely varied, but that it should be set aside. It is quite obvious that a Court of Appeal should not set aside such an order merely because the judge of first instance, in the exercise of his discretion, left something less for the maintenance of the bankrupt than they themselves would be disposed to leave. It was contended, however, that the judgment of the learned judge showed that he inflicted a kind of penalty on the bankrupt because he had refused to allow the claims of the petitioners to be liquidated by his friend or by his political party. I do not think that the judgment of the learned judge when fairly considered, leads to any such conclusion. He took into consideration the fact that the bankrupt had maintained himself on £150 per annum as evidence of what was sufficient for his maintenance, and also the fact that none of the bankrupt's relatives had claims on him, and he formed the opinion that £200 would be an adequate allowance. In fixing it at that figure he considered he was treating the bankrupt liberally, and then he used the words:

> "I think I am dealing liberally with him, especially as he admits that by the party who really caused his indebtedness he could have had his debts paid in full."

That does not, in my view, at all mean that he would have allowed the bankrupt to retain more of his so-called salary but for this refusal. It merely means, at the most, that he considers the adequate allowance which he had made a liberal allowance, for this and other reasons.

On the whole, I am of opinion that the order appealed from was wrong and should be reversed. That the order of Boyd, J., of Feb. 19, 1915, was right and should be restored, and the appeal be allowed with costs here and below.

LORD SHAW.—On Feb. 19, 1915, Boyd, J., sitting in the Bankruptcy Court in Ireland, made an order that Mr. Hazleton, member of Parliament for North Galway, should pay out of his salary of £400 as such member, a sum of £200 per annum to the appellant as official assignee. The judgment was to "be applied by the said official assignee in discharge of the debts due" by the bankrupt. The award of bankruptcy was made on June 5, 1914, and after challenge was sustained. Several matters—notably as to what were the debts and why incurred—appear to have added zest to the discussion in the courts below, but they do not elucidate the issue before this House. On June 5, when Mr. Hazleton was declared bankrupt, he was not then a member of Parliament: he was an ex-member. In July, when he was elected a member of Parliament, he was a bankrupt. On one point, accordingly, an explanation and statement may not be out of place. How comes it that there is a question as to the allocation of a portion of salary of a bankrupt member of Parliament? Are not bankrupts prohibited from sitting in Parliament? On this question there is a cleavage between British and Irish law and practice. It arises from the phraseology employed in the Bankruptcy Acts of the three kingdoms. The cleavage may have been accidental, but it is unquestionably deep.

The law of England stands thus: By the Act of 1883, s. 32 and s. 33, it is provided that "where a debtor is adjudged bankrupt" he shall be disqualified for "being elected to or sitting or voting in the House of Commons." This applies, it will be observed, to "a debtor." The disqualification is removed on annulment of bankruptcy or the discharge of the bankrupt with a certificate that his bankruptcy was caused by misfortune and without his misconduct. If not so removed, within six months the court certifies this to Mr. Speaker, and the seat is vacated. By the Bankruptcy Act, 1890, s. 9, the disqualification is not to exceed a period of five years from the date of discharge. The law of Scotland is substantially the same as that of England. By the Bankruptcy Frauds and Disabilities (Scotland) Act, 1884, s. 5 and s. 6, the disqualification of the English Act of the previous year is adopted for Scotland—that is to say, "where a debtor is adjudged bankrupt" includes the case of

> "a person whose estate has been sequestrated or with respect to whom a decree of cessio bonorum has been pronounced."

The law of Ireland stands in this way. While the law of Scotland was put by Parliament on the same footing as the English law of bankruptcy, and the disqualification as to being elected or sitting in Parliament was thus assimilated, no such legislative step took place in regard to Ireland. The Irish position in this particular accordingly rests on the code contained in the Bankruptcy (Ireland) Amendment Act, 1872. Section 41 thereof provides that

> "if a person, being a member of the Commons House of Parliament, is adjudged bankrupt, he shall be and remain, during one year from the date of the order of adjudication, incapable of sitting and voting in that House, unless within that time either the order is annulled or the creditors who prove debts under the bankruptcy are fully paid and satisfied."

Herein lies the difference between the Irish and the British case. In the latter the disqualification applies to "a debtor"—a comprehensive and general term; the former applies to "a person being a member of the Commons House of Parliament," with the result that if a person was adjudged a bankrupt, not while he was, but while he was not, a member of Parliament, then the Irish Bankruptcy Act cannot apply to him and there is no disqualification. I can see at least room for an argument to the opposite effect, but no such argument was offered, and practice seems to be against it. Furthermore, it is more than doubtful whether the competency of a member to be elected for or sit in the House of Commons could in any view be determined by the ordinary judiciary of the country, the question being one for that House under separate procedure. The case of the respondent is the case of a person who had been adjudged a bankrupt before his election.

The result accordingly is that English and Scottish bankrupts in that position may not be elected to, nor sit in, Parliament; Irish bankrupts may. Counsel for the appellant, in an eloquent and humorous aside, called this "another injustice to Ireland." But, my Lords, if it be an injustice at all, it is not an injustice to Ireland alone. For the Irish bankrupt would not be disqualified from election to or a seat in Parliament for any constituency in the United Kingdom, while in the case of the English or Scottish bankrupt the disqualification in all its scope would apply to him; he could not be elected to, or sit in, an Irish seat. I have referred to these matters, my Lords, not alone because of their public interest, but because they have a bearing on a question of public policy which was much canvassed in argument and in the judgments of the courts below. To that question I shall immediately advert.

But before doing so, I refer to the argument submitted to the effect that the payments made to Mr. Hazleton in his capacity as a member of Parliament is not of the nature of salary, and—as I understood it—it is not even of the nature of income. It is admitted that—apart from the considerations pleaded as to public policy—if it be salary or income in the ordinary sense, the ordinary rule of bankruptcy law, giving rights to the creditors therein, would apply. It is notable that both in its origin and its annual distribution by Parliament the payment was treated as salary eo nomine.

On Aug. 10, 1911, the House of Commons passed the following motion:

> "That in the opinion of this House provision should be made for the payment of a salary at the rate of £400 a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of this House, or as a Minister, or as an officer of His Majesty's household."

By the Appropriation Act of the same year a sum of £252,000 was granted—sched. B. part 7, headed "Civil Services, Class II."—"to defray the charges of the several Civil Services herein particularly mentioned." And then the language of this item is thus given—viz., "for the salaries of members of the House of Commons." This language is repeated in subsequent years. I see nothing to induce me to think that these payments are anything else than what Parliament, which granted them, has called them. But the matter does not stop there. It is an admitted fact that income tax is paid and is payable in respect of this salary. It was to this state of matters that Parliament addressed itself by s. 3 of the Finance Act, 1913, which provided that deductions may be allowed in respect of expenses "where the Treasury are satisfied with respect to any class of persons in receipt of any salary, fees, or emoluments." And it is admitted that in respect of these expenses a deduction of £100 is made from the salary of £400 to Members of Parliament. I do not think it possible to treat the payments, in these circumstances, as other than salary, and salary liable to income tax as income.

To this state of matters the provisions of the Irish bankruptcy statutes must apply. These provisions are two in number. By s. 51 of the Act of 1872, it is provided that when a bankrupt is in receipt of a salary or income other than is mentioned in s. 319 of the Irish Bankrupt and Insolvent Act, 1857,

> "the court may from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the official assignee."

The Act of 1857, in the section just referred to, provides that the court may order such portion of the "pay, half-pay, salary, emolument, or pension of any bankrupt" as, on communication from the court, various departments of State may consent to. It appears to be agreed that this section, which applied in terms to the War Office, Admiralty, the East India Co., or a government department "to which such bankrupt may belong," did not cover the case of the respondent. These two statutes between them are completely exhaustive. And I see no justification for the view of the learned Master of the Rolls that the one statute was exhaustive of all instances of public salaries, and the other and later had only to do with private incomes. Accordingly it would not appear to be doubtful that since this case is "other than" one covered by the Act of 1857, the Act of 1872 must embrace it. I am humbly of opinion that this is so, and

that it was within the competence of BOYD, J., acting under the provisions of the later Act, to pronounce the order of Feb. 5, that the bankrupt do pay out of his salary or income £200 yearly in four instalments to the official assignee, to be applied in discharge of the bankrupt's debts.

I think that the various statutes cited are conclusive of the point, and that reinforcement by authority is accordingly out of place. But if such reinforcement had been required there seems little doubt that the decided cases, and notably the important judgment of LINDLEY, L.J., in *Re Huggins* (9) would lead to the same result—namely, that the payments to Mr. Hazleton are payments of salary or income to which the Bankruptcy Acts apply.

Only a few words are required in dealing with the suggestion made that the payments made to Mr. Hazleton cannot be considered salary or income because it is open to Parliament to alter the law and refuse in future years the vote of salaries to members of the House of Commons. This seems to have no bearing on the question; many of the salaries or incomes earned throughout the country are enjoyed on a tenure equally or even more precarious, with no future rights except, it may be, to a week or a month's notice before dismissal, but the payments as they accrue are nevertheless and unquestionably payments of salary or income.

Another argument is to a converse effect—viz., that it would be to lower a position of such dignity and of great independence to permit of the distribution of any part of the payments made towards the liquidation of the member's debts. I have much difficulty in understanding what the argument means, unless, indeed, we are supposed to have left the regions of fair dealing altogether. I am, moreover, in some measure acquainted with a system of jurisprudence in which such an allowance is made to the creditors of persons who, being overtaken by bankruptcy, have continued to hold positions of the highest dignity and responsibility. Clergymen of the Established Church, town clerks, and professors in universities—all of them, to speak generally, holding office ad vitam aut culpam—have been liable to the action of their creditors in ingathering their salaries, the bankrupt being secured by the court in a beneficium competentiæ. This result, just in itself and just to all parties, is exactly analogous to that achieved by BOYD, J., in the order which he made in this case. As to the amount of the allowance of £200, I do not detain your Lordships. The cases would, and in my opinion ought to be, of the rarest and most special and cogent, when any Court of Appeal would interfere with the estimate and award made by the judge sitting in bankruptcy. In all ordinary cases—of which this seems to be one—the opinion of that judge should be final.

The only question remaining to be dealt with is that of public policy. This is apparently at the foundation of the judgments of the learned Lord Chancellor and PALLES, C.B. The learned Master of the Rolls does not appear to share their views, and sets them aside, basing his own opinion upon the Acts of Parliament. These I have already analysed. It cannot be suggested that this House, sitting as a court of law, should presume to import into the construction of an Act of Parliament any views or conjectures as to the grant of these salaries by the legislature. That—the legislative stage—is concluded. The salaries are there; and they have been instituted without any language of statute to suggest that the salaries so set up should be subject to any differential treatment by law. The argument accordingly is that there is some ground of public policy which should induce the judiciary to prevent the ordinary rule from coming into operation—the rule which distributes this income among creditors a due reserve being made for the bankrupt at the sight of the court. I cannot see that there is any such ground of public policy. There is no injury to the general body of His Majesty's lieges which compels such an abrogation of creditor's rights, or confers a discriminative privilege upon a member of Parliament. Such a privilege—if it be privilege to enjoy for oneself something which of one were not a member would go to one's creditors by the ordinary law of the land—does not seem to me to find any warrant in public policy. The view of the legislature on such a claim is well indicated so late

as in the Bankruptcy Act of last year. Section 128 of that Act prescribes:

> "If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under this Act in like manner as if he had not such privilege."

And I cannot see anything of public policy which should induce the judiciary to come to any different view. I see no reason of public policy arising from the dignity or responsibility of Parliament or any one of its members for raising the latter into an elevation beyond the reach of his creditors. As the law stands on the statutes, and until these are altered by Parliament, the Irish bankrupt may be elected to the House of Commons, while a British bankrupt is under a disability in this particular—a disability which he shares with traitors, aliens, minors, and madmen. I see no ground of public policy which would, this being the case, give to those bankrupts who are so admitted to Parliament a privilege not accorded to any other bankrupts in the country, thus making them not only privileged over their fellow members, but privileged over their fellow citizens. I do not, on public policy, see any reason for thus elevating the position; nor on law, do I, as I have stated, see any ground for lowering the position of salaries of members of the House of Commons by the derogatory treatment of such income as merely as alimentary or eleemosynary dole. I concur in the judgment proposed.

LORD PARKER OF WADDINGTON.—I agree. The question your Lordships have to decide depends primarily on the true construction of s. 319 of the Irish Bankrupt and Insolvent Act, 1857, and s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872. These sections have to be read together as part of one Act. (See s. 1 of the Act of 1872.) Section 319 deals with some but not all of the salaries or periodic payments in the nature of salary, which by the common law could not, on grounds of public policy, be assigned or taken in execution either at law or in equity. It enables the salaries or periodic payments with which it deals to be made available to some extent for the creditors of a bankrupt notwithstanding the policy of the common law. Section 51 of the later Act deals with all salaries or income not falling within the provisions of s. 319 of the earlier Act. It enables the salaries or income with which it deals to be made similarly available. The only difference between the two sections is that the extent to which salaries or periodic payments falling within s. 319 can be made available depends on the discretion of the judge in bankruptcy, to be exercised with the consent of the public official therein referred to, whereas the extent to which salaries or income falling within s. 51 can be made available depends on the discretion of the judge in bankruptcy alone. If the sections be read together it is reasonably clear that s. 51 embraces all salaries which were not assignable or capable of being taken in execution by common law other than those specified in s. 319. It was so decided in *Re Huggins* (9) in reference to the corresponding provisions of the English Bankruptcy Act, 1869. In construing an Act which, on the face of it, is intended to modify public policy for the benefit of the creditors of a bankrupt, it would be wrong for any court of law to limit the plain meaning of the words used by appealing to the public policy intended to be modified. The only public policy which such a court can consider is the public policy embodied in and appearing on the face of the Act itself.

In the present case the judge in bankruptcy, on Feb. 19, 1915, made an order under s. 51 of the Act of 1872 directing the bankrupt to pay to the official assignee in his bankruptcy for the benefit of his creditors the sum of £200 per annum out of his Parliamentary salary or income of £400 per annum. If the Parliamentary salary or income referred to be salary or income within s. 51, the judge in bankruptcy had full discretion to make the order he did, and there is certainly nothing to justify your Lordships in interfering with such discretion. If the order was wrong it must be on the ground either (i) that the Parliamentary salary or income referred to was within s. 319 of the earlier and not within s. 51 of the later Act, or (ii) that it was not within either section. It was not contended before the Court of Appeal, nor is it contended before your Lordships, that the Parliamentary salary or income in question is within s. 319 of the earlier Act. The whole argument before the Court of Appeal and before your Lordships was that it was not within either section, and the Court of Appeal discharged the order made by

the judge in bankruptcy on this ground. In order to see whether the Court of Appeal was right in so doing it is necessary to consider the origin and nature of the Parliamentary salary or income with which the judge in bankruptcy had to deal.

It appears that on Aug. 10, 1911, the House of Commons passed a resolution that:

> "In the opinion of the House provision should be made for the payment of a salary at the rate of £400 a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of the House or a Minister or as an officer of His Majesty's household."

Ever since this resolution was passed members of Parliament, as such, have regularly received £400 per annum by equal quarterly instalments, the money required being included in the Estimates, voted in the usual manner, and subsequently appropriated for the purpose by the annual Appropriation Act. The Appropriation Act, 1911, contains an express reference to the "salaries" of members of the House of Commons. In subsequent Appropriation Acts these salaries are included in the general salaries and expenses of the House, but this change of form does not connote any change in the nature of the payment. The payment is made to and received by every member virtute officii. It does not vary with his pecuniary needs or with the expenses he must incur in fulfilling his duties or with the assiduity with which those duties are fulfilled. Indeed, it continues to be payable to him for periods during which he may be disqualified from sitting and voting, and can have no duties to perform: (see Bankruptcy Act, 1883, s. 33 (1)). It may be precarious in the sense that the House of Commons may at any time see fit to rescind this resolution of Aug. 10, 1911, or to refuse to vote the necessary funds, but there is the same expectation of continuity of payment as exists in the case of all officials whose salaries are not charged on the Consolidated Fund In other respects it bears all the marks of an official salary. Moreover, it is admittedly income, and as such (after allowing the deductions for expenses provided by the Finance Act, 1913), is subject to income tax. Under these circumstances I confess I am unable to see any reason why it should not be held to be salary or income within s. 51 of the Act of 1872. In holding the contrary I think the Court of Appeal were, to some extent at any rate, influenced by a consideration of the objects which the House of Commons might be supposed to have had in view in passing the resolution of Aug. 10, 1911. The Lord Chancellor, for example, was of opinion that the salary must be looked on as payment of money, first, to indemnify the member in respect of general loss of other means of subsistence caused by his having to attend to his public duties; secondly, to indemnify him against the actual expenses which he may have had to incur; and, thirdly, to ensure by means of such indemnity that no member of the House might be prevented from discharging the great public duties entrusted to him by the vote of his constituency. He seems to have thought that on this footing it would be against public policy to make any part of the salary of a member available for the payment of his creditors. Again, the Lord Chief Baron appears to have been of opinion that the salary was granted to enable a member to perform his duties and support his office with the degree of dignity due to it, and that therefore it would be against the principles of the common law to make the salary available for his creditors in the bankruptcy.

In my opinion, courts of law have no business in such a case to speculate on the objects which the House of Commons may have had in view. It is not for them to say that what is voted and paid as, and bears all the distinguishing marks of, a salary is not a salary because, if it were, some presumed intention of the House of Commons might be frustrated by an application of the general law. It may well be that at common law the salary in question would be inalienable, but that is no reason for refusing to apply the provisions of the law of bankruptcy under which other salaries, inalienable at common law, can be made available for creditors. Again, it may well be that one of the objects the House of Commons had in view in passing the resolution of Aug. 10, 1911, was to enhance the dignity and to increase the efficiency of its members, but even so I am not sure that public policy has not on this occasion justified its reputation as an unruly horse, for while, on the one hand, the public is undoubtedly interested in every man paying his lawful debts, it is, on the other hand, by no means clear that either the

dignity or efficiency of a member of Parliament would be enhanced by his being placed in a better position to defeat his creditors than the rest of His Majesty's subjects. In my opinion the appeal succeeds.

LORD SUMNER.—The respondent is an undischarged bankrupt, who sits in the House of Commons as Member for North Galway, and in that capacity is paid £400 a year out of funds provided by Parliament. Previous to his election he had been adjudicated a bankrupt in Ireland on his own petition. If he had been adjudicated under the bankruptcy legislation applicable in England, Scotland, and Wales he would have been ineligible for election.

Much has been said on the difference between the Irish Bankruptcy Acts and those which govern other parts of the United Kingdom, and counsel for the appellant warmly disputed and deplored it as an injustice to Ireland. Be this as it may, the respondent receives this sum as having been validly elected to Parliament, and I think your Lordships can but deal with that fact as you find it; otherwise the order of BOYD, J., which the appellants seek to restore, would have neither basis nor operation.

The chief question is whether this payment is either "salary" or "income," that is "salary" or "income" within the meaning of s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, but as that Act neither defines nor qualifies these terms, I take it that the best, if not the only, way of deciding whether the payment comes within the meaning of the section is to ascertain whether it comes within its words. The money is paid quarterly. It is not, I gather, forthcoming immediately on election. The payee may be a member and entitled to sit, and actually sitting for some time before he is put in funds. The payments are the same for all members, and all members (except those in receipt of ministerial salaries) are entitled to them. The fund out of which they are made is appropriated by statute annually to the service of the Crown, and the office, which actually disburses them, is that which pays so many public salaries. It is that of the Paymaster-General. They are chargeable with income tax, a fixed sum of £100 per annum being allowed free of tax in all cases on the supposition that it represents the expense of performing Parliamentary duties. The rest is taxed as income belonging to the member and applicable to his own purposes. Judging by the character of these payments, I am, with all respect, unable to join in the views taken in the Court of Appeal in Ireland, that they are either an indemnity against the cost of being in Parliament, or a subvention in aid of the member's private means, in case they are insufficient to support that dignity, or a compensation for the public work he may do, or only a casual and precarious bounty not to be reckoned upon until it is encashed.

The question before your Lordships is one of interpretation of the relevant statutes in the light of the circumstances and the practice proved. As the sum is the same for all, though the expenses, the means, the sacrifices, the labours, and the attendances of the members differ, I think it is in its nature a salary, and a salary none the less that, like all State salaries not specifically charged on the Consolidated Fund or otherwise provided for by statute, it will not be paid unless Parliament annually appropriates public money for the purpose. The legislature has in fact chosen the word "salary" to describe these payments. If I may say so, it has done so with equal deliberation and precision. The term is used in the Appropriation Act, 1911, Sched. B, Part 7, Class II, item No. 1A, and the Finance Act, 1913, s. 3, is also applicable. I think that the modification introduced by the Appropriation Act, 1912, Sched. B, Part 6, Class II, item No. 2 makes no difference in this regard. If, then, the payments which the respondent receives are salary or income within s. 51 of the Act of 1872, an order to pay part of them to the appellant was within the jurisdiction of BOYD, J. The contrary is argued on the grounds either that (i) they fall within the Irish Bankrupt and Insolvent Act, 1857, s. 319, in which case the consent of the head of the respondent's department would have been required, or that (ii) s. 51 of the Act of 1872 is placed in such antithesis to s. 319 of the Act of 1857 that it must be read as referring only to private salaries or incomes, in contradistinction to those derived from the State, or that (iii) there is such a rule of public policy against the alienation of salaries like this as requires the words to be read otherwise than in their apparent sense.

As s. 319 proceeds by enumeration of departments, and necessarily does not name the salary, and as the respondent is not a subordinate in any department, the case does not fall within s. 319. The two sections read together clearly mean that all salaries or incomes not brought in by the first shall be comprehensively brought in by the second. I am not satisfied that this salary has any analogy in fact to those payments, made for the purpose of enabling a certain office of State to be maintained or of retaining the future services of officers, which have been the subject of the decisions cited, but, however this may be, the words of the statute, being clear, import that the legislature considered that the alienation of part of this salary under an order in bankruptcy was consistent with public policy, a view which is supported by the explicit application of similar provisions in other Bankruptcy Acts to various payments, which probably would be inalienable at common law. I think, therefore, that the plain words of s. 51 must be enforced, and that the order of BOYD, J., was rightly made. The quantum to be paid was in his discretion, and, as I read his judgment, it proceeded on no erroneous principle of law. I think that the appeal should be allowed.

Solicitors: *Munton, Morris, King, Gavan Duffy & Co.*, for *W. V. Seddall*, Dublin; *Herbert Z. Deane*, for *John L. Scallan & Co.*, Dublin.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

LADBROKE & CO. *v.* TODD

[KING'S BENCH DIVISION (Bailhache, J.), March 27, 1914]

[Reported 111 L.T. 43; 30 T.L.R. 433; 19 Com. Cas. 256]

Bank—Negligence—Opening customer's account without inquiry—Stolen cheque paid into account—"Account payee only"—Proceeds collected from drawer's bank—"Negligence"—Absence of care to protect payee—"Customer"—Person becoming customer when account opened—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 82.

A banker is guilty of negligence towards the drawer of a cheque crossed "account payee only" if he opens an account for the person presenting the cheque and collects the money for it without making any inquiries concerning the respectability of the customer by requiring references or otherwise.

A person becomes the "customer" of a bank within s. 82 of the Bills of Exchange Act, 1882, when he takes to the bank money or a cheque and asks to have an account opened in his name and the bank accepts the money or cheque and agrees to open an account in the name of that person. It is not necessary that the person should have drawn any money on the account or even should be in a position to draw money.

The words "without negligence" in s. 82 means without taking due care to protect the person whose name appears on the cheque as payee, especially in the case of a cheque marked "account payee only."

Notes. Considered: *London and Montrose Shipbuilding and Repairing Co.* v. *Barclays Bank* (1925), 31 Com. Cas. 67; *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia & China*, [1928] All E.R.Rep. 285; *Lloyds Bank, Ltd.* v. *Savory & Co.*, [1932] All E.R. Rep. 106.

As to protection to bankers collecting cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 179–186; and for cases see 3 DIGEST (Repl.) 261–272. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Action in the Commercial List tried by BAILHACHE, J., without a jury.

The plaintiffs claimed to recover £75 11s. 3d. for money had and received by the defendant to the use of the plaintiffs, and alternatively, damages for the conversion of a cheque for the like amount.

Hogg and *Carthew* for the plaintiffs.

Gibbons, K.C., and *Frank Newbolt* for the defendant.

BAILHACHE, J.—Messrs. Ladbroke & Co. bring this action against Mr. W. T. T. Todd, who carries on business as a banker at No. 27, Old Jewry, under the style of the John Bull Bank, for the conversion of a cheque for £75 11s. 3d., or, alternatively, for the proceeds of the cheque as money had and received to the plaintiff's use.

The matter arose in this way. A young man named Robert Howard Jobson, who was a member of University College, Oxford, had a betting account with the plaintiffs, and at the end of the week ending Oct. 18, 1913, he had won £75. The plaintiffs, intending to pay that betting debt, placed a cheque for £75 11s. 3d. in an envelope addressed to Jobson, and also other cheques in envelopes addressed to other people. These letters were placed in a pillar box, and were soon afterwards abstracted by a thief, who took the cheques out of the envelopes and substituted forged cheques, the letters being afterwards forwarded to their destinations. Subsequently, some men went to various banks with the stolen cheques, representing themselves as being the persons in whose favour they were drawn in order to obtain payment. On Oct. 20, 1913, a young man went to the defendant with the cheque for £75 11s. 3d. and said he wanted to open an account with the cheque. The cheque was one of the stolen cheques, and was drawn in favour of R. H. Jobson, and crossed "Account payee only." He stated that he was Jobson, and the payee of the cheque. He said he wanted the cheque cleared as soon as possible as he wished to go to Oxford that night. He had indorsed the cheque before he went to the bank. The defendant said the cheque would take three days to clear, and that if he wanted it specially cleared it would cost 10s. 6d. The young man then stated that the cheque was the result of a betting transaction, and he, therefore, did not wish it to appear in his banking account at Oxford. That seemed to the defendant to be a reasonable explanation. The young man was well-dressed and well-spoken, and appeared to be of a class likely to be an undergraduate at Oxford University. The defendant accepted the cheque, but gave the young man to understand that he would not be allowed to draw upon the account until the cheque had been cleared. The young man signed his name in the signature book of the bank and then left. The defendant was careful to see that the signature in the book corresponded with the endorsement on the cheque. That, however, only showed that the same person had written both signatures, but did not show that he was the real Mr. Jobson. The defendant was not suspicious, but was taken in by the young man's appearance. The cheque was duly cleared, and on the afternoon of the same day the pretended Mr. Jobson sent a messenger to the defendant's bank with an order for the money written on a stamped piece of paper. The defendant said that would not do, and the young man must come to see him. The pretended Mr. Jobson accordingly came on the following day, drew a cheque for the amount of the stolen cheque, and was paid over the counter. He had asked to be paid in £5 notes, and was very angry because he could not get all the money in notes. The whole of the circumstances, so far as the defendant was concerned, were reasonable, and did not raise any suspicion in his mind. There was also the further circumstance that when the young man came to draw the money, the defendant and he talked freely, and it appeared that both knew Mr. Bottomley. That circumstance made the defendant still less suspicious.

I have no doubt that the defendant took the cheque in good faith, but something more is necessary before he can claim the protection of s. 82 of the Bills of Exchange Act, 1882, which provides as follows:

> "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Therefore, it appears that a banker must not only receive a cheque in good faith, but he must also receive payment of it without negligence and for a customer. At one time there were numerous decisions upon the question whether a banker had received payment for himself or for a customer, but that question was put an end to by s. 1 of the Bills of Exchange (Crossed Cheques) Act, 1906 [repealed by Cheques Act, 1957], and the defendant brought himself within the protection of s. 82 if he could show that he received payment of the cheque for a customer in good faith, and without negligence.

I think the pretended Mr. Jobson was in fact a customer of the defendant. It is true that it was the first transaction, but I have to look at the relationship between the parties created by the receipt of the cheque. Was he a customer of the bank when he handed the cheque to the defendant? I think he was. There must be a time when he began to be a customer, and I think a person becomes a customer of a bank when he goes to the bank with money or a cheque, and asks to have an account opened in his name, and the bank accepts the money or cheque, and is prepared to open an account in the name of that person. I think that person becomes a customer then, and after that he is entitled to be called a customer of the bank. I do not think it is necessary that the person should have drawn any money, or even that he should be in a position to draw money. I think such a person becomes a customer the moment the bank receive the money or cheque, and agree to open an account. Therefore, I think the pretended Mr. Jobson was a customer of the defendant's bank.

The last question is whether the defendant received the cheque and collected the money for it without negligence. On that point I have felt great difficulty. The words "without negligence" cannot mean without breach of duty towards himself or towards the person who was his customer. They must mean without taking due care to protect the person whose name appears on the cheque as being the payee, and especially in the case of a cheque marked "account payee only." Was the defendant under any obligation to make any inquiries when he received the cheque? If I had been left without any evidence on the point I should have been disposed to think that the defendant was not under any obligation to make inquiries in the absence of anything to make him suspicious. But I am not left to my own views on this point, because I had the evidence of two gentlemen, one of whom was the manager of a branch of the National Bank, and the other a retired branch manager of the Bank of Australasia, both of whom said it was the practice of banks in a case of this kind to make inquiries. It was true that banks were willing to take cheques, but before they would allow them to be operated upon they must be satisfied as to the respectability of the intended customer. Sometimes that was done by references, and sometimes by an introduction through a customer. That being evidence of the ordinary practice of bankers, I am not left to form my own conclusions. The defendant, in fact, did fall short of that degree of care ordinarily exercised by bankers, and therefore he was guilty of negligence.

I thought at one time that no inquiries would have helped, but counsel for the plaintiffs satisfied me that inquiries would have been useful. The pretended Jobson knew something of the real Mr. Jobson from the letter in which the cheque was enclosed. He knew that he was a member of University College, Oxford, and that his initials were R. H. Jobson, but he did not know what R. H. stood for, and accordingly he gave the names of Richard Henry. The initials, however, did not stand for Richard Henry, but for two other names. It was, therefore, quite clear that if the defendant had taken the precaution of making inquiries at Oxford as to whether Richard Henry Jobson was a member of University College, he would have been told that there was no person of that name in the college, although there was a person of the name of Robert Howard Jobson. This was a case, therefore, in which an inquiry would have been useful, and, as the defendant had failed to take the ordinary precautions which other banks usually take, there would be judgment against him for the amount claimed.

Solicitors: *Herbert Smith, Goss, King & Gregory*: *Bruce, Miller & Co.*

[*Reported by* L. C. THOMAS, ESQ., *Barrister-at-Law.*]

HATFIELD (OWNERS) *v.* GLASGOW (OWNERS). THE GLASGOW

[House of Lords (Earl Loreburn, Lord Dunedin, Lord Atkinson and Lord Parmoor), November 5, 6, December 8, 1914]

[Reported 84 L.J.P. 161; 112 L.T. 703; 13 Asp.M.L.C. 33]

House of Lords—Jurisdiction—Review of finding of fact—Concurrent findings of courts below—"Tolerably clear" that findings erroneous—Consideration of probability.

The rule that concurrent findings of fact should not be disturbed on appeal does not apply where there is tolerably clear evidence that the findings are erroneous, and this principle is especially applicable where the conclusion sought to be set aside rests upon the consideration of probability.

A vessel, the *H.*, while rendering assistance to another vessel, the *G.*, was rammed by the *G.* and all her hands with one exception were lost. In the court of first instance both vessels were held to blame, the *H.* owing to want of skilful navigation and the *G.* owing to the fact that she did not reverse her engines in time to avoid the collision, but the Court of Appeal reversed that decision and held that the *H.* was alone to blame.

Held: the House of Lords had jurisdiction to review the findings in the courts below as this was not a true example of concurrent findings; on the facts judgment would be entered for the *H.* and the *G.* pronounced alone to blame.

Rule laid down by Lord Herschell and Lord Watson in *P. Caland and Freight (Owners)* v. *Glamorgan Steamship Co.* (1), [1893] A.C. 207, as to concurrent findings considered.

Notes. As to jurisdiction of the House of Lords concerning questions of fact, see 9 Halsbury's Laws (3rd Edn.) 363; and for cases see 36 Digest (Repl.) 373, 374. As to collision regulations generally, see 35 Halsbury's Laws (3rd Edn.) 592 et seq.: and as to the overriding duty to take seamanlike precautions, see ibid., 600, and for cases see 41 Digest 685 et seq. The Regulations for Preventing Collisions at Sea, art. 29, is now replaced by the Collision Regulations, 1948, r. 29.

Cases referred to:

(1) *P. Caland and Freight (Owners)* v. *Glamorgan Steamship Co., The P. Caland*, [1893] A.C. 207; 62 L.J.P. 41; 68 L.T. 469; 9 T.L.R. 309; 7 Asp.M.L.C. 317; I.R. 138, H.L.; 41 Digest 718, *5551*.

(2) *Skinner* v. *London, Brighton and South Coast Rail. Co.* (1850), 5 Exch. 787; 15 Jur. 299; 155 E.R. 345; 8 Digest (Repl.) 103, *673*.

(3) *Great Western Rail. Co. of Canada* v. *Braid, Great Western Rail. Co. of Canada* v. *Fawcett* (1863), 1 Moo.P.C.C.N.S. 101; 1 New Rep. 527; 8 L.T. 31; 27 J.P. 596; 9 Jur.N.S. 339; 11 W.R. 444; 15 E.R. 640, P.C.; 8 Digest (Repl.) 96, *639*.

(4) *Gray* v. *Turnbull* (1870), L.R. 2 H.L.Sc. & Div. 53.

(5) *Kwang Tung (Owner)* v. *Ngapoota (Owners) The Ngapoota*, [1897] A.C. 391; 66 L.J.P.C. 88; 13 T.L.R. 420, P.C.; 41 Digest 752, *6040*.

Appeal by the plaintiffs, owners of the steamship *Hatfield*, against an order of the Court of Appeal.

A collision took place in the North Sea on Oct. 11, 1911, while the *Hatfield*, an iron screw steamship of 1,753 tons gross and 1,086 tons net register, at the request of those in charge of the *Glasgow*, was attempting to render assistance to the latter. The *Glasgow* was a steel screw steamship of 1,068 tons gross and 492 tons net register. On the morning of the collision the *Glasgow*, her steering gear having gone wrong, was drifting in the North Sea, flying signals of distress, and the *Hatfield* came up to take her in tow. She rounded the stern of the disabled vessel and came out on her starboard quarter. A few minutes later the *Hatfield* was struck on the port bow by the *Glasgow's* stem, and almost immediately went to the bottom, all her hands, with the exception of one man named

Hagar, being lost. By the decree of the Admiralty Division both vessels were pronounced to blame. BARGRAVE DEANE, J., found that the master of the *Hatfield* in a heavy sea and wind miscalculated his direction and got too close to the *Glasgow*. He therefore attributed blame to the *Hatfield*. He found also those in charge of the *Glasgow* to blame, because although he did not find that the engines of the *Glasgow* were set ahead, he found that they were not reversed at the time and at the distance when they were asserted to have been reversed or at any material time. He was advised by the assessors and found that had the engines been so reversed the collision would have been avoided. The assessors in the Court of Appeal agreed with the advice given by the assessors to the judge in the court below. From that judgment both parties appealed to the Court of Appeal (LORD PARKER, LORD SUMNER and WARRINGTON, J.), who found that the *Hatfield* was alone to blame. In their opinion the sole cause of the collision was a miscalculation by those in charge of the *Hatfield* and negligence. The charges of negligence made against those navigating the *Hatfield* were: (i) That a good look-out was not kept (ii) that she failed to keep clear of the *Glasgow;* (iii) that she was in the circumstances manœuvred too close to the *Glasgow*, and improperly and at an improper distance attempted to cross the *Glasgow's* bows; (iv) her engines were not stopped or reversed in due time or at all; (v) that those in charge of her neglected to comply with art. 29 of the Sea Rules.

Art. 29 of the Regulations for Preventing Collisions at Sea is the only article of such regulations material to the case. Its terms are as follows:

> "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper look-out or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

Roche, K.C., and *Lewis Noad* for the appellants.
Sir Robert Finlay, K.C., *A. D. Bateson, K.C.*, and *Raeburn* for the respondents.

The House took time for consideration.

Dec. 8, 1914. The following opinions were read.

EARL LOREBURN.—This is a collision case in which BARGRAVE DEANE, J., found both the two steamships to blame—namely, the *Hatfield*, which was sunk, and the *Glasgow*. The Court of Appeal found that the *Hatfield* alone was to blame. A sad feature of the collision is that all hands were lost in the *Hatfield*, except one man, Hagar by name. In such a state of things the crew of the surviving ship is especially bound to be careful not to admit any unconscious bias in favour of their own vessel into their evidence, and a court has always to keep in mind that what is said against the ship which has been destroyed is said against those who cannot tell their own story. I must advert to the fact that a scrap log was thrown overboard the morning after the collision because, it is said, it had been wetted by sea water and had been reduced to pulp. This has not, though it might have, affected my judgment, but it was very wrong to throw it overboard under the circumstances.

Some things are common ground. The *Glasgow* is a steamship of 1,068 tons gross. Her steering gear went wrong and she was drifting not far from the Galloper Lightship on the morning of Oct. 1, 1911, flying signals of distress. About 11 a.m. the *Hatfield*, a steamship of 1,753 tons gross, came up to take her in tow, rounded her stern, and came out on her starboard quarter. What then happened we have to collect from various sources, but in a few minutes the *Hatfield* was struck on her port bow by the *Glasgow's* stem, and almost immediately went to the bottom. At the time a gale was blowing from N. or N.E., and there was a rough sea. Everything else that is material we have to find out for ourselves from such evidence and indications as are afforded.

There are three sources of information, in addition to skilled witnesses. In the first place, the surviving ship, the *Glasgow*, was inspected when she came into port. The forward fluke of the anchor on her port side was broken off. There was substantially no setting over of the stem, and the rivets can be seen in the photographs, apparently not

displaced. In fact, except the anchor on the port side, the bows of the *Glasgow* were not substantially injured. Now that shows one thing. When the impact took place the *Hatfield* was not going ahead. It is agreed that the stem of the *Glasgow* struck the port side of the *Hatfield*. In fact, it was clear, that the *Glasgow* struck the *Hatfield* practically at right angles and when the latter ship was not moving, or hardly moving. One more fact appeared from this inspection. The condition of the *Glasgow's* bows showed that the blow was not an up-and-down blow. The bows of the *Glasgow* went clean into the *Hatfield*.

Our next source of information is the solitary survivor of the *Hatfield*, namely, Hagar, who came on deck immediately after the collision. Bargrave Deane, J., who saw him, says he was an honest witness, but thought he was too agitated to be reliable upon detail. Hagar said that the stem of the *Glasgow* penetrated 6 ft. or 7 ft. into the *Hatfield*, at about right angles, and if that is accurate then the experts are satisfied, nor was it disputed that the *Glasgow* must have had headway on her—in other words, that she rammed the other ship—which, if accepted, would put an end to the case. I will not act upon that because I do not feel absolutely clear about the extent of penetration, and both courts below declined to accept it. It is due to the witness to say that his evidence is decidedly confirmed by the report made by the mate of the *Glasgow* to the master, and I am by no means sure that this is not true.

The last source of information is the crew of the *Glasgow*, and before I deal with that I will put together the facts which are either admitted or established, apart from what those present at the collision can prove. I take with me to the consideration of the *Glasgow's* evidence these facts: The blow was struck at about right angles; the *Hatfield* was practically motionless at the time; the blow was severe enough to sink her almost at once, and it was not an up-and-down blow.

Now for the account given by the officers of the *Glasgow* herself. The master's version was as follows, and the others agreed so far as they went. After describing how he had his steering gear broken and how the *Hatfield* passed under his stern and came out on the starboard quarter in order to take him in tow, he proceeds: "She appeared stationary there for about five or ten minutes and then she appeared to go on the same course as we were heading ourselves, and steaming slowly ahead; but it appeared to me that she was still edging in towards us all the time. When he had got forward of the beam he seemed to act on a starboard helm then and still edging in, and he got nearly abreast of our forecastle head, still under his starboard helm and still edging in towards us . . . well, he still had headway on him; he still appeared to be attempting to cross the bow, and when he had got nearly at right angles to us and about two ships' lengths off I thought it was dangerous and I put the engines full speed astern." Here the witness was interrupted by the learned judge, but he proceeds a little later: "Just when she was about these two ships' lengths off I rang the engines full speed astern, and I could tell by the vibration of the ship that the engines were going astern, and about a minute after I had rung the engines astern the collision occurred." The witness then described by models how the ships were placed towards each other at the time he thought there was a risk and ordered the engines full speed astern, and this diagram showed the *Hatfield* on the starboard bow of the *Glasgow*, not far from right angles and about 480 ft. off. The witness said that "the *Hatfield* came broadside down on us," and was steaming ahead at the time of the collision about four or five knots.

I know how strange are the views that honest men can take of what they have themselves seen, or even done, especially in times of agitation, and I do not wish to be understood as imputing falsehood, but I decline to accept this version, for the following reasons.

There is nothing to show that the relative positions of the two ships a minute before the accident was inaccurately described by the master of the *Glasgow*, Captain Turnbull. Taking it to have been broadly speaking as he described it, the crucial point is—how did these two ships get in a minute's time from that position into the position they were in unquestionably at the moment of collision, namely, the *Hatfield* right across the bows of the *Glasgow*, and the *Glasgow's* stem running into her at about right angles? They could

not have drifted together in so short a time. Captain Turnbull says that the *Hatfield* "had been edging round on this starboard helm," and "as soon as the wind got her on the port quarter that assisted her to get round," and "the *Hatfield* came broadside down on us." He adds that at the time of the collision the *Hatfield* was "steaming ahead about four or five knots." That is in substance his explanation of the *Hatfield's* movements. In regard to the *Glasgow* he says that he reversed his engines when the ships were in the position described in the diagram, two ships' lengths apart, but the accident nevertheless occurred. I make all allowances for inexactitude as to distance and time, to which we are all liable. But this is quite clear. If the two ships were in anything like the position described by the master of the *Glasgow* in his diagram, it was his duty to reverse his engines in time to avoid a collision. The event proves that he did not reverse in time. The *Hatfield* could not move laterally. The *Glasgow* could move back, for her engines were in good working order, and there was ample sea room. Now, he says that he did reverse a minute before the collision, when the ships were in the position described. BARGRAVE DEANE, J., did not accept this statement, and his finding is not impaired by reason of the fact that he thought the order was given but not obeyed in the engine room. More than that, there is no statement in any of the logs except the engineer's log that the engines were reversed before the collision, and the engineer's log was written up six or seven days afterwards. More than that, the account given by Captain Turnbull to the owners' agent says nothing about reversing, but the *Glasgow* was lying dead in the water, and helpless, at the time of the collision. I will add that the nautical assessors advise us that there could have been no collision if the *Glasgow* had reversed at the time her master alleges. This being so, I agree with BARGRAVE DEANE, J. I am quite satisfied, on the evidence, that the *Glasgow* could have avoided the collision by reversing, and ought to have reversed, and did not so reverse. Therefore I hold the *Glasgow* to blame.

Ought we then to say that the *Hatfield* also was to blame? The contention of her owners at the trial rested partly on an allegation that the *Glasgow* rammed her by going ahead, and partly on the contention that the *Glasgow* ought to have reversed. To my mind it does not much signify what alternative views learned counsel thought it right to rely upon, provided there was no surprise, and that is not suggested. We have to act on the evidence. The only blame imputed to the *Hatfield* is that she came too near, though it was her business to come somewhat near with a view to taking the *Glasgow* in tow. The only evidence is the evidence of Captain Turnbull. I have already pointed out that his evidence cannot be accepted as to reversing his engines. Nor can it be accepted when he says that the *Hatfield* was moving at the speed of four or five knots when the collision occurred, because every witness agrees that she must have been practically motionless, judging from the condition of the *Glasgow's* bows, almost the only solid material we have in this case. Certainly I will not accept his evidence, under these circumstances, to inculpate another ship, when no one can contradict him. I do not mean to charge him with falsehood, because one knows how much room there is for honest error; but the story he tells of the way in which the one ship drifted on to the other is unsatisfactory in itself, quite apart from the errors I have adverted to already, and I cannot act upon it. I find, therefore, that, upon his own statement, upon which he must be judged, when corrected by other testimony, the master of the *Glasgow* was in fault, because he ought in any view to have avoided the collision by reversing. I am not at all satisfied with the evidence he gives of the *Hatfield's* default, and it is not proved that she was to blame.

I do not feel the difficulty of accepting Captain Turnbull's evidence when it inculpates himself and rejecting it where it inculpates the *Hatfield*. It is not a case of founding two mutually contradictory conclusions upon the same basis of facts, though this, too, may be sometimes necessary in a court of law, because a man's own evidence may be conclusive against himself as an admission when it cannot be received, and is no evidence at all against another person. But that is not this case. The master's statement is not an entirety, one and indivisible. Accepting that part of it which is not corrected by other evidence, I think it shows that he was to blame, and does not show that the *Hatfield* was

A to blame. I feel at liberty to form my own opinion on the whole of the evidence and the advice we receive, and to pick and choose what I believe to be true. I suspect that the *Glasgow* was going ahead, perhaps manœuvring to get near enough for a line to be thrown. It is sufficient to say that no fault on the part of the *Hatfield* has been proved to my satisfaction, and it is upon that ground that I found my opinion.

B **LORD DUNEDIN.**—I agree with the motion made by the noble earl who has preceded me, and I concur with much of what he has said. But, I feel constrained to go somewhat further, and to say that I have come to the conclusion that the true cause of the collision was that the *Glasgow* at the last moment went ahead and not astern. The fault I have to find with the judgments under appeal is that, with all respect to the learned judges, none of them faces the question: What caused the accident? There was a C collision of sufficient force to effect the sinking of the *Hatfield* in seven minutes after impact. The question of how that came about is not handled at all by the Court of Appeal, except in an indirect manner in some remarks by LORD SUMNER, and in the court of first instance it is left thus by the learned trial judge:

> "There was sufficient momentum between the two vessels to cause this serious damage which caused the *Hatfield* to sink."

D

Now, "momentum" never did and never will cause a collision. I do not make this remark as a mere verbal criticism on the use of the word without something more. What I do mean is that you must have motion in a certain direction on the part of one or both bodies in order to make those bodies collide, and before one can approach the question of blame I think it is necessary to make up one's mind on this topic. Now, the E *Glasgow*, it is admitted on all hands, was lying in the trough of the sea, with the wind on her starboard quarter, and drifting to leeward, and, upon the assumption that no use was made of her engines, was incapable of forward motion. Therefore, upon this assumption, the impact must have been due to motion on the part of the *Hatfield*. Inasmuch, however, as the collision, when it took place, was one in which the ships were, according to the description, almost at right angles to each other, the motion must have F been, if it existed, caused by a forward movement on the part of the *Hatfield*. The idea, however, is to my mind completely negatived by the fact, admitted by all, that if the *Hatfield* at the moment of collision had had forward way on her the bow of the *Glasgow* would have been twisted at least to a slight extent to port, which was not the case. Indeed, the expert witnesses for the *Glasgow* admit that at the moment of collision the *Hatfield* could not have had any way on her. The only other theory that G remains is, then, that the *Hatfield*, by her motion, having got into immediate proximity, the actual collision was caused by the effect of a wave lifting up one vessel and, so to speak, dropping it on to the other. But if this had happened the markings on the stem of the *Glasgow* must have been more or less vertical, whereas in fact they were all horizontal.

The matter, however, does not end there. All the expert witnesses admit that if the H penetration was severe it would speak to forward motion on the part of the *Glasgow*. Now, what was the penetration? It was at least sufficient to cut through the stringer plates, for without doing that you could not knock a hole in the vessel sufficient to make her founder in seven minutes. How much further did it go? The mate of the *Glasgow* admitted in cross-examination that the gash extended "to pretty near the coamings of the hatchway," and the sole survivor of the *Hatfield* said distinctly that he tried to get I past the hatchway on that side, and could not because of the knocked up splinters. I confess I am utterly unable to appreciate the comment of the learned trial judge on the evidence of this witness. I can imagine a great discount would have to be put on computation as to feet. But trying to get past a certain place and failing is a positive fact which does not rest on calculation, and, unless the witness is to be disbelieved, leaves no room for exaggeration one way or other. The calculation as to feet can be done afterwards on the plan.

What, however, is the view of the expert witnesses on the other side. They have to admit that an ugly hole was knocked in the *Hatfield*, or she would not have sunk. But

they think that the penetration of the stem of the *Glasgow* cannot have been more than 2 ft. because they found marks on the sides of the stem, and those marks do not extend more than 2ft. from the actual nose of the stem. To my mind this is absolutely inconclusive and for a very simple reason. Of course, if you force a V-shaped wedge slowly into a homogeneous substance it may very well be that the marks on the sides of the "V" will register for you the extreme point of penetration. That, however, will only be because in the case supposed there will be lateral pressure on the edges of the wedge. But when you come to the case of a violent blow effected by the edge of a wedge-shaped object against a substance which is not homogeneous no such result necessarily follows. It becomes a question of chance, as to which no one can accurately predict how far the opposing substance is knocked clean away by the blow of the entering wedge. This is especially the case when you are dealing with metal. No one can tell where exactly the stringers, which admittedly were burst, would break away. It is, therefore, in my judgment, quite inconclusive as to the amount of penetration finally achieved to find out how far on the side of the stem you find marks of friction. On the whole matter I therefore come to the conclusion that this collision, with its effects, was impossible except in the view that the *Glasgow* had forward way. If that is so it settles the whole case, for I entirely concur with the reasoning of the noble earl as to the dearth of any evidence against the *Hatfield*. I cannot help thinking that the opinion I have just expressed was really shared by my noble friend, LORD SUMNER, and that he over-rated the weight to be put on BARGRAVE DEANE, J.'s, comment on the evidence of the survivor and the mate. I am very far from wishing to depart from the salutary rule as to our not, in this House, interfering with concurrent findings on matters of fact. I cannot, however, look on this case as a true example of concurrent findings. The learned trial judge and the Court of Appeal do not come to the same result, and their theory of what actually happened is not the same. And, further, neither the trial judge nor the Court of Appeal pronounce any finding on what caused the collision? To say that the *Hatfield* "came too near" is, in the circumstances, not enough. I therefore do not consider that in coming to the conclusion I have come to I in any way do violence to a rule which I should always wish to follow.

LORD ATKINSON.—I concur. This is a most painful and embarrassing case. Every soul on board the *Hatfield* who could have given evidence as to the movements of his vessel and the cause of the collision has perished. The witnesses for the *Glasgow* have a free field. They can, if their consciences permit, without fear of contradiction, suppress facts, invent facts, minimise or exaggerate occurrences. One has to decide, in reality, on the story of one side. The story of the other side never can be told, and this demands that the case of the living against the dead should be clearly and satisfactorily established.

The *Glasgow* called for help. She invited the *Hatfield* to come to her assistance, and in a high wind and heavy sea endeavour to perform the difficult and dangerous operation of taking her in tow. In such an operation, I think, a duty was cast upon the vessel so asking for assistance to be on the alert, to observe the movements of the vessel come to salve her, to accommodate her own movements as far as safety would permit to those of the latter vessel, and to render aid, according to the rules of good seamanship, in assisting in the enterprise both desired to accomplish. The only fault attributed to the *Hatfield* is that her captain miscalculated his distance and came too close to the ship he was trying to salve. It was not even suggested that any other of his manœuvres were negligent or improper or contrary to good seamanship. But even if it be taken, for the moment, that he did come too close, and was in that respect guilty of negligence, and therefore to blame, the *Glasgow* would also be to blame if, by the exercise of due care and skill on her part, she could have avoided the consequence of the *Hatfield's* negligence. It would have been her duty to reverse her engines timeously so as to get stern-way on herself and get out of the way of the approaching ship so far as good seamanship in the circumstances would require. I do not think it is enough that the captain of the *Glasgow* should merely give the order to reverse at the moment he in fact came to the conclusion that the *Hatfield* was coming too close, if according to good seamanship he should, with his

means of knowledge, have reached that conclusion earlier. If the *Glasgow* was moving ahead, then the reversing of her engines was in the result useless; no stern-way could be got upon her, and it is not even pretended by Captain Turnbull that any stern-way was acquired by her until the very moment of the collision. He said, I think, that she (i.e., his ship) just got stern-way on at the moment the collision took place.

Now for the case of the *Glasgow*, the reversing of her engines became the crucial movement. The first question is, Has it been satisfactorily proved that the engines were reversed at all, and secondly has it been satisfactorily proved that, even if reversed, they were reversed as soon as, according to the requirements of good seamanship, they should have been reversed?

I confess, Bargrave Deane, J.'s, way of dealing with this matter somewhat puzzles me. He evidently kept in mind the circumstances that the scrap log in existence at the time of the collision had disappeared; that in only one of the four logs produced is any mention whatever made of this reversing of the engines, though the logs were all written up at leisure; that the only log in which it does appear is written up one week after the arrival of the crew at Dover, and after consultation with the captain; that the entry is merely "Engines working full speed astern at the time"—i.e., the time of collision; that there is any statement whatever as to how soon that operation commenced, and that even this entry is inserted after entries of events occurring some days later than the collision itself. These, in my mind at all events, are rather damning facts. They throw, I think, grave suspicion on the *Glasgow's* case. Now, the learned judge deals with them thus. He comes to the conclusion—

(i) That the engines were in fact reversed.
(ii) That they were not reversed in time.
(iii) That the delay in reversing them was due to the absence of the engineer from the engine room.

This last finding was wholly wrong. Not only was there no evidence to support it, but it was in direct conflict with the only evidence given on the point. The engineer, according to the evidence, was sent down to the engine room by the captain, not one minute before the collision, but five minutes before the order to reverse was alleged to have been given. And then the judge says :

> "I do not believe, in the absence of proper books made up at the proper time, that these engines were reversing a minute before the collision, or anything like it. If they had been reversing for a minute, then I cannot believe that the *Glasgow*, which is a speedy ship, and, according to her engineer, would probably go eight knots at her full speed when reversing, could not, in a minute, have got away from the collision. He was not reversing for a minute; there was not time to reverse a minute. The whole thing was done late."

He thus rejects the evidence of the captain and engineer, that the latter was ordered to go to the engine room, and went there five minutes before the order to reverse was given. He further rejects their evidence that the engines were reversed one minute before the collision, but he accepts the statement made by them that the engines were in fact reversed, which is the very fact upon which the state of the log books throws most suspicion.

The Court of Appeal, seeing that this third finding was in conflict with the only evidence given on the point, most properly put it aside, and Captain Turnbull having sworn that he gave the signal to reverse the engines as soon as he observed that the *Hatfield* was approaching too close, held that he was not guilty of any negligence. It is clear, that if the *Hatfield* was at the time of the collision steaming across the bow of the *Glasgow* from starboard to port at any considerable rate of speed, the stem of the *Glasgow* must have been twisted or bent to port. It has not been bent to port. On the contrary, according to the evidence of the two experts, Messrs. Casebourn and Blackett, it has been bent slightly to starboard. The first of these witnesses said that the existence of this twist to starboard involves the theory that the *Hatfield* was very nearly motionless. If she had been going about four or five knots, the speed her captain fixes, the

stem of the *Glasgow* would have been bent to port. Mr. Blackett agrees with him, and the theory of the collision which the former of these two gentlemen adopts is this, that there was a hatchet blow "from the *Glasgow* inflicted on the other vessel." If that means that the *Glasgow* from the crest of a wave fell down upon the *Hatfield*, cutting into her hull so deeply that she sank in a few minutes, then the unfortunate thing for this theory is that the *Glasgow* delivered this blow from above downwards without inflicting a single vertical scratch on her own hull. The marks she bore were horizontal. The same consideration would apply if the *Hatfield* from the crest of a wave had fallen upon the stem of the *Glasgow*. It appears to me almost inconceivable that the collision could have occurred in either of these ways without leaving some vertical marks upon the stem and bow of the *Glasgow*. The fact that the marks are horizontal suggests, I think strongly, that the stem of the *Glasgow* did not come into collision with the hull of the *Hatfield* with an ascending or descending motion; but that the blow was, on the contrary, a direct and level blow. I cannot find that BARGRAVE DEANE, J., ever alluded to this important point, or found as a fact, or even indicated what in his opinion, the speed of the *Hatfield* was as she approached the *Glasgow*. It is, I think, clear that the speed could not have been as high as that mentioned by her captain, four or five knots. From the evidence of the experts as to the bending the *Glasgow's* stem to starboard, it could hardly have been half so much.

The captain of the *Glasgow* must be held bound by the diagram he drew. He said that the *Hatfield* was distant from him two lengths of his own ship, i.e., 480 ft. (160 yards), at right angles to her, when he concluded that the *Hatfield* was coming too close, and gave the order to reverse. Now a knot is about 2,000 yards; 160 yards is something a little more than one-twelfth of this. If the *Hatfield* was going ahead at the rate of two knots, that would be one knot in thirty minutes, she would steam one-twelfth of a knot in two and a half minutes. If going at three knots it meant a knot in twenty minutes and one-twelfth of a knot in one and two-third minutes. But the captain said that though he kept his engines going astern after the impact, he only kept them going for a minute altogether from first to last. Again he said that he only felt the vibrations of the engines going astern for about half a minute. The strange thing is, however, that he says that he thought the *Hatfield* was getting too close five minutes before he gave the order to reverse. The learned judge put the question to him: "About five minutes before that you saw the chief engineer on the bridge deck?" Answer: "Yes". "And told him what?" Answer: "To be ready, as I thought the ship was getting rather close to us and I might require to go astern or go ahead, whichever I thought fit." He also says when the *Hatfield* got only 480 ft. away he thought it was dangerous. Captain Turnbull had, therefore, ample warning. He saw and appreciated the threatening danger, yet five precious minutes were by him allowed to elapse before he took action. If he had reversed when the *Hatfield* was 160 yards away he must, having regard to the rate of progress of the latter vessel, have got stern-way on his own ship in time and kept clear. BARGRAVE DEANE, J., found as a fact that the *Glasgow* was late in reversing, but gave a bad reason for his conclusion. There are no concurrent findings of fact on this point, and, therefore, nothing to prevent your Lordships from coming to the conclusion that the *Glasgow* was too late in reversing, and was therefore to blame.

The remaining question is, was the *Hatfield* to blame? I confess I have the greatest difficulty in accepting the conclusion that the injuries the *Hatfield* received were brought about in the manner described by the expert witnesses or by Captain Turnbull. It may well be that Hagar was inaccurate as to the precise number of feet to which his ship was penetrated, but he was found to be an absolutely honest witness, intending to speak the truth. Why, then, should his evidence be rejected when he says he could not pass between the hole in the *Hatfield's* side and the hatch coamings, the jagged ends of the irons helping to prevent his doing so? He tried to pass in order to see the damage done to his ship, and he says he had to go up to the forecastle deck to discover if the water was coming into her hold—a vital matter for him. He states that his opinion was that the *Glasgow* must have been going ahead to be able to deliver the blow that she did. The forming of that opinion tends I think, to prove Hagar's sagacity rather than his inac-

liability, but he receives the strongest corroboration of his statement as to the depth of the penetration of his ship from the fact that at the very moment of, or very soon after the collision, the mate of the *Glasgow* told his captain that his ship had cut into the *Hatfield* too near the coamings of her hatch. There was little or no time for invention. It was said at once. He repeated it at the Board of Trade inquiry, and though on the trial he tried to wriggle out of this statement, he was ultimately forced to admit that what he had stated at the inquiry was correct. No doubt that evidence was in conflict with the evidence of the two experts, who from the absence of all signs of injury on the bow of the *Glasgow* beyond 2 ft. from her stem, concluded that she could have only penetrated 4 ft. into the hull of the *Hatfield*. Well, no doubt it would be somewhat strange that if she had penetrated deeper than 2 ft. some more marks or injuries to her hull more aft of her stem than those found should not have been discovered, but not at all more strange than that she should have given or received a descending or ascending blow, and nothing but the horizontal marks or scorings been found upon her hull. Nor, indeed, more strange, it would appear to me, than that she should have penetrated even to the depth of 2 ft., and, considering what she must have gone through, not been more damaged than she was. For it was, as I take it, proved by Mr. Steel that the stem of the *Glasgow* must have cut through three stringer plates and for some distance through part of an iron deck, making a V-shaped hole in the side of the *Hatfield* through which the water rushed in and sank her. It is not disputed that the stem of the *Glasgow* made this hole. The mate saw it. The blow must, therefore, have been delivered with considerable force, and must, I should think, have been a level and direct blow. An effort was made at the trial to show that it was not delivered at right angles, but that is contrary to the case made at the earlier stages of the proceedings.

I think that the evidence as to the nature of the *Hatfield* injuries is not inconsistent with Hagar's opinion that the *Glasgow* had headway on her when the collision occurred. It is scarcely possible, one would think, that all this injury could have been inflicted if the *Glasgow* was at the time of the collision a receding vessel. Such is the extremely unsatisfactory position in which the case is left. It could not, I think, be successfully contended that the case of the *Hatfield* came within the principle laid down in *Skinner* v. *London, Brighton, and South Coast Rail. Co.* (2) and *Great Western Rail. Co. of Canada* v. *Fawcett* (3) and such like cases, to the effect that the happening of the accident is primâ facie proof of negligence on the part of the persons having control over the thing which caused the accident. Bargrave Deane, J., though he apparently disbelieved much that Captain Turnbull and his engineer deposed to on other points, believed them when they said they never went ahead, and endeavoured to reconcile this conclusion with the extent of the *Hatfield's* injury by saying first that the amount of penetration of the *Glasgow* stem into the *Hatfield* was not so great as is alleged, and then by saying that "we all know in these collision cases that the damage is most difficult to reconcile with the history of the case." Certainly this is a case to which this last remark is singularly applicable; but he never dealt with the question of the horizontal marks upon the bows of the *Glasgow*—no more than he dealt with the speed of the *Hatfield*. I have no hesitation in saying that in my view the evidence does not, in the peculiar circumstances of this case, establish satisfactorily that the *Hatfield* was guilty of any negligence causing this collision.

The question is: Am I precluded from giving effect to that opinion by the rule as to concurrent findings of fact laid down by Lords Herschell and Watson in *P. Caland and Freight (Owners)* v. *Glamorgan Steamship Co., The P. Caland* (1). Lord Watson said he concurred that the findings of fact in the courts below should not be disturbed in this House unless their Lordships should arrive at a tolerably clear conclusion that the findings are erroneous, and added

> "and the principle is specially applicable to a case in which the conclusion sought to be set aside rests upon consideration of probability."

The question of fact there alluded to was this: whether the red side-light of the ship *Caland* was invisible to the crew on board the *Glamorgan*—the ship which collided with her—or whether it was visible but was either unseen by the latter's crew, or seen and

disregarded. Both the courts held that on a balance of probability the light was not visible. There was in that case, as in *Gray* v. *Turnbull* (4) abundant evidence on each side. Here there was no conflict of evidence. There could not be. But once BARGRAVE DEANE, J., believed the captain and engineer on this one point, that their ship did not go ahead, the only point on which apparently he did believe them, he concluded that the *Hatfield* came too close and was to blame. The Court of Appeal did not feel itself at liberty, notwithstanding the circumstantial evidence, to disagree with the opinion of the judge in the court below as to the credibility of these witnesses, and accordingly accepted his decision as to the culpability of the *Hatfield*. I think, however, that these two decisions fall far short of such concurrent findings of fact as LORD HERSCHELL and LORD WATSON were dealing with in the case above cited. In my opinion, therefore, your Lordships are not debarred by the rule there laid down from holding that, considering all the evidence, direct and circumstantial, in this case, it has not been satisfactorily established that the *Hatfield* was to blame. I am therefore of opinion that the appeal of the *Hatfield* should be allowed, and the *Glasgow* should be held alone to blame. I do not think that *The Ngapoota* (5) applies to this case, as the captain of the *Glasgow*, five minutes before he says he ordered the engines to be reversed, thought that the *Hatfield* was too close.

LORD PARMOOR, stated the facts and continued.—The main case put forward by the appellants was that, immediately before the collision, the engines of the *Glasgow* were put ahead and should have been put astern, and that in consequence of this she rammed and sank the *Hatfield*. The nature and extent of the injury to the *Hatfield* are not inconsistent with this explanation of the collision, and the marks on the stem of the *Glasgow* are in a horizontal direction, such as would naturally be found on a ramming ship. Owing to the loss of life it was not possible for the appellants to call direct evidence. They mainly relied on the evidence of experts to prove that the nature of the injuries to the *Hatfield* was such that they could not have been inflicted unless the *Glasgow* was steaming ahead at the time. The learned judge held that the amount of the penetration by the *Glasgow's* stem in the *Hatfield's* side was not so deep as alleged, and did not sustain the case of the appellants that the *Glasgow* must have been steaming ahead at the time of the collision. He found that the engines had not been put ahead immediately prior to the collision. In this finding the Court of Appeal concurred.

Although the evidence on this point appears to me to be of an unsatisfactory and inconclusive character, I am not prepared to differ from the finding of the learned trial judge, endorsed in the decision of the Court of Appeal. The learned trial judge further found that the *Glasgow* did not reverse her engines in time, and that the whole thing was done too late. He says:

> "I do not believe, in the absence of proper books made up at the proper time, that these engines were reversing a minute before this collision, or anything like it."

I can see no reason for differing from the learned judge's finding under this head, although there is considerable difficulty in dealing with a case in which direct evidence is only available on one side. An agreed diagram to which I attach great importance shows the direction of the wind and "the position of the vessels when *Glasgow's* engine ordered full speed astern, as stated by Captain Turnbull, a witness for the defendant." In the diagram the distance shown between the two vessels is approximately 480 ft. Captain Turnbull in his evidence estimates that the *Hatfield* was steaming ahead at about four or five knots. If this had been accurate the collision would have taken place in about a minute from the time that the *Glasgow's* engines were said to be ordered "full speed astern." Having regard to the state of the stem of the *Glasgow* after the collision, I think it is impossible that the *Hatfield* could have been steaming at this rate, and that her speed was probably not more than two knots. Assuming that the speed of the *Hatfield* did not exceed two knots, the captain of the *Glasgow* appreciated the danger and ordered "full speed astern," according to the witness of the diagram, two minutes at least before the collision. If the order was so given and had been promptly carried out there was sufficient interval for the stern-way to be got on the *Glasgow* before the collision

took place, and the accident would have been avoided. Without attempting to determine the exact cause of the delay, I should draw the same conclusion as the learned trial judge, that, having regard to the time at which the captain of the *Glasgow* appreciated the risk of a collision, the engines were not reversed in time, and the whole thing was done too late. I agree with the opinion expressed by Lord Parker, that it is not fair to be too meticulous on the question of time, but it is proved that had the engines been reversed not less than one minute before the collision, an appreciable way astern would have been got on the vessel, sufficient to avoid the collision.

The learned trial judge, in forming his opinion of the time at which the engines of the *Glasgow* were reversed, comments on the absence of proper books made at the proper time. There is no satisfactory explanation given by the repondents. The statement of the captain of the *Glasgow* that the scrap log, being reduced to a pulp, was thrown away from the bridge deck, is open to serious adverse comment. Whatever its condition, every document, in a case in which one ship has foundered and the crew is lost, should be carefully safeguarded as a precaution in the interest of truth and good faith. The logs produced, other than the engineer's entry from his scrap log, were upon Oct. 1, and contain no reference to a reversal of the engines of the *Glasgow*. This same criticism applies to the letter of Oct. 2, written from Messrs. Hammond to the owners of the *Glasgow*, and forwarded on information obtained from Captain Turnbull. This letter makes no reference to a reversal of the engines. The entry from the engineer's scrap log contains the entry, "engine full speed astern at the time," but it was not made until Oct. 9, and gives no assistance in solving the difficulties which surround the case. I am therefore of opinion that the learned judge was justified in finding that the *Glasgow* did not reverse her engines in time, and holding that in this respect she was to blame. On the question whether the *Hatfield* was solely to blame, I concur with the judgment of my noble friend on the Woolsack, and I do not desire to add anything further.

Appeal allowed.

Solicitors: *Downing Handcock, Middleton & Lewis* for *Downing & Handcock*, Cardiff; *Thomas Cooper & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

MERCANTILE MARINE SERVICE ASSOCIATION *v.* TOMS AND OTHERS

[Court of Appeal (Swinfen Eady and Pickford, L.JJ.), November 23, 24, 1915]

[Reported [1916] 2 K.B. 243; 85 L.J.K.B. 311; 114 L.T. 124]

Practice—Parties—Representative parties—Action for tort—Libel—Defendants—R.S.C., Ord. 16, *r.* 9.

By R.S.C., Ord. 16, r. 9: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested."

The plaintiffs sued the three defendants, who were the chairman, vice-chairman, and secretary of a guild, "on their own behalf and on behalf of all other members" of the guild, for damages for an alleged libel contained in a newspaper owned and managed by the guild. The guild was an unregistered voluntary association, comprised of some 15,000 members, regulated by rules, and governed by a committee. The plaintiffs applied under Ord. 16, r. 9, for an order that the defendants be appointed to represent all other members of the guild.

Held: in an action for libel the persons responsible were those who published or authorised the publication of the words complained of; only those members of the guild who were responsible for that publication could be made liable; and, therefore, the other members of the guild did not have "the same interest in the cause" as those who had published the words complained of, the rule did not apply, and no order for representation could be made.

Quære, whether Ord. 16, r. 9, applies in an action in tort.

Notes. As to representative parties, see 30 HALSBURY'S LAWS (3rd Edn.) 315-317; and for cases see DIGEST (Practice) 415 et seq.

Cases referred to:

(1) *Temperton* v. *Russell*, [1893] 1 Q.B. 435; 62 L.J.Q.B. 300; 68 L.T. 425; 57 J.P. 518; 41 W.R. 321; 9 T.L.R. 304; 37 Sol. Jo. 303; 4 R. 302, C.A.; Digest (Practice) 416, *1132*.

(2) *Wood* v. *McCarthy*, [1893] 1 Q.B. 775; 62 L.J.Q.B. 373; 69 L.T. 431; 41 W.R. 523; 9 T.L.R. 447; 37 Sol. Jo. 478; 5 R. 408, D.C.; Digest (Practice) 421, *1168*.

(3) *Walker* v. *Sur*, [1914] 2 K.B. 930, 934; 83 L.J.K.B. 1188, 1190; 109 L.T. 888; 30 T.L.R. 171, C.A.; Digest (Practice) 420, *1165*.

(4) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426, 445; 70 L.J.K.B. 905; 50 W.R. 44, H.L.; Digest (Practice) 635, *2677*.

(5) *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; Digest (Practice) 416, *1133*.

Also referred to in argument:

Parr v. *Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366; 82 L.J.Ch. 193; 108 L.T. 446; 29 T.L.R. 235; 43 Digest 99, *1041*.

Linaker v. *Pilcher* (1901), 70 L.J.K.B. 396; 84 L.T. 421; 49 W.R. 413; 17 T.L.R. 256; 45 Sol. Jo. 276; 43 Digest 127, *1291*.

Andrews v. *Salmon*, [1888] W.N. 102; 4 T.L.R. 490; 8 Digest (Repl.) 657, *37*.

Appeal by the plaintiffs from a decision of Low, J., at chambers.)

The plaintiffs issued a writ against A. T. Toms, T. W. Moore, and J. W. Grace ("sued on their behalf and on behalf of all other members of the Imperial Merchant Service Guild"), and Charles Birchall, Ltd. The claim on the writ was for damages for libel contained in the "Guild Gazette," a journal of the Imperial Merchant Service Guild, published Sept. 1, 1915. According to an affidavit sworn by the secretary of the plaintiff association the guild, which had for its objects (inter alia) the protection of the interests and the legal defence of captains, officers, and apprentices of the merchant service, was composed of a very large number of persons who had a community of interest in the funds of the guild and in the above-mentioned publication, and the rules of the guild provided that in the event of a dissolution of the guild or its amalgamation by another body, the funds should be divided equally among its existing members. The named defendants were the chairman, secretary, and vice-chairman of the guild, and the chairman and vice-chairman were members of the management committee. The "Guild Gazette" was owned and managed by the guild. The plaintiffs applied under Ord. 16, r. 9, for an order that the defendants, and A. Kinloch and A. Wilkinson, being joint trustees with the defendant T. W. Moore of the guild, should be appointed to represent all other members of the guild, and that the trustees be added as defendants. Low, J., affirming the district registrar, made no order on the application.

Rigby Swift, K.C., and *J. H. Layton* for the plaintiffs. The plaintiffs are entitled to an order under Ord. 16, r. 9, that the defendants and the trustees, who hold the invested funds of the guild, should be appointed to represent in the action all the other members of the guild. Here the defendants and the trustees are fairly representative of the guild; and the plaintiffs require the order for the purpose of getting at the funds of the guild which are vested in the trustees. There appears to be no express authority for making the order in actions in tort, but the plaintiffs should receive the assistance of the court

in their attempt to render liable the persons responsible for the libel, and the application of the rule should be extended if necessary to actions in tort.

Gordon Hewart, K.C., and *Greaves Lord*, for the defendants, were not called on to argue.

SWINFEN EADY, L.J.—This is an appeal from an order of Low, J., refusing the plaintiffs' application and affirming the decision of the district registrar. The action is for libel, and the plaintiffs by their writ claim damages. The plaintiffs, the Mercantile Marine Service Association, sue in respect of the libel published, as they allege, upon themselves. The defendants at present on the record are Toms, Moore, and Grace, and then the writ goes on to say "sued on their own behalf and on behalf of all other members of the Imperial Merchant Service Guild" and Charles Birchall, Ltd. It appears that there is a voluntary unregistered association called "the Imperial Merchant Service Guild." It is an association, we are told, having something like 15,000 members, but it is a voluntary association. There are certain rules by which it is regulated, and its affairs are governed by a management committee. It is said that this association issues three times a year a periodical called the "Guild Gazette," a journal of the Imperial Merchant Service Guild, and of which the short title is "The Merchant Service Guild." The plaintiffs complain that in this publication they have been libelled, and it is for that libel that they claim damages.

The application which has been refused, and the refusal of which is the subject of this appeal, is an application by the plaintiffs by which they ask that the first three defendants—Toms, Moore, and Grace—Toms being the chairman of the association, Moore the secretary, and Grace the vice-chairman, be appointed to represent all other members of the Imperial Merchant Service Guild. That is the first part of their application. Then the second part is for leave to add as defendants in the action Andrew Kinloch and Andrew Wilkinson, who, with the defendant Moore, are the trustees of the invested funds of the guild. So what the plaintiffs desire to do is to obtain an order that these three officers—the chairman, secretary, and vice-chairman—may be appointed to represent all the other members of this association in the action for libel. Then it asks to add the defendant Moore, who is already one of the trustees, Mr. Kinloch and Mr. Wilkinson, as the trustees of the invested funds.

To deal with the latter part first. If it was a mere application for leave to amend by adding additional defendants, there would be no opposition, but what the plaintiffs are really desirous of obtaining is that they may not only sue the three trustees and have them as defendants on the record, so that if they obtain a judgment for damages in the action they may obtain payment out of the funds of which those persons are trustees, but they also ask that the three officers may be appointed to represent all the members of the guild. They make the application under Ord. 16, r. 9:

> "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested."

I have great difficulty in seeing that in the present case there are numerous persons having the same interest in this cause or matter within the meaning of the rule. The action is for libel, and primâ facie it is for the plaintiffs to prove the persons who have issued the libel, and it is primâ facie only those who have issued it, either by themselves or their agents or servants, or directly authorised the libel, who are liable. No doubt, every defendant in an action has a common interest with every other defendant in the sense that every defendant hopes and wishes that the action will fail. That is not, of course, what the rule means. The various members of this association may be in a wholly different position. With regard to the defence of some members, if the management committee were sued, and if in fact they authorised the publication of the libel, it may be that their defence would be that the material complained of was not capable of the meaning alleged, or of any libellous meaning. It may be that their defence would be that it did

not refer to the plaintiffs; upon the footing that they had authorised it, they may raise such defences of that kind as may be open to them. The other members of the association might say: "However libellous it may be, we did not authorise it and took no part or share in it. We were on the high seas and did not see it in the 'Gazette,' and know nothing about it." In my opinion, this rule is not intended to apply to any such case as this, and the case is not within the rule. I think the statement that LINDLEY, L.J., made in *Temperton* v. *Russell* (1) ([1893] 1 Q.B. at p. 438) is applicable to this case and that the persons assumed to be represented by these three officers whom it is proposed to sue, the chairman, vice-chairman, and secretary, the members of the association assumed to be represented by those three persons, have no such interest as is contemplated by the rule.

I have asked whether there is any authority in the case of action of tort, because this is a pure tort, for the application of this rule, and no case has been referred to, and so far as I know there is no case in the books, in which it has ever been done. In *Wood* v. *McCarthy* (2), a judgment of the Divisional Court WILLS, J., referring to what LINDLEY, L.J., said in *Temperton* v. *Russell* (1) ([1893] 1 Q.B. at p. 438), says that the lord justice was referring to the well-established practice in the Court of Chancery, and was pointing out the distinction between actions of contract and actions of tort:

> "What he [LINDLEY, L.J.] said was: 'This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action . . . is founded on tort.'"

True it is that the limitation of the rule to which LINDLEY, L.J., gave expression in *Temperton* v. *Russell* (1)—that is to say, the limitation—that the expression only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter has been dissented from and is no longer law. But, apart from that, the decision in *Temperton* v. *Russell* (1) is good law. In *Wood* v. *McCarthy* (2), WILLS, J., in the passage I have just read, was pointing out that this did not apply to cases of tort, and I am not aware that the rule has ever been applied in cases of this kind, and one can see many reasons why it should not be so applied. That appears in *Walker* v. *Sur* (3) both in the judgments of BUCKLEY, L.J., and of KENNEDY, L.J. No doubt, counsel for the plaintiffs is quite right in saying that there are dicta in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (4), especially in the speech of LORD MACNAGHTEN, which indicate that in a proper case it is possible that an order of that kind may be made; but I am quite satisfied that the present case is not such a case, and no order ought to be made here. Nor do I think that the plaintiffs are in need of obtaining the order which they seem to think they need, because, if it be the fact that the issue of this paper contains a libel, they may sue and recover relief against the persons who have authorised the libel and who directed its insertion. That being so, I am of opinion that the order of LOW, J., affirming the registrar, and refusing to make the order, was right, and this appeal wholly fails.

PICKFORD, L.J.—I am of the same opinion. We start with the fact that no such order has ever been known to be made. It does not follow from that that the order cannot be made, but at any rate it suggests doubts whether it ought to be made. It is sought in an action of libel to make defendants by representation some 15,000 members of an unincorporated association. It does not seem to me that it is at all necessary to do so in order to give the plaintiffs such rights as they may be found to be entitled to. No reason has been given to us why the plaintiffs will be able to try their right more fairly or to get their remedy more certainly by making this order. There are many dicta in wide terms, some of which no doubt would seem primâ facie to cover a case of this kind. There are other dicta equally strong, such as that mentioned by WILLS, J., in delivering judgment in *Wood* v. *McCarthy* (2) as having been made by LINDLEY, L.J., in *Temperton* v. *Russell* (1), which are as strong as possible against such an order being

made. I find that LORD MACNAGHTEN, in *Duke of Bedford* v. *Ellis* (5) said this ([1901] A.C. at p. 10):

> "As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said that they will fairly and honestly try the right."

I asked the learned counsel for the plaintiffs whether he was able to say that the action, being as at present constituted, or perhaps with the addition of the trustees, he could not fairly try the right, and he admitted that he was not able to say so. If that be so, and the plaintiffs can fairly try the right with the action as at present constituted, or perhaps with the addition of the trustees, it seems to me there is no reason whatever to make the order in this case, and, therefore, the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for *Whitley & Co.*, Liverpool; *Ellis, Davis, Roberts & Co.*, for *Miller, Taylor & Holmes*, Liverpool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WINTER *v.* WILKINSON

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Kennedy, L.J., and Warrington, J.). December 3, 10, 1914]

[Reported [1915] 1 Ch. 317; 84 L.J.Ch. 237; 112 L.T. 482; 79 J.P. 241; 31 T.L.R. 121; 13 L.G.R. 425]

Friendly Society—Registered branch—Unauthorised application of funds—Action by trustees of society against branch trustees and officers—Competency—Friendly Societies Act, 1896 (56 & 60 *Vict.*, *c.* 25), *s.* 68.

Funds of a registered branch (or lodge) of a friendly society having been used in a manner not authorised by the rules,

Held: a claim by the trustees of the society for a declaration that the trustees, secretary and treasurer of the branch had been guilty of breaches of trust was not a "dispute" referable to arbitration under s. 68 of the Friendly Societies Act, 1896, and, therefore, an action for such a declaration, an account, and an injunction could be maintained by the trustees of the society.

Notes. As to the manner in which Friendly Society disputes are determined, see 18 HALSBURY'S LAWS (3rd Edn.) 64–68; and for cases see 25 DIGEST 321 et seq. For Friendly Societies Act, 1896, s. 68, see 10 HALSBURY'S STATUTES (2nd Edn.) 563.

Cases referred to:

(1) *Morrison* v. *Glover* (1849), 4 Exch. 430; 19 L.J.Ex. 20; 14 L.T.O.S. 204; 14 J.P. 84; 154 E.R. 1281; 7 Digest (Repl.) 525, *298*.

(2) *Prentice* v. *London* (1875), L.R. 10 C.P. 679; 44 L.J.C.P. 353; 33 L.T. 251; 39 J.P. 711; 7 Digest (Repl.) 525, *297*.

(3) *Mulkern* v. *Lord* (1879), 4 App. Cas. 182; 48 L.J.Ch. 745; 40 L.T. 594; 43 J.P. 492; 27 W.R. 510, H.L.; 7 Digest (Repl.) 526, *303*.

(4) *Sinden* v. *Banks* (1861), 3 E. & E. 623; 30 L.J.Q.B. 102; 3 L.T. 775; 7 Jur.N.S. 910; 9 W.R. 415; 121 E.R. 576; sub nom. *Linden* v. *Banks*, 25 J.P. 390; 25 Digest 323, *248*.

(5) *Cox* v. *James* (1882), Diprose & Gammon, 282; 25 Digest 335, 273.

Appeal by the plaintiff against an order staying further proceedings in the action made by the Vice-Chancellor of the County Palatine of Lancaster, Manchester district.

The Grand United Order of Oddfellows Friendly Society ("the order") was a registered friendly society composed of branches called districts and lodges, each district consisting of a number of lodges. The objects of the order (r. 2) were the raising of a fund or funds mainly for the payment of sickness and funeral benefits, the relief of members when travelling in search of employment during temporary or permanent disablement, and in old age, the relief of widows and orphans of members, and the establishment of accident, pension, and superannuation funds. There was provision (r. 72) for the establishment of lodges whose duties were stated to be: (i) to establish a sick and funeral fund for the payment of sick and funeral benefits under the lodge rules; (ii) to establish a management fund for the payment of expenses of management; (iii) to establish a distress or relief fund for the assistance of members in distressed circumstances; (iv) to provide medical advice, attendance, and medicine to members in sickness; and (v) the establishment of any other funds, and such other duties as might be provided for by the general and district rules. A lodge was empowered (r. 31) to appropriate surplus capital in the payment of additional benefits, but no lodge could divide its funds (r. 94), to be devoted to the objects of the society, without the sanction of the branch of directors and a certificate of dissolution from the Registrar of Friendly Societies. Money wrongly divided was to be recovered by legal process. The first rule of the Burnley district and that of the Lord Nelson Lodge provided that the objects and rules of district and lodge be carried into effect subject to the rules of the order.

The plaintiffs Mathew Winter and William Coventry, trustees of the order alleged that on or about Nov. 16, 1911, the board of directors of the order sanctioned the appropriation by the Lord Nelson Lodge of surplus capital under the provisions of r. 31, for the purpose of granting increased sick benefits, increased funeral benefits to members and members' wives, and of assisting members who were out of work and could not pay their contributions. They alleged that they had learnt that the defendants, James Wilkinson, John Thomas Whittaker and James Newbold, the trustees, John Thomas Aldersley, the secretary, and Thomas Atkin, the treasurer of the Lord Nelson Lodge, in or about the year 1912, wrongfully and in breach of rr. 31 and 94 of the rules of the order, appropriated and distributed funds of the lodge amounting, so far as the plaintiffs were able to ascertain, to £755 6s., by dividing the same among the whole of the members of the lodge, without having obtained the sanction of the board of directors or a certificate of dissolution from the Registrar of Friendly Societies. Such wrongful appropriation and division constituted, the plaintiffs alleged, a breach of trust on the part of the defendants, and they were personally liable to make good all sums so appropriated and divided. By the provisions of r. 94 the funds so wrongfully divided had become forfeited to the general funds of the order, and were recoverable by legal process. The plaintiffs claimed (1) a declaration that the appropriation by the defendants, as trustees and officers of the lodge, of the funds thereof, and the division of the same among the members of the lodge, were breaches of trust by the defendants, and that the defendants were personally liable to restore and make good all funds and property so divided as aforesaid; (ii) all necessary accounts and inquiries and orders for repayment and otherwise; (iii) an injunction to restrain the defendants from further appropriating or dividing the funds of the lodge or any part thereof. A motion was made by the defendants for a stay of all further proceedings in this action on the ground that the question between the parties was a "dispute" within the meaning of s. 68 of the Friendly Societies Act, 1896, that ought to be referred to arbitration. On Oct. 13, 1914, the case came on to be heard before the Vice-Chancellor of the County Palatine of Lancaster, Manchester district, who made an order staying all further proceedings in the action.

P. O. Lawrence, K.C. (with him *Roby*), for the plaintiffs.
Jenkins, K.C. (with him *T. C. Eastwood*), for the defendants.

Cur. adv. vult.

Dec. 10, 1914. **LORD COZENS-HARDY, M.R.,** read the following judgment of the court.—This appeal from an order of the Vice-Chancellor staying all further proceedings in the action raises an important question under the Friendly Societies Act, 1896. Can

an action be maintained against the trustees of a lodge registered as a branch under the Act, or must the matter be decided by the domestic tribunal of the lodge under s. 68?

The plaintiffs are the trustees of the Grand United Order of Oddfellows Friendly Society. Three of the defendants are the trustees of the Lord Nelson Lodge No. 9 of the Burnley District of the order. A fourth defendant is the secretary, and the fifth defendant is the treasurer of the lodge. The statement of claim sets out the material part of r. 31 of the order. [His Lordship read it, and continued:] Rule 72 provides for the establishment of lodges and the duties of lodges, which it is unnecessary to read. It also sets out r. 94 and r. 1 of the rules of the lodge. The language of s. 68 is very wide:

> "(1) Every dispute between . . . (d) an officer of any such registered branch and the society or branch of which that registered branch is a branch . . . shall be decided in manner directed by the rules."

It has, however, been decided in many cases that the dispute to which the section applies must be between the society and a person in his capacity as a member. For example, a society can sue a member for appropriate relief under a mortgage granted by a member to the society: see *Morrison* v. *Glover* (1), *Prentice* v. *London* (2), and *Mulkern* v. *Lord* (3).

It remains to consider what is the legal position of trustees of a friendly society. By s. 49 (1) all the property of a society vests in the trustees, who need not be members. By s. 9 (3) and the first schedule cl. 2 the rules must provide the purposes for which the funds of the society are to be applicable. This is done in r. 28 of the Lodge Rules. If the trustees apply the funds in a manner not authorised by the rules, and indeed expressly prohibited by the rules, they are guilty of a breach of trust. They are liable to be sued, not in their character of members, for they need not be members, but in their character of trustees in whom property is vested by Act of Parliament to be held upon certain trusts. What we have said about an action against the trustees applies in principle also to the secretary and treasurer in so far as they have been parties to the breach of trust. They stand in a fiduciary position. The Court of Queen's Bench more than fifty years ago held that a treasurer might be sued for money had and received, and that the section of the Act then in force, corresponding to s. 68, did not take away the common law right of action: *Sinden* v. *Banks* (4). That authority has never been questioned. The present action is not a common law action, but is an equitable action claiming relief by a beneficiary against the trustees, and the same principle must apply. Chitty, J. in *Cox* v. *James* (5) granted the precise relief sought in the present case. It is true that the point under the section corresponding to s. 68 was not taken, probably because counsel thought it was not a sound point after *Sinden* v. *Banks* (4).

In our opinion the order of the Vice-Chancellor was wrong. The action ought not to be stayed and the defendants must put in a defence. We prefer to base our decision on the general ground that this is not a dispute within the meaning of s. 68. But our decision might be based upon the particular rules of this society. Rule 41 provides that a dispute

> "shall be reduced to writing, and referred to the following general meeting for settlement except where otherwise provided by these rules."

And r. 94 does otherwise provide, for it says that money wrongly divided by a lodge is to be "recovered by legal process"—words which exclude settlement by a general meeting. In the view which we take it is not necessary to consider the authorities which have been cited as to the circumstances in which certain disputes between a society and a member in his capacity as a member, may still be dealt with by the court. The result is that the appeal must be allowed and the defendants must pay the costs here and below.

Appeal allowed.

Solicitors: *R. B. Wheatly, Son & Daniel*, for *Cobbett, Wheeler & Cobbett*, Manchester; *W. J. & E. H. Tremellen, Roberts & Riley*, Burnley.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law*.]

R. *v.* CREWE LICENSING JUSTICES. Ex Parte BRICKER AND OTHERS

[KING'S BENCH DIVISION (A. T. Lawrence, Lush and Atkin, JJ.), July 1, 1914]

[Reported 111 L.T. 1074; 79 J.P. 26; 30 T.L.R. 626]

Licensing—Transfer of licence—Old on-licence—Undertaking by transferee—Jurisdiction of justices to impose.

Upon an application for the transfer of an old on-licence the licensing justices have no power since the passing of the Licensing Act, 1904, to impose upon the transferee an undertaking or to make the transfer of the licence conditional upon the transferee giving an undertaking as to the management of the licensed premises, even though such undertaking was given when the licence was first granted before 1904.

Notes. Sections 16 (5), 18 (1), 23 (2) (c) and Sched. II, Part II, Supplemental, of the Licensing (Consolidation) Act, 1910, were repealed by the Licensing Act, 1953, and replaced by ss. 11 (4), 14, 21 (7) and s. 14 (5) of that Act respectively.

As to renewal of licences, see 22 HALSBURY'S LAWS (3rd Edn.) 549 et seq., as to undertaking on renewal of old on-licence, see ibid., 556; and for cases see 30 DIGEST (Repl.) 29, 30, 36 et seq. For the Licensing Act, 1953, ss. 11 (4), 14 (5), see 33 HALSBURY'S STATUTES (2nd Edn.) 158, 162.

Case referred to:

(1) *R.* v. *Dodds*, [1905] 2 K.B. 40; 74 L.J.K.B. 599; 93 L.T. 319; 69 J.P. 210; 53 W.R. 559; sub nom. *R.* v. *Dodds, Ex parte Roberts and Walker & Son*, 21 T.L.R. 391, C.A.; 30 Digest (Repl.) 37, *282*.

Rule Nisi for a mandamus directed to the licensing justices for the borough of Crewe in the county of Chester commanding them to deliver to one Albert Bricker the transfer of a licence in respect of the premises known as the Earl of Crewe Hotel, situate in Crewe, without any endorsement on such licence, or, in the alternative, for a mandamus commanding them to hold a transfer sessions and to proceed to hear and determine the matter of an application by the said Albert Bricker and by the two executors of Catherine Bebbington, widow, deceased, for the transfer to Bricker of the licence formerly held by Catherine Bebbington in respect of the said premises. The rule was obtained at the instance of Bricker and the executors upon the ground that an undertaking given by one John Bebbington in 1896 had now expired, and that the licensing justices had no power to compel the granting of another undertaking or to impose a condition upon the transfer of the licence. In the affidvit of the applicants' solicitor, upon which the rule was granted, the facts were stated as follows. At the general annual licensing meeting for the borough of Crewe held in August, 1896, John Bebbington, was granted a full licence for the sale of intoxicating liquors for the Earl of Crewe Hotel. That provisional grant was subsequently duly confirmed, and Mr. Bebbington giving an undertaking that the house should be a free house, so long as he had control over it. John Bebbington died in June, 1907, and after his death the licence was transferred to his two sons, and then on Feb. 28, 1911, to Catherine Bebbington, his widow, who carried on the hotel until her death on Feb. 22, 1914, as fully licensed premises under licences annually renewed to her. The hotel remained a free house during that period. On May 12, 1914, the solicitor for the applicant Bricker, who was the tenant selected by a brewery company to whom the hotel was being sold, applied for the transfer to Bricker of the licence granted to Mrs. Catherine Bebbington, and no objection was raised to the proposed tenant. The application was adjourned, and at the adjourned transfer sessions on June 23, 1914, application was again made for the transfer. At the request of the justices evidence was given by the assistant clerk as to the undertaking given by John Bebbington in 1896, but it appeared that no entry had been made in the register of licences as to any condition or undertaking, and no undertaking or condition was endorsed on the original licence or on any renewal thereof. The justices decided to transfer the licence to Bricker,

but the chairman stated that the licence would be endorsed to the effect that it was to be conducted on the basis of the undertaking given by John Bebbington in 1896, when the licence was originally granted to him, and they declined to allow the licence to be given to Bricker except with the endorsement upon it. As the transfer could not be obtained without the endorsement and as all the parties objected to the giving of any such endorsement, the hotel had been closed, there being no one entitled to carry on the business, and the brewery company, who had contracted to purchase the hotel, declined to carry out their contract unless the licence was granted without the endorsement.

In answer to the rule, an affidavit was made by the chairman of the licensing justices. He stated (inter alia) that he was present as a justice at the meeting in 1896 when the licence was granted to John Bebbington, and that Mr. Bebbington, stated on oath to the justices that the house should be a free house, free from a brewer, that the licence was granted in 1896 upon that undertaking; and that the licence has been renewed annually upon the basis of that undertaking. When the application was made for the transfer of the licence the justices were informed that the brewery company had contracted to purchase the house for £14.250, subject to the transfer being granted to their tenant, and at the adjourned transfer sessions on June 23 the transfer was granted, and the justices informed the applicants that copies of the undertaking given in 1896 would be served on the owners and the new licensee. It was not intended that any endorsement should be placed on the licence, but the intention was that an endorsement or entry should be made upon the licensing register to the effect that the licence was subject to the original undertaking given upon the grant thereof in 1896, and the justices intended to reconsider the matter at the next general annual licensing meeting, when the circumstances of the undertaking having been given and any other circumstances would be considered. No application had been made for the transfer licence. Upon the same day, June 23, 1914, the clerk to the licensing justices issued a written notice to those concerned that the licence held by the late Catherine Bebbington had on that day been transferred to Bricker "upon the terms of the undertaking given to the licensing justices . . . by John Bebbington upon the original grant of the licence to him the said John Bebbington in the year 1896—namely, that the house in respect of which the said licence was granted should not be a "tied" house, but that it should always be a free house, that is to say, free from a brewer."

By the Licensing (Consolidation) Act, 1910:

> "Section 16. . . . (5) Where the licensing justices, on an application for the renewal of an old on-licence, as defined in the second schedule to this Act, ask the holder of a licence to give any undertaking, they shall adjourn the hearing of the application, and cause notice of the undertaking for which they ask to be served upon any registered owner of the premises, and give him an opportunity of being heard. [This provision was contained in s. 9 (2) of the Licensing Act, 1904.] . . . Section 18 (1). The power to refuse the renewal of any such justices' on-licence as is described in the first part of second schedule to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the second part of that schedule shall be vested in the compensation authority and not in the licensing justices, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. . . . Section 23 (2) (c). The special provisions of this Act affecting the renewal of an old on-licence shall apply to the transfer of an old on-licence as they apply to the renewal."

In the first part of the second schedule old on-licences are described as justices' on-licences which were in force on Aug. 15, 1904, including renewals of a licence so in force, and in the second part there is the following provision:

> "Supplemental.—If the licensing justices refuse to renew an old licence . . . on the ground that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted."

[This provision was contained in s. 9 (2) of the Licensing Act, 1904.]

Wootton for the justices.

Rigby Swift, K.C. (*R. M. Montgomery* with him), in support of the rule.

A. T. LAWRENCE, J.—This is a rule for a mandamus to licensing justices to grant the transfer of a licence, or, in the alternative, to hold a transfer sessions and hear the application for the transfer. The dispute has centred upon the terms of an undertaking alleged to have been given when this licence was granted in 1896; and it was said by the licensing justices that that undertaking was not only applicable to the licence while it was held by the original grantee, but that it extended to the house generally into whatever hands the licence might come. The original grantee died; his sons held the house and died, and his widow subsequently held the house, and she also died, and the house was then sold to a brewery company, who put in a tenant called Bricker, and now Bricker has applied for a transfer of this licence to him. There is nothing to be said against him or as to the conduct of the house, and the only thing the justices have alleged is that this undertaking given in 1896 binds the house in the hands of Bricker, and they have sought, on the transfer of the licence to him, to impose upon him an undertaking that this house is to be carried on as a free house, the effect of that being that the brewers who had bought it could not hold it in the ordinary way. The question is whether the justices when they granted the transfer of the licence, as they did on June 23, had any right on granting that licence to impose any clog or undertaking upon it.

Even assuming that the undertaking when it was originally given was in the terms alleged by the justices, I do not think that the justices had any right to impose this clog upon the licence in the hands of Bricker. The house has passed through many hands since the undertaking was originally given, and it does not seem to me that there is any justice in now imposing it upon him; and, I do not think that the justices had any power to impose it. Before 1904 the justices had power in their discretion to refuse a licence of this kind, and they had also power to require undertakings from persons to whom they granted licences; but now, since the passing of the Licensing Act, 1904, they have no such power, and their power to refuse a transfer is limited to certain definite grounds. The case of *R.* v. *Dodds* (1) shows that the justices have no such power. In that case COZENS-HARDY, L.J., said ([1905] 2 K.B. at p. 58):

> "In my opinion, the old practice of exacting undertakings on renewals of on-licences cannot survive the destruction of the general discretionary power to grant or to refuse, to which the existence of the practice was due. It is not for us to legislate: our duty is limited to interpretation. The introduction in the licence of the undertaking, was not authorised."

That applies in this case, that construction should be put upon the statute, because since 1904 a contribution to the compensation fund is charged upon these premises according to their annual value as licensed premises. That takes no account of any clog or condition attaching to the premises. Therefore since 1904 this house has been paying a contribution to the compensation fund on its full value, and we ought not to hold that nevertheless the power of the justices to impose the undertaking still remains. For these reasons I think that the rule should be made absolute for a mandamus to grant the transfer.

LUSH, J.—I am of the same opinion. The circumstances and the reasons in respect of which undertakings were given before 1904 were pointed out by COLLINS, M.R., in *R.* v. *Dodds* (1), and he there said that these undertakings were voluntary in the sense that the justices could not compel an applicant for a licence to given an undertaking, but the reason why undertakings were asked for and were often given was that before 1904 the justices had unlimited power, in their discretion, to grant or refuse licences, and therefore in order to get the licence the applicant gave the undertaking. But by the passing of the Act of 1904, this condition of things was altered, and in *R.* v. *Dodds* (1) the Master of the Rolls pointed out that it was no longer right to introduce into the

licence an undertaking by the licensee. I, therefore, on the authority of *R.* v. *Dodds* (1) come to the conclusion that the undertaking, ceased to be one that on a subsequent renewal was binding on the licensee. It certainly does not bind the applicants who never entered into it; and, therefore, the justices, in insisting that the licence should be granted with this condition attached to it, were attempting to impose a clog upon it, which, according to the case of *R.* v. *Dodds* (1) they had no power to do, and therefore the rule must be made absolute.

ATKINS, J.—I agree. As the justices could only grant a licence for one year, the undertaking given by Bebbington in 1896 was an undertaking for one year, which might be impliedly renewed on each renewal of the licence. I think, though it is not necessary to decide the point, that the undertaking was not applicable after 1904, because after that date the justices could not have insisted upon it, and there is no reason for inferring that it continued after that date to be given. On the present application for a transfer the justices had no power to impose upon the new transferee a condition or undertaking that the house should be a free house. To my mind, they did exact, or wished to exact, from him such an undertaking. It was contended for them that they did not intend to exact an undertaking from the proposed transferee, but only wished him to understand that he held the licence upon the undertaking given in 1896 by his predecessor. I cannot draw any such distinction between the two things, so far as the jurisdiction of the justices is concerned. To my mind, they did in fact grant this transfer on the terms of an undertaking that the grantee should hold these premises as a free house. I think that they had no power at all to impose such an undertaking. The only doubt in my mind has arisen from the wording of the second part of the second schedule to the Licensing (Consolidation) Act, 1910. The paragraph, headed "Supplemental," provides this:

> "If the licensing justices refuse to renew an old on-licence on the ground that the holder of the licence has persistently and unreasonably refused to supply suitable refreshment (other than intoxicating liquor) at a reasonable price, or on the ground that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted."

An old on-licence is one granted before Aug. 15, 1904, and when we find those words in an Act of 1910, it does at first sight look as if an undertaking given before Aug. 15, 1904, might still be operative. But I think that the real explanation of that is that those words are taken from s. 9 (2) of the Licensing Act, 1904, and the words "undertaking given on the grant or renewal of the licence" in s. 9 of the Act of 1904 could have a complete operation with reference to the renewal of licences first granted before Aug. 15, 1904. If that is not so, it is impossible to reconcile the meaning put on behalf of the justices on that supplemental paragraph with the decision in *R.* v. *Dodds* (1). I am satisfied that *R.* v. *Dodds* (1) does in substance decide this case. It appears to me that the justices in the present case did exactly the same thing that the justices in that case had done. For the reasons given by my brethren I think that the justices had no power to do so, and therefore, I think that the proper order is that they should be directed to hand over the licence without any condition.

Rule absolute.

Solicitor: *J. M. Voss*, for *H. W. G. Garnett*, Crewe; *E. W. & Bruce Beal*, for *Charles E. Speakman*, Crewe.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

Re LAW GUARANTEE TRUST AND ACCIDENT SOCIETY, LTD. LIVERPOOL MORTGAGE INSURANCE CO.'S CASE

[COURT OF APPEAL (Buckley, Kennedy, L.JJ., and Scrutton, J.), May 25, 26, 27, 28, June 29, 1914]

[Reported [1914] 2 Ch. 617; 84 L.J.Ch. 1; 111 L.T. 817; 30 T.L.R. 616; 58 Sol. Jo. 704]

Insurance—guarantee of debentures—Insurance by guarantor of part of liability—Liquidation of guarantor—Measure of insurer's liability—Not limited by amount of dividend paid by guarantor to guaranteed creditors.

In 1900 an insurance company guaranteed an issue by a trading company of debentures by affixing to each debenture a statement guaranteeing payment of principal and interest in certain events. A reinsurer then issued to the insurance company a document guaranteeing the insurance company to the extent of two-elevenths of the risk undertaken by the insurance company on the debenture insurance. In 1909 the trading company defaulted in the payment of the debentures, and the debenture-holders preferred a claim against the insurance company which then went into liquidation and claimed against the reinsurer.

Held: the reinsurer's liability to the insurance company was not limited by or proportional to the amount of the dividend payable by the insurance company to the debenture-holders, and, therefore, the reinsurer was liable to pay to the liquidator of the insurance company two-elevenths of the total deficiency of the insurance company in respect of their guarantee, and not merely two-elevenths of the dividend payable by the insurance company to the debenture-holders.

Notes. The Companies (Consolidation) Act, 1908, has been repealed and is replaced by the Companies Act, 1948. Section 206 of the 1948 Act corresponds, with some minor amendments, to s. 120 of the 1908 Act.

Explained and Distinguished: *British Dominions General Insurance Co.* v. *Duder*, ante p. 176. Referred: *Re Law Guarantee Trust and Accident Soc., Godson's claim*, post p. 1173; *British Union and National Insurance Co.* v. *Rawson*, [1916-17] All E.R. Rep. 293.

As to the nature and creation of rights of indemnity, see 18 HALSBURY'S LAWS (3rd Edn.), 528 et seq.; and for cases see 26 DIGEST (Repl.) 230 et seq. As to assignment of such rights, see 18 HALSBURY'S LAWS (3rd Edn.) 540; and for cases see 26 DIGEST (Repl.) 241. As to debt insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 398–402, and cases there cited. For Companies Act, 1948, s. 206, see 3 HALSBURY'S STATUTES (2nd Edn.) 624.

Cases referred to:

(1) *Re Richardson, Ex parte Governors of St. Thomas's Hospital*, [1911] 2 K.B. 705; 80 L.J.K.B. 1232; 105 L.T. 226; 18 Mans. 327, C.A.; 5 Digest (Repl.) 726; *6285*.

(2) *Dane* v. *Mortgage Insurance Corpn., Ltd.*, [1894] 1 Q.B. 54; 63 L.J.Q.B. 144; 70 L.T. 83; 42 W.R. 227; 10 T.L.R. 86; 9 R. 96, C.A.; 26 Digest (Repl.) 11, *45*.

(3) *Finlay* v. *Mexican Investment Corpn.*, [1897] 1 Q.B. 517; 66 L.J.Q.B. 151; 76 L.T. 257; 13 T.L.R. 63; 26 Digest (Repl.) 115, *802*.

(4) *Re Eddystone Marine Insurance Co., Ex parte Western Insurance Co.*, [1892] 2 Ch. 423; 61 L.J.Ch. 362; 66 L.T. 370; 40 W.R. 441; 8 T.L.R. 393; 36 Sol. Jo. 308; 7 Asp.M.L.C. 107; 29 Digest 117, *718*.

(5) *Carr* v. *Roberts* (1833), 5 B. & Ad. 78; 2 Nev. & M.K.B. 42; 2 L.J.M.B. 183; 110 E.R. 721; 26 Digest (Repl.) 251, *1912*.

(6) *Ashdown* v. *Ingamells* (1880), 5 Ex.D. 280; 50 L.J.Q.B. 109; 43 L.T. 424, C.A.; 5 Digest (Repl.) 1052, *8502*.

(7) *Re Perkins, Payser* v. *Beyfus*, [1898] 2 Ch. 182; 67 L.J.Ch. 454; 78 L.T. 636; 46 W.R. 595; 14 T.L.R. 464; 42 Sol. Jo. 591; 5 Mans. 193, C.A.; 5 Digest (Repl.) 1047, *8459*.

(8) *Walmershausen* v. *Gullick*, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 9 T.L.R. 437; 3 R. 610; 26 Digest (Repl.) 150, *1115*.

(9) *Cruse* v. *Paine* (1868), L.R. 6 Eq. 641; 37 L.J.Ch. 711; 19 L.T. 127; 17 W.R. 44; affirmed 4 Ch. App. 441; 38 L.J.Ch. 225; 17 W.R. 1033, L.C.; 23 Digest (Repl.) 303, *3684*.

(10) *Lacey* v. *Hill, Crowley's Claim* (1874), L.R. 18 Eq. 182; 43 L.J.Ch. 551; 22 W.R. 586; sub nom. *Lacy* v. *Hill, Crowley's Claim*, 30 L.T. 484; 26 Digest (Repl.) 132, *936*.

(11) *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest 52, *156*.

(12) *Re Denton's Estate, Licences Insurance Corpn. and Guarantee Fund, Ltd.* v. *Denton*, [1904] 2 Ch. 178; 73 L.J.Ch. 465; 90 L.T. 698; 52 W.R. 484; 48 Sol. Jo. 396, C.A.; 26 Digest (Repl.) 10, *9*.

(13) *Shaw* v. *Royce, Ltd.*, [1911] 1 Ch. 138; 80 L.J.Ch. 163; 103 L.T. 712; 55 Sol. Jo. 188; 18 Mans. 159; 26 Digest (Repl.) 10, *8*.

(14) *Parr's Bank* v. *Albert Mines Syndicate* (1900), 5 Com. Cas. 116; 29 Digest 410, *3226*.

(15) *Martin* v. *Munich Assurance Co.*, June 1, 1891, unreported.

(16) *Chippendale* v. *Holt* (1895), 65 L.J.Q.B. 104; 73 L.T. 472; 44 W.R. 128; 12 T.L.R. 50; 40 Sol. Jo. 99; 8 Asp.M.L.C. 78; 1 Com. Cas. 197; 29 Digest 118, *719*.

(17) *Herckenrath* v. *American Mutual Insurance Co.* (1848), 3 Barb.Ch.N.Y. 63.

(18) *Governors of St. Thomas's Hospital* v. *Richardson*, [1910] 1 K.B. 271; 79 L.J.K.B. 488; 101 L.T. 771; 17 Mans. 129, C.A.; 5 Digest (Repl.) 753, *6475*.

Also referred to in argument:

China Traders Insurance Co. v. *Royal Exchange Assurance Corpn.*, [1898] 2 Q.B. 187; 67 L.J.Q.B. 736; 78 L.T. 783; 46 W.R. 497; 14 T.L.R. 423; 42 Sol. Jo. 507; 8 Asp.M.L.C. 409; 3 Com. Cas. 189, C.A.; 29 Digest 120, *730*.

Uzielli v. *Boston Marine Insurance Co.* (1884), 15 Q.B.D. 11; 54 L.J.Q.B. 142; 52 L.T. 787; 33 W.R. 293; 1 T.L.R. 49; 5 Asp.M.L.C. 405, C.A.; 29 Digest 117, *712*.

Nelson v. *Empress Assurance Corpn., Ltd.*, [1905] 2 K.B. 281; 74 L.J.K.B. 699; 93 L.T. 62; 53 W.R. 648; 21 T.L.R. 555; 10 Asp.M.L.C. 68; 10 Com. Cas. 237, C.A.; 29 Digest 48, *105*.

Law Guarantee Trust and Accident Society v. *Munich Reinsurance Co.*, [1912] 1 Ch. 138; 81 L.J.Ch. 188; 105 L.T. 987; 56 Sol. Jo. 108; 29 Digest 414, *3247*.

Seaton v. *Heath, Seaton* v. *Burnand*, [1899] 1 Q.B. 782; 68 L.J.Q.B. 631; 80 L.T. 579; 47 W.R. 487; 15 T.L.R. 297; 4 Com. Cas. 193, C.A.; on appeal sub nom. *Seaton* v. *Burnand, Burnand* v. *Seaton*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 16 T.L.R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H.L.; 26 Digest (Repl.), 9, *1*.

Home Insurance Co. of New York v. *Victoria—Montreal Fire Insurance Co.*, [1907] A.C. 59; 76 L.J.P.C. 1; 95 L.T. 627; 23 T.L.R. 29, P.C.; 29 Digest 339, *2739*.

Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim (1880), 17 Ch.D. 337; 50 L.J.Ch. 273; 44 L.T. 299; 10 Digest (Repl.) 1171, *8150*.

Appeal from a decision of NEVILLE, J., [1913] 2 Ch. 604.

The Law Guarantee Trust and Accident Society, Ltd. (hereinafter called "the society"), was incorporated in 1888. Part of the business consisted in issuing policies of insurance to guarantee the repayment of loans on mortgages and debentures. In 1900 Sands, Wilson & Co. (1900), Ltd., issued a series of 275 debentures of £100 each, which were further secured by a trust deed dated Aug. 30, 1900, of which the society was the trustee.

The society guaranteed this issue by appending a memorandum at the foot of each debenture in which it guaranteed to the registered holder the payment of the principal moneys and interest, but not bonus, to become due under the debenture. The memorandum also specified the times when payments of interest and principal in pursuance of the guarantee should be made by the society. A reinsurance was then effected with the Liverpool Mortgage Insurance Co., Ltd. (hereinafter called "the company"), which undertook £5,000, or two-elevenths, of the risk carried by the society. This reinsurance

was carried out in the following manner: The society on Sept. 20, 1900, sent the company a document called a putting-on slip, giving short particulars of the risk undertaken by the society, and requesting the company to be placed upon £5,000 of that risk at an initial premium of £109 16s. 7d. and £25 per annum. On Oct. 18, 1900, the company's manager wrote in reply:

"We have entered our share of risk in this matter as per your memorandum of Sept. 20, last."

On Mar. 23, 1904, the company delivered to the society a policy affixed to a debenture in identical terms with one of the guaranteed debentures in the following terms:

"The Liverpool Mortgage Insurance Co., Ltd. (hereinafter called "the guarantors"), hereby guarantees the within-named society to the extent of £5,000, being two-elevenths of the risk assured by and subject to the conditions of the within policy of debenture insurance, and also the like proportion of all costs and expenses incurred by the society with the consent of the guarantors in respect of any claim arising under the within policy or in relation to the enforcement with the like consent of the society's powers as transferees of the debentures so long as the annual premium of £25 shall be paid on Aug. 30 each year or within thirty days thereafter."

In September, 1909, Sands, Wilson & Co. (1900), Ltd., made default in the payment of their debentures, and the society entered into possession of its assets in exercise of the powers conferred by the trust deed, and the risk which the society had guaranteed then became a claim. On Dec. 13, 1909, the members of the society passed an extraordinary resolution for the voluntary winding-up of the society, and by an order of Dec. 14, 1909, this was directed to be continued under the supervision of the court. On July 28, 1910, a scheme of arrangement was approved by the court under s. 120 of the Companies (Consolidation) Act, 1908, for compromising the claims of creditors and policyholders of the society, with a view to avoiding a forced realisation of the society's assets. The leading feature of the scheme was that the completion of the liquidation should be postponed till Dec. 31, 1918, and that interest of 3 per cent. should be allowed on the unpaid balance of claims in the meanwhile. Clause 23 of this scheme gave the liquidators liberty to offer reinsurers

"to be bound by the scheme in all respects, and accordingly to have their liabilities in respect of reassurances ascertained on the footing of the claims of the assured made and allowed under this scheme being treated as the amount payable under the policies reinsured."

The Company consented to be bound by the scheme, and contended that cl. 23 limited their liability to the society to what the society should have to pay under the scheme; and as the society appeared to be insolvent, there was considerable probability that the society under the scheme would pay less than 20s. in the pound. The realisation of the assets comprised in the debentures of Sands, Wilson & Co. (1900), Ltd., had been completed, and a proof for £26 5s. 1d. on each £100 debenture, or £4,988 6s. 11d. in all, had been admitted by the liquidators of the society. The liquidators thereupon claimed under the reinsurance effected with the company that the latter were liable to the liquidators for two-elevenths of this sum—viz., £967 5s. 6d., together with two-elevenths of certain other small sums which the society had already paid under the policy issued by them, making a total claim against the company of £988 17s. 1d. in all. The liquidators of the society then issued a summons asking a declaration that payment in full by the society in respect of liabilities incurred on policies or guarantees was not a condition precedent to the liability of the company on reinsurances by them of the same risks, and that such liability of the company was not limited by or proportional to the amount of the dividend paid or to be paid by the society to the persons entitled to such policies or guarantees, and, further, or in the alternative a declaration that in respect of the risk undertaken by the society on guarantees to the holders of debentures in Sands, Wilson & Co. (1900), Ltd., reinsured by the company as to two-elevenths of such risk, the company were or would become liable to pay to the liquidators of the society the sum of £988 17s. 1d.

Neville, J., held that the memorandum issued by the reinsurer was a contract of indemnity, and that its liability must be measured by the amount which the insurer would pay and not by the amount for which the insurer was liable. Semble, on the authority of *Re Richardson, Ex parte Governors of St. Thomas's Hospital* (1), if the liquidators of the insurer could recover more from the reinsurer than they should themselves pay to the debenture-holders, they would recover it for the debenture-holders and not for the creditors of the insurer.

Younger, K.C., and *Maugham, K.C.* (*W. A. Greene* with them), for the insurance company.

Tomlin, K.C., and *Dighton Pollock* for the reinsurer.

Cur. adv. vult.

June 29. The following judgments were read.

BUCKLEY, L.J.—The question for decision may be tersely expressed thus: Are the respondent company liable to pay to the liquidator of the appellant society two-elevenths of the liability of the society or two-elevenths of the ability of the society to meet that liability? The appellants say the former; the respondents say the latter. The liability of the society is a liability to two-elevenths of a sum of £4,988 6s. 11d., for which the proof of the debenture-holders has been admitted. Are the company liable to pay to the liquidator of the society two-elevenths of £4,988 6s. 11d., or to pay (say) 10s. in the pound on that sum, being the dividend which the estate of the society can pay? The answer to this question is to be found upon an examination of two contracts in order to ascertain, first, their true construction, and, secondly, their legal effect.

The first contract is tripartite. The parties to it are the debenture-holders, Sands, Wilson & Co., Ltd., and the Law Guarantee Society, whom I will call the society. The debenture-holder advanced his money upon the terms that he should be entitled to such liability of Sands, Wilson & Co., Ltd., as is contained in the debenture and in a certain debenture trust deed, and to such liability of the Law Guarantee Society as is found in the instrument appended to the debenture whereby the society guaranteed the debenture-holder in the manner therein expressed. The obligations of Sands, Wilson & Co. under the debenture are to pay £100 in 1910, or at the expiration of six calendar months' notice given by the company to the debenture-holder (in which case a bonus of £5 is to be paid), or when the debenture is drawn for redemption, or upon a certain default in payment of interest, or upon the winding-up of the company, or when the security stated by the debenture trust deed shall have become enforceable and a certain notice shall have been given. The obligation of the Law Guarantee Society to the debenture-holder is that if Sands, Wilson & Co. make default the society will pay (a) in 1910, or (b) on the day after the mortgaged properties have been realised and the proceeds distributed. The obligation of the society (except in one event to be presently mentioned) is not an obligation (a) to pay the same sum, nor (b) at the same time, nor (c) in the same event as Sands, Wilson & Co. are liable to pay. For instance, suppose that default is made for three months in payment of interest but that the mortgaged properties are not realised, the obligation of Sands, Wilson & Co. is to pay at once, but there is no obligation in the society to pay until 1910. The same is true of each of the other obligations. The only case in which the obligation is the same is that of the debentures running until 1910 and the debenture debt becoming then payable for the first time. The obligation of Sands, Wilson & Co. is to pay the debenture-holder in an event or at a date £x; the obligation of the society is to pay the debenture-holder in another event and at another date £y. This is true in every case except that of the debenture running to maturity in 1910. If default is made and the mortgaged properties are realised, the liability of the society is only to pay the differential sum left undischarged by the distribution of the proceeds of the sale of the mortgaged properties. It is, therefore, an obligation to pay a different sum at a different time to the sum and the time at which Sands, Wilson & Co. are liable to make repayment. All these considerations point to an independent obligation in respect of a new debt rather than to a suretyship for the original debt. The respondents

argue that the obligation is one collateral to the principal debt, and that no doubt is the case. But it is not every collateral obligation which is an obligation of suretyship. On the other hand, the considerations to which I have pointed attention create no difficulty if the obligation be regarded as one by which the society insure the debenture-holder against the event of his sustaining loss by reason of Sands, Wilson & Co. not performing their obligations. Take, for instance, obligation 2 (b) in the society's guarantee; it is an obligation in case the mortgaged properties do not upon realisation answer the debt to protect the debenture-holder against loss in that event by paying him the balance of the debt. The case seems to me similar to but in some respects stronger than *Dane* v. *Mortgage Insurance Corpn., Ltd.*, (2), as being an obligation of insurance and not of suretyship. I say that it is stronger because the obligation in *Dane* v. *Mortgage Insurance Corpn., Ltd.* (2), was to pay the principal sum if the debtors made default, whereas in this case the obligation is to pay the differential sum, being the balance unsatisfied after realisation of the mortgaged properties. In *Dane* v. *Mortgage Insurance Corpn., Ltd.* (2), LORD ESHER, M.R., speaking of the policy in that case, said ([1894] 1 Q.B. at p. 61);

> "The policy is not a guarantee that the bank will be able to pay; it is a positive direct contract that, if the bank does not pay a certain amount on a fixed day, the insurance company will pay that amount."

That is true of the present case, except that there is the stronger point that the Society here is not bound to pay the sum which Sands, Wilson & Co. ought to pay, but only (except in the event of the debenture running to 1910) a different sum—namely, the unsatisfied balance after realisation of the mortgaged property. The reasoning in *Dane* v. *Mortgage Insurance Corpn., Ltd.* (2), and in *Finlay* v. *Mexican Investment Corpn.* (3), applies, I think, to the present case.

In arriving at the conclusion that this tripartite contract is one not of suretyship but of insurance, I have not founded myself at all upon any language in the documents. In fact the society became bound in return for the receipt of a certain premium as the price of its obligation. This, however, does not appear in the documents to which the debenture-holder was a party. The true effect of the contract is to be ascertained, I think, not upon a scrutiny of the terms used, but upon an examination of its effect. I will assume, then, for the moment that I am right in thinking that this tripartite contract is one of insurance. The next question is, what is the effect of the second contract? This was one between two parties only—namely, the society and the Liverpool Mortgage Insurance Co., whom I will call the company. If the first contract was one of insurance, the society had an insurable interest. They were at risk, and this contract is one by which the company guaranteed the society to the extent of two-elevenths of the risk and the like proportion of all costs and expenses. This is a reinsurance. As between the society and the company, the former, having an insurable interest, are entitled to recover from the latter upon the reinsurance the proper proportion of the loss whether the society have paid the entirety of the loss or not. This was assumed in *Eddystone Marine Insurance Co.* (4). The question there was whether the relation was different when the words of the instrument were "to pay as may be paid thereon." The court held that this did not make a difference, and that the reinsurer was entitled to recover from the reinsuring office payment on the policy of reinsurance although it had not made payment upon the original policy of insurance. If this be the proper view of the effect of the two contracts, the appellants are right in their contention. But, secondly, I will assume (contrary to the opinion which I have expressed) that the first—the tripartite contract—was not one of insurance but one of indemnity. The society are then entitled to be indemnified against a debt of two-elevenths of £4,988 6s. 11d., which, having regard to the liquidation of the society, can be enforced by the debenture-holder only to the extent of, say, 10s. in the pound on that sum. Is the liquidator entitled to recover from the company only that 10s. in the pound or can the company say that they have discharged themselves when they have paid the liquidator 10s. in the pound, being the amount which, under the circumstances, is the limit which the debenture-holder can enforce against the society?

The first question here is, I think, upon the language of the second contract. The company guaranteed the society against two-elevenths of the costs and expenses incurred by the society. They would have to pay these (to the indemnity of the society) to the persons to whom the costs were due, or would have to pay them to the society and thus put the society in funds to pay those persons, whether the society had already paid or was about to pay them or not. Their obligation to pay such sum as is payable in respect of the guarantee to the extent of £5,000, being two-elevenths of the risk, is exactly the same. Each alike must be measured and satisfied either by a payment of 10s. in the pound or of 20s. in the pound. The question is, which of these two is it? The obligation as to the costs must, I think, be an obligation to pay 20s. in the pound as above stated. If so, the obligation as to the £5,000 must likewise be an obligation to pay 20s. in the pound. It is said that in *Carr* v. *Roberts* (5), the court found an obligation not to indemnify only but to pay also, and that something turned upon that fact. I do not agree. In *Ashdown* v. *Ingamells* (6), BRAMWELL, L.J., pointed out that the fact that the agreement is not merely to indemnify but also to pay is not material. The measure of damage, according to *Carr* v. *Roberts* (5), *Ashdown* v. *Ingamells* (6), and *Re Perkins, Poyser* v. *Beyfus* (7), is not the dividend which the estate of the principal debtor can pay, but the full amount for which the principal debtor is liable. LINDLEY, L.J., in his work on PARTNERSHIP (5th Edn.), p. 375, in a passage which is quoted by WRIGHT, J., in *Wolmershausen* v. *Gullick* (8), ([1893] 2 Ch. at p. 528), says:

> "Where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified, and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the amount of dividend which such estate can pay."

The latter part of this passage is to be found repeated in the 8th Edn. at p. 438. Effect was given to this obligation in *Cruse* v. *Paine* (9), and in *Lacy* v. *Hill, Crowley's Claim* (10). The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the indemnity is not concerned. In such a case the party indemnified is entitled to receive 20s. in the pound, and, having got it, to deal with it as he thinks proper.

The case is otherwise where the party giving the indemnity is concerned with the application of the money which he pays. This was the case in *Re Richardson, Ex parte Governors of St. Thomas's Hospital* (1). The wife, who was bound to indemnify, was there concerned in seeing that the money which she paid went to the lessor, so as to relieve the property of which she was beneficial owner from the consequences of non-payment of rent and damages for breach of covenant. In *Cruse* v. *Paine* (9), the stock jobbers were interested in seeing that the amount which they provided was applied in discharging the calls upon the shares. In *Re Perkins, Poyser* v. *Beyfus* (7), the executors of assignee No. 2 were interested in the application of that which they had to pay in discharging the obligations under the lease. But here the company are not interested in the question whether the amount which they pay does or does not go to the debenture holders. The case is that which is put in *Carr* v. *Roberts* (5), where both LITTLEDALE, J., and PATTESON, J., at the conclusion of their judgments point out that it is the duty of the defendant to pay the whole amount, and it makes no difference whether it is applied in discharge of the debt, or whether the plaintiff, having recovered it, does not make a proper use of it. In the alternative, therefore, and if the contract is not one of insurance but of indemnity, I think it still results that the company are liable to the liquidator of the society for the full sum, and not 10s. in the pound in respect of the sum. In the winding-up of the society a scheme of arrangement has been carried which provides for a moratorium. The company have come in under art. 23 of the scheme, and have thus assented to have their liability ascertained on the footing that the claim of the assured under the scheme shall be treated as the amount payable under the reinsurance. In the view which I have expressed of the nature of the contract by which the company

is bound nothing arises upon the scheme which affects in any way the question to be decided. Except as affecting a moratorium, the scheme leaves the liability of the company unaffected.

I am anxious to point out some consequences which would ensue if the view I have expressed were not the right one. The contrary view is one which makes it to the interest of the company that the society should be insolvent. For to such extent as the society cannot pay in full, the argument is that the company are not liable to make payment. It is obvious that such a consideration cannot have entered into the contemplation of the parties in fixing the premium. The company has received a certain premium upon the terms that in an event it shall pay a certain sum. If its liability is reduced to 10s. in the pound, it has received payment of premium as the price of an obligation to pay 20s., but is, by reason of circumstances, not material at all so far as the company is concerned, relieved of one-half of the liability. If this were true, a society whose credit was bad ought to pay a less premium than a society whose credit was good, because the obligation would in the former case result in a smaller liability. The fact is, I suppose, that as a matter of business, if the credit of the society were bad, a larger, not a less, premium would be demanded as the price of the guarantee. The argument of the reinsurer is best illustrated by an example. Assume that the liability to the debenture-holders is £11,000 and that consequently the liability of the company is £2,000, being two-elevenths of that sum. Assume that the other debts of the society are £5,000 and £4,000. Exclude for the moment the £2,000, there remains £9,000 + £5,000 + £4,000, that is £18,000 of debts. Suppose the assets to be £1,800 this will give a dividend of 10 per cent. The company are liable, says the reinsurer, to pay 10 per cent. on the £2,000. The society then bears nothing as regards the £2,000 debt and has been indemnified, and the creditors will all alike get a dividend of 10 per cent. The fallacy, I think, lies in saying that this indemnity, and that the right of the creditors is satisfied by such an adjustment. If the right of the society against the company is, as it certainly is, an asset of the society, it is one upon which the society is entitled to realise the full amount for which the company are liable. Until that has been got in it is misleading to say that the society can only pay 10 per cent. It can pay such dividend as its assets will produce after the claims against the company and others in like cases have been realised. The liability of the company is an element in determining the amount of the dividend. The respondents want to take the amount of the dividend as a fixed factor, and to determine the liability accordingly. In my opinion this is wrong. If the society had not gone into liquidation, it would have had a right of action against the company for 20s. in the pound on the company's liability, and none the less if its assets were so small that after recovering the amount the assets would be insufficient to pay the creditors, including the debenture-holders, 20s. in the pound. That right of action has vested in the liquidator. Why has he a less right because the estate in liquidation will not pay 20s. in the pound? How is the right affected by the fact that the right of action became exercisable for the first time after winding-up commenced? Whether the contract be one of insurance or one of indemnity, the appellants are, I think, entitled to succeed. It seems to me that the order under appeal ought to be discharged and there should be substituted a declaration which, subject to any suggestion which the parties may make as to its form, should be a declaration that the company are liable to pay to the liquidator of the society two-elevenths of the deficiency remaining after applying the proceeds of the mortgaged properties towards payment of the debenture debt. In this concrete case that would mean, as I understand, that the company are liable to pay to the liquidator two-elevenths of £4,988 6s. 11d.

KENNEDY, L.J.—The question to be decided in this case—and in my view it is by no means an easy one—does not, I think, depend at all upon a close examination of the language of the contract into which the Law Guarantee Trust and Accident Society, Ltd. (which I shall call the society), entered under the tripartite arrangement to which Sands, Wilson & Co., Ltd., and their debenture-holders, were the other parties. Some time was expended at the hearing of the appeal in this court in discussing the precise

nature of the obligation undertaken by the society towards the debenture-holders: Is its proper category "guarantee" or "suretyship" or "indemnity" or "insurance"? In the document which constitutes the tripartite agreement the word describing the obligation of the society is "guarantee." In my view, this matter is not important. The obligation of the society towards the debenture-holders, although not co-extensive or identical at all events with the obligation of Sands, Wilson & Co. to those parties, might, I think, without thereby affecting the issue which we have to decide, be treated as coming within any one of those categories; one might, in regard to suretyship and insurance, for example, apply to the description of this tripartite agreement the language of KAY, L.J., in *Dane* v. *Mortgage Insurance Corpn., Ltd.* (2), ([1894] 1 Q.B. at p. 62) and say that

> "it does not seem to me material to consider whether the contract sued upon is a contract of suretyship or a contract of insurance."

The one matter which is material to consider is the ultimate effect of the tripartite agreement, so far as it affects the responsibility of the society, and, in my opinion, whether the undertaking of the society ought to be classed as an insurance, an indemnity, a surety, or a guarantee, the effect of it was that under it the society became bound, in an event which has in fact occurred, to pay to the debenture-holders a large sum of money. Having this risk, the society, in order to relieve itself of it in some part, entered into a contract with the Liverpool Mortgage Insurance Co. (referred to hereafter as the company) which was endorsed on each of the debentures in the form of a memorandum dated Mar. 23, 1904, and signed by the representatives of the two interested parties. That memorandum, so far as it is material, is in the following terms:—It is headed:

> "Premium £25—The Liverpool Mortgage Insurance Co., Ltd. (hereinafter called the guarantors), hereby guarantee the within-named Law Guarantee and Trust Society, Ltd. (hereinafter called the society), to the extent of £5,000, being two-elevenths of the risk assured by and subject to the conditions of the within policy of debenture insurance and also the like proportion of all costs and expenses incurred by the society with the consent of the guarantors in respect of any claim arising under the within policy or in relation to the enforcement, with the like consent, of the society's powers as transferees of the debentures so long as the annual premium of £25 shall be paid on Aug. 30, in each year or within thirty days hereafter."

I may note, in passing, that the company, according to the actual words of this document, assent to the description of the nature of the society's liability under the tripartite agreement as the liability of insurers.

What is the legal effect of this memorandum? The society contends that it created a contract of reinsurance. NEVILLE, J., has held that it is more properly described as a contract of limited indemnity. In my opinion, if, as I think it is not incorrect to say, the obligation of the society under the tripartite agreement was a contract of insurance, this contract between the society and the company is a contract of reinsurance. But, whatever name be given to the obligation which the society undertook towards the debenture-holders under the tripartite agreement, I think that the company by this contract insured the society against the risk which that obligation involved to the extent of £5,000, being two-elevenths of the sum which the society might in a certain event be called upon to pay in performance of that obligation, and also the like proportion of the costs and expenses incurred by the society, as mentioned in the memorandum. In other words, the company, in the event of the society becoming, as it has become, liable to pay the debenture-holders, became thereupon liable to pay the society two-elevenths of the amount, together with the like proportion of costs and expenses incurred by the society. I hold this to be a contract of insurance. I will add that I should not be prepared to hold that there would be a difference in the result in regard to the liability incurred by the company if it be treated as a contract of indemnity. There appears to me to be authority for holding that, in the view of a court of equity, to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of

the liability against which the indemnity has been given: see WRIGHT, J., in *Wolmershausen* v. *Gullick* (8), ([1893] 2 Ch. at pp. 527, 528), citing LORD LINDLEY's work on PARTNERSHIP, (5th Edn.), pp. 374, 375. As NEVILLE, J., points out in the course of his judgment in this case, if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance. If this is true in regard to a contract of indemnity in general, it is certainly true of contracts of insurance and reinsurance, which are essentially contracts of guarantee against loss by an event: see BRETT, L.J., in *Castellain* v. *Preston* (11) (11 Q.B.D. at p. 387), and per BOWEN, L.J. (ibid. at p. 403). In the case of a reinsurance policy the attempt was made in *Re Eddystone Marine Insurance Co.* (4), to argue that the reinsurer was not bound to pay the party who effected the reinsurance until he had paid the assured on the original policy, but STIRLING, J., held that payment on the original policy was not a condition precedent to the right to recover on the policy of reinsurance.

In my view, the society, upon the happening of the event which, under the terms of the tripartite agreement, involved it in the liability to make a payment to the debenture-holders, became entitled under the contract which it had made with the company to require the company to pay to the society two-elevenths of that amount, and the same proportion of the costs and expenses referred to in the memorandum, and the company had no right to say to the society: "We will wait, before paying, to see how much you will pay in discharge of your liability to the debenture-holders." This being that which may be called the normal position, is it altered by the fact of the insolvency and liquidation of the society? It is contended on behalf of the company that it is; that, inasmuch as the debenture-holders will not be able to enforce against the company payment in full of the amount due to them from the company, but only payment of a dividend upon their proof in the liquidation for that amount, the company, so far as the indebtedness to the debenture-holders as distinct from costs and expenses is concerned, will satisfy its contractual obligation to the society if it pays only the amount of that dividend. This question might have arisen on the points stated in the report of that case in *Re Eddystone Marine Insurance Co.* (4), but it does not appear to have been argued by counsel or dealt with by the learned judge. I do not think that this contention of the reinsurer is sound. How the person who receives payment of a sum of money under a contract of insurance or reinsurance, or, I will call it, of indemnity, deals with that sum is, in general and apart from special considerations, no concern of the party who, in fulfilment of his contract, has made the payment to him. Upon what grounds of equity or legal logic can it be argued that, because the law, on grounds of public policy, compels the creditor, the liability to whom is the event upon which the right of a bankrupt or of an insolvent company to payment of the sum covered by the contract arises, to be content with such share of the assets of the bankrupt or the company in liquidation as a pari passu distribution between creditors will give, those assets are not to include the payment due under the contract? If the discharge of the liability, against which the contract of insurance or reinsurance was the protection, is not, and I think that it is not, a condition precedent to the right to claim payment of the amount of the insurance or the reinsurance, upon what ground ought it to be held that if the person entitled to that payment becomes bankrupt or, if a company goes into liquidation, the trustee of the bankrupt or the liquidator of the insolvent company does not have the right to the payment of that amount in full which the bankrupt before his bankruptcy or the company before its liquidation possessed because, when he has received the amount, the law intercepts the asset in his hands and compels him to apply it in a particular way as part of the estate divisible amongst all the creditors? I confess myself unable to see any principle upon which such a contention can be supported; and, although there is not, so far as I know, any express decision upon the point, counsel for the insurance company was, I think, warranted in citing language in the judgments of LITTLEDALE, J., and PATTESON, J., in *Carr* v. *Roberts* (5), and in referring to the grounds upon which *Dane* v. *Mortgage Insurance Corpn., Ltd.* (2), and *Finlay* v. *Mexican Investment Corpn.* (3), and *Ashbury* v. *Ingamells* (6), were decided as tending to support his contention to the contrary. I do not think that it is true to say that in such a case as the present the party who is entitled

A makes a profit; he gets only the amount of the payment for which he bargained in the event which has occurred, and he has paid a premium based upon the risk, in such event, of that amount having to be paid. BUCKLEY, L.J., has dwelt in his judgment upon the strange consequences that would, as pointed out by the counsel for the insurance company in their argument before us, ensue if the argument put forward in the present case on behalf of the company were held to prevail. I agree with him in these criticisms.

B I desire only, in conclusion, to refer to the case of *Re Richardson, Ex parte Governors of St. Thomas's Hospital* (1), which my brother NEVILLE, J., seems to treat as an authority for the view which he has taken of the present case. It appears to me that we can decide the present question in favour of the society without differing from the decision of the Court of Appeal in that case. The circumstances were peculiar. The husband's right of indemnity, upon which the wife was sued in an action in which the trustee in bank-

C ruptcy of her husband's estate and the husband's landlord were joint plaintiffs, was not a contractual right, but an equitable obligation arising from the relation of cestui que trust and trustee which existed between wife and husband; and it was held by the Court of Appeal that the husband's trustee in bankruptcy could avail himself of the husband's right of indemnity only for the purpose of passing on the money which his wife paid by way of compromise in the action to the landlord, his co-plaintiff, who was the principal

D (or ultimate) creditor. To hold otherwise, said the Master of the Rolls ([1911] 2 K.B. at p. 711), would be to allow a trustee to make a profit out of his position as trustee. In the present case the right to payment upon which the society is insisting depends upon an express contract, whether of insurance or reinsurance, for the payment in a certain event of a sum of money. The debenture-holders are not parties to these proceedings. There is no bond of connection between the company and the debenture-holders. The

E company has no sort of interest in seeing how the money due from the company to the society is applied by the society.

For the reasons which I have stated, I concur with the other members of this court in holding that the appellant society is entitled to succeed; and I have only to add that I have not referred to the scheme of arrangement which has been adopted in the liquidation of the company and into which the company has entered because, if I understand rightly

F the nature of its provisions, they do not affect the decision of the particular point involved in the present appeal.

SCRUTTON, J.—This an appeal by the liquidators of the Law Guarantee Trust and Accident Society, Ltd., whom I will call "the society," against orders of NEVILLE, J.,

G ([1913] 2 Ch. 604), dated Oct. 31, 1913, and WARRINGTON, J., ([1914] W.N. 117), dated Mar. 9, 1914. These orders purport to fix the amount and conditions of liability of the Liverpool Mortgage Insurance Co., Ltd., whom I will call "the insurance company" under their insurance or guarantee of the society. The liability of the society insured is under their guarantee, under conditions to be referred to, to the debenture-holders of Sands, Wilson & Co. (1900), Ltd., of the principal and interest due to them from Sands,

H Wilson & Co. on their debentures.

The society as part of its business guaranteed to debenture-holders the payment of principal and interest by the company issuing the debentures. They usually did so as part of the arrangement under which that company offered debentures to the public, and had an arrangement with that company in the nature of a debenture trust deed, while their guarantee to the debenture-holder was annexed to each debenture issued.

I Accordingly each £100 debenture issued on Aug. 30, 1900, by Sands, Wilson & Co. contained a promise by Sands, Wilson & Co. to pay the principal sum of £100 on Aug. 30, 1910, or upon such earlier day as it might become payable in accordance with the conditions endorsed thereon (with a bonus of £5 per debenture if Sands, Wilson & Co. repaid the debenture before the appointed day on six months' notice). It also contained a promise to pay interest at the rate of 4½ per cent. on Feb. 28 and Aug. 30 in each year. There was also annexed to the debenture a "guarantee" by the society to the registered holder of the debenture of the payment of the principal moneys and interest, but not bonus: (i) As to interest, that if Sands, Wilson & Co

should make default for thirty days, the society would pay the amount on demand; (ii) as to principal, that if there were default in the payment of the principal moneys or any part thereof, the society would pay the amount thereof upon whichever of the days following should first happen—(a) Aug. 30, 1910, (b) the day after the securities for the debenture-holders shall have been enforced and completely realised and distributed. The society, having taken this and numerous other similar liabilities, desired to protect itself by reinsurance, and by a policy endorsed on a specimen debenture and dated Mar. 23, 1904, the insurance company

> "guaranteed the society to the extent of £5,000, being two-elevenths of the risk assured by, and subject to, the conditions of the within policy of debenture insurance [that is, the society's guarantee endorsed on the debenture], and also the like proportion of all costs and expenses incurred by the society with the consent of the guarantors in respect of any claim arising under the within policy . . . so long as the annual premium of £25 shall be paid on Aug. 30, in each year."

In September, 1909, Sands, Wilson & Co. being in difficulties, the society as trustee for debenture-holders entered into possession. On Dec. 14, 1909, an order for liquidation of the society's affairs under the supervision of the court was made. In this liquidation a scheme of arrangement was sanctioned by the court which provided for a moratorium of claims in the liquidation for principal moneys till Dec. 31, 1918, the liquidators paying interest meanwhile at the rate of 3 per cent. The loss of principal of the debenture-holders of Sands, Wilson & Co. after realisation of securities was assessed at £4,988, or £26 5s. 1d. per £100 debenture, and a proof to that amount was admitted in the liquidation of the society. This loss was finally assessed after Aug. 30, 1910, and therefore the society were under their guarantee liable in strictness to pay the full amount of the principal, getting the benefit of the securities when realised. The scheme of arrangement of the society offered reinsurers of risks guaranteed by the society two options, the second of which was

> "to be bound by the scheme in all respects, and accordingly to have their liabilities in respect of reassurances ascertained on the footing of the claims of the assured made and allowed under this scheme being treated as the amount payable under the policies reinsured."

The insurance society accepted the latter option. Accordingly, as the claims of debenture-holders of Sands, Wilson & Co. have been allowed at £4,988, this amount will be payable on Dec. 31, 1918, by the Society, and the insurance company accept this as the amount payable by the society under their guarantee. The proof as pointed out might strictly have been based on the full amount of principal. It is highly probable, however, that the assets of the society will not be sufficient to pay the creditors in full, and the question then arises which is the subject of this appeal, whether the insurance company are bound to pay the society two-elevenths of the admitted proof or only two-elevenths of the amount of the dividend which the society pays on the proof.

The liquidators accordingly took out a summons before NEVILLE, J., asking for a declaration that payment in full by the society in respect of liabilities incurred on policies or guarantees was not a condition precedent to the liability of the insurance company on reinsurances by them of the same risks, and that such liability of the insurance company was not limited by or proportional to the amount of the dividend paid, or to be paid, by the society to the persons entitled to such policies or guarantees. On this summons NEVILLE, J., made an order declaring that payment by the society of liabilities incurred under policies or guarantees is not a condition precedent to the liability of the insurance company on reinsurances by the latter company of the same risks, but that the ultimate liability of the insurance company under such reinsurance is limited to the proportional amount of the dividend and other sums paid or to be paid by the society to the persons entitled to such policies or guarantees, and that any sum in excess of such proportional amount paid by the insurance company to the society in respect of such reinsurances will be held by the liquidators on behalf of the society. This order, if I follow it, though WARRINGTON, J., has taken a contrary view of its effect, allows the

liquidators of the society to recover the full amount of the admitted proof from the insurance company, with an obligation to repay so much of it as the liquidators do not pay in dividends to the debenture-holders of Sands, Wilson & Co. NEVILLE, J., in his judgment threw out the suggestion that the society might recover or be compelled to recover the whole amount for the benefit of the debenture-holders, but declined to decide it as the matter was not before him. A further summons was taken out on Nov. 10, 1913, for a declaration that the liquidators might properly be required to pay direct to the debenture-holders the sum guaranteed; and this summons came on before WARRINGTON, J., on Mar. 9, 1914. That learned judge treated the decision of NEVILLE, J., as one

> "that the company might be called on to pay as soon as the liability has actually matured—that is to say, as soon as it is ascertained that the assets of the society are liable to pay a dividend on £x to the debenture-holders in Sands, Wilson & Co., the company might be required to pay that £x to those debenture-holders."

He treated the declaration he was asked to make as inconsistent with this interpretation of the judgment of NEVILLE, J., and refused it. Thereupon the liquidators appealed to the Court of Appeal, asking in substance for three alternative declarations: (i) That payment in full by the society was not a condition precedent to the liability of the insurance company, who were not entitled to limit their liability to the amount of the dividend paid by the society; (ii) that to the extent to which the liquidators pay the debenture-holders' proofs they will be entitled to be repaid by the insurance company those amounts in full, but not exceeding two-elevenths of the sum guaranteed; or (iii) that the insurance company may be required to pay directly to the debenture-holders two-elevenths of their loss. The second alternative may be disposed of at once. It was apparently founded on a suggestion that the insurance company had really reinsured or guaranteed the first two-elevenths of the loss, and might, therefore, be required to pay two-elevenths of the admitted proof although only a dividend was paid on the proof, so long as the total dividend paid was equal to or more than two-elevenths of the proof and two-elevenths of the proof did not exceed £5,000. On this it is sufficient to say that a bargain might be made to reinsure the first two-elevenths of the loss, or the first £1,000, or the loss in excess of £1,000, or any other proportion or part of the loss, but that there is no trace of such a bargain in this case.

The questions before us resolve themselves into this: Is a reinsurer or guarantor relieved pro tanto from liability to his assured or guaranteed by the fact that the latter is insolvent and so unable to pay more than a dividend on the liability reinsured, the liability of the reinsurer being thus reduced by the insolvency of the reinsured? And, if so, can the reinsurer or guarantor be compelled to pay direct to the original assured or principal creditor the sum for which the latter has an admitted claim on his assurer or guarantor, for which sum such assurer or guarantor would, if he paid, have an admitted claim on his reinsurer? It was obvious from the arguments before us that this was a matter of considerable difficulty. For the insurance company it was said that their contract, whatever it was called, was a contract of indemnity, and that they indemnified the society if they paid it what it had to pay; to pay it more would be to enable the society or its general creditors to make a profit. For the society it was said that the whole object of reinsurance might be to save oneself from bankruptcy in case of claim, but that the contention of the insurance company involved that a person with no assets other than full reinsurance against his insurance liabilities would yet be driven into bankruptcy, and only recover from his reinsurers the nominal dividend his general assets could pay. Premiums on such reinsurances would have to be regulated not only by the solvency of the original principal debtor, but also by the solvency of the person whose risk was reinsured; the more insolvent the latter was the less the reinsurer would have to pay. And it was said, how is what the reinsurer is to pay—that is, the dividend—to be ascertained until you know his contribution? His contribution when made will increase the general dividend, and this increase will again increase his contribution. To this it was answered that the rule would be, find what dividend the general assets

apart from claims on reinsurances would pay the general creditors apart from those whose claims were reinsured and collect this dividend from such reinsurer.

It is, perhaps, sufficient to say there is no trace of this complicated rule in the policy, and it would not apply to cases where there were no general creditors whose claims were not reinsured. For instance, for simplicity, take a man who has only insured one risk of £1,000, and, having no assets, has reinsured his whole risk. He becomes insolvent, and a claim for a total loss accrues on his policy. Left to himself, his dividend to his creditors will be nil, and, on the argument of the insurance company, the amount payable by his reinsurer will be nil. Yet in fact he should remain solvent, his reinsurer providing the funds to satisfy his only debt. The same result would follow if he had ten fully reinsured policies and ten losses. If it be said that the society's argument enables the general creditors to make a profit, the answer appears to be that it is not the society's argument, but the operation of law which, though a creditor has a claim which the debtor has reinsured, takes the contribution of the reinsurer and divides it between the general body of creditors, because the creditor has no privity with the reinsurer, and no charge, lien, or equitable security on his payment to the debtor.

Considerable discussion took place before us whether the obligation of the society to the debenture-holders was that of surety for the principal debtors, Sands, Wilson & Co., or insurers of the debenture-holders against the insolvency of Sands, Wilson & Co. In the view I take of the case it is immaterial to decide this point or to discuss whether this document is nearer to that in *Re Denton's Estate, Licences Insurance Corpn. and Guarantee Fund, Ltd.* v. *Denton* (12), which the Court of Appeal held to create the relation of principal and surety, or that in *Shaw* v. *Royce Ltd.* (13), which WARRINGTON, J., held to be an insurance. I incline to the latter view. But it is clear that under the document, whatever it is, the society ran a risk of being called upon to pay if Sands, Wilson & Co. did not, or of incurring a loss if the realised securities did not cover the principal sum due under the debentures. This risk of having to pay, or risk of loss, was intended to be covered by the agreement entered into with the insurance company. And it seems to me clear that on the principles laid down by the Court of Appeal in *Dane* v. *Mortgage Insurance Corpn., Ltd.* (2), and applied by CHARLES, J., in *Finlay* v. *Mexican Investment Corpn.* (3), and by MATHEW, J., in *Parr's Bank* v. *Albert Mines Syndicate* (14), this contract is a contract of insurance. Probably as an insurance against loss by a liability to pay money in certain events it may be correctly described as a contract of reinsurance. There is, however, no direct privity between the debenture-holder or principal debtor, Sands, Wilson & Co., on the one hand and the insurance company on the other. The debenture-holder cannot sue the insurance company direct. If the insurance company can get at Sands, Wilson & Co. it will be by subrogation or payment of the society, and in the society's name. I am not aware of any way in which an original assured can get at a reinsurer; his rights are only against the original insurer, the reinsured. If so, the insurance company has guaranteed two-elevenths of the risk assured by the society; the society has become liable to pay a sum of so many pounds, but has not the funds to pay it.

Does this fact reduce the liability of the insurance company? Stated in this way the question seems to me to answer itself. In marine insurance the question has been treated as comparatively settled. In England, in 1892, in *Re Eddystone Insurance Co.* (4), the Western Insurance Co. reinsured certain of its liabilities on marine policies on ships with the Eddystone Co. by policies containing the clause "to pay as may be paid thereon." Losses occurred in which the Western Co. were liable on the policies, and the Eddystone Co. to the Western Co. on their policies. But both companies were in liquidation, and the Western Co. had not paid their assured anything, even a dividend. Before STIRLING, J., the Eddystone Co. contended that they were liable to pay to the Western Co. the proper rateable proportion of any dividend which might be paid to the original assured only when and not until such dividend had been actually declared and paid. Their counsel argued ([1892] 2 Ch. at p. 427):

> "We cannot under this clause be compelled to indemnify the Western Co. except in respect of what they may actually pay, and not until they have paid."

A The Western Co. contended that as they became liable to pay the sum assured by their policy on the occurrence of the loss, the Eddystone Co. became liable to pay their proportion of such sum, irrespective of any question whether the Western Co. had paid wholly or in part the claim under their policy. Their counsel argued (ibid. at p. 426):

> "The Eddystone Co. are bound to indemnify the Western against all claims
> B up to the full amount of the reinsurance, whether the Western have paid anything or not,"

and (ibid. at p. 427)

> "It cannot be contended that if the insured is insolvent and can pay nothing, the reinsurer is to keep his premium and escape all liability."

C STIRLING, J., said (ibid.):

> "Now, a main object of reinsurance is to relieve the reinsured from a portion of the risk previously undertaken by him; and the result of giving effect to the liquidator's contention would be that, before the reinsured obtains the benefit of his reinsurance, he must himself have paid on the original insurance, even though
> D bankruptcy might be the result. I think that this could not be intended, and that such a construction ought not to be put on the language of the policy unless it is clearly called for. In my opinion the words do not clearly require to be so construed. They would be satisfied if they were held to amount simply to this—that the payment to be made on the reinsurance policy is to be regulated by that to be made on the original policy of insurance. I am fortified in this view by the
> E observations of MATHEW, J., in the unreported case of *Martin* v. *Munich Assurance Co.* (15), with the shorthand notes of which I have been furnished. The contention of the liquidator of the Western Co. must accordingly prevail; and I hold that payment by his company is not to be taken to be a condition precedent to his recovering against the Eddystone Co."

F The judgment may appear to be ambiguous, for the phrase "the payment to be made" might mean liability or might mean actual payment. It has, however, been held that actual payment without legal liability will not do (*Chippendale* v. *Holt* (16)), and STIRLING, J., says that the contention of the Western Co. must prevail. The amount paid before the original insurer has paid can only be the whole liability, and the case is treated by the editors of ARNOULD ON MARINE INSURANCE (8th Edn., p. 422, para. 324), as deciding that the whole amount of liability and not the dividend only is payable.

G This view of the case has, to my knowledge been taken in practice and business. The law in the United States seems to be the same. In *Herckenrath* v. *American Mutual Insurance Co.* (17), in 1848 the Chancellor held that the original assured had no claim for the whole sum received by his insurer from a reinsurer, but only to a dividend. The argument deals with the suggestion that the insurer makes a profit, pointing out
H that he makes no profit, but the State requires his assets to be distributed in a particular way; he parts with them all: "It is none the less a loss because they are unable to pay it in full." The Chancellor cited and apparently approved a decision of the Commercial Court of Marseilles in 1748, cited by EMERIGON (TRAITÉ DES ASSURANCES, vol. i, cap. 8, s. 14, p. 253; translation by MEREDITH, 1850, p. 202), where the insolvent insurer paid 60 per cent. of the loss, but recovered 100 per cent. of the loss from his
I reinsurer, the court holding that the reinsurer was bound to pay what the original assurer became liable to pay, not what he had actually paid. American text-writers take the same view. PARSONS in his work on MARINE INSURANCE, vol. 1, p. 300, says:

> "The reinsured is not bound to pay his insured and found his claim on this actual payment before he can call on the reinsurer. For if the reinsured be insolvent and pay but a small dividend on their policy, they have still a claim on the reinsurers for the whole amount for which they are reinsured, this amount being measured by the risks which the reinsurers assume for the premium paid them."

PHILLIPS in PHILLIPS ON INSURANCE (5th Edn.), paras. 1751, 1752, states the law:

> "A reinsurer is not liable for over the amount for which the insurer is legally liable. The amount of a total loss in a policy of reinsurance is not subject to be reduced below the value at which it is stipulated to estimate the property in the policy of reinsurance on the ground of the insolvency of the reassured, and of his failure to pay the full amount insured by the original policy."

This may only deal with valued policies, but the principles do not seem to differ. It was suggested in argument that marine policies stood in a peculiar position. Having some acquaintance with them, I do not see why. The insurer reinsures a subject-matter, the ship, in which he has an insurable interest, in that if she is lost he will have to pay under his policy. The measure of his loss is not what he pays, but what he is liable to pay: *Chippendale* v. *Holt* (16). The original assured cannot sue the reinsurer, or claim that the money the latter pays is charged or secured to him. If the original assured has no privity with the reinsurer, why can the latter avail himself of the transactions of the assured?

NEVILLE, J., thought himself bound by the decision in *Re Richardson, Ex parte Governors of St. Thomas's Hospital* (1) to hold that the society could not recover from the insurance company more than they had actually paid, but could call upon the insurance company to pay off the debenture-holders. The latter point, however, he said was not before him, and it was not in the original summons. The facts in *Richardson's Case* (1), were remarkable and peculiar. Richardson, the husband, was twice bankrupt. He was also lessee of some properties from St. Thomas's Hospital, and held them as trustee for his wife under circumstances explained in *Governors of St. Thomas's Hospital* v. *Richardson* (1). Between his first and second bankruptcy the landlords got judgment against him for arrears of rent, damages for non-repair, and costs, and he then went into bankruptcy. The Court of Bankruptcy gave leave to the landlord to join with the trustee in an action against the wife as cestui que trust. I understand how the husband and his trustee could ask to be indemnified by the wife. I do not understand how the landlord had any direct claim against the wife to the sum claimed. However, the action never came to trial, for the wife paid £520 to the two plaintiffs in compromise of a claim for £720. Then the question arose who was to have the £520, the trustee for the general body of creditors, or the landlords against whose claim the husband was to be indemnified, and the Court of Appeal gave the money to the landlords. But the Master of the Rolls stated ([1911] 2 K.B. at p. 709) that it was not the case of a contractual right to indemnity but of the equitable right which every trustee has to be indemnified by his cestui que trust. The case did not decide that the trustee could not recover till he paid, and only what he paid. He had in fact paid nothing and got £520 by consent. The authorities on insurance were not cited to the court, which was not dealing with any questions of reinsurance, and, while FLETCHER MOULTON, L.J., made some very general statements as to the common law right of indemnity, they were not, as I read the decision, necessary for it, and, if I understand the decision of the Court of Appeal in *Ashdown* v. *Ingamells* (6), were contrary to the common law rules therein laid down. In *Ashdown* v. *Ingamells* (6), A. agreed for valuable consideration to pay the trade debts of B.; he did not do so, and B. was forced into liquidation by his trade creditors, whose proof for £1,750 was admitted. The trustee of B. sued A. for damages, and it was replied that as B.'s estate would only have to pay a nominal dividend there was no damages. HUDDLESTON, B., agreed with this contention, but the Court of Appeal reversed him. They held that the insolvent, if solvent, would have recovered the full amount—whether it was a contract to indemnify or pay was immaterial—and that the trustee could recover what the bankrupt could, if solvent, have recovered, without regard to whether the estate had paid or not. I do not understand how this supports the view of NEVILLE, J., or justifies the general observations of FLETCHER MOULTON, L.J., *Carr* v. *Roberts* (5), is to the same effect.

In the result, I am of opinion that as the society have admittedly incurred liability to the debenture-holders to the amount of £4,988, the insurance company, who have guaranteed two-elevenths of that risk and insured them against two-elevenths of that risk, must pay them the amount of their liability. This would be even more strikingly

true of the liability to pay expenses incurred imposed by the second part of the policy. If the society is liable to pay these expenses, but insolvent, will the insurance company only be liable to pay a dividend on them? That after they have paid, the law takes that sum they pay and divides it among general creditors so that the legal claim of the debenture-holders is not satisfied in full does not seem to me to afford any defence to the insurance company, who have no privity with the debenture-holders, but only when they have paid in full a right of subrogation to the rights of the society. I think the society are entitled to the first and second declarations asked for in their notice of appeal. The third declaration cannot be supported from any point of view. It is unnecessary to decide whether the society are entitled to the fourth declaration, but I incline to the view that under the decisions in *Lacey* v. *Hill, Crowley's Claim* (10), and *Cruse* v. *Paine* (9), they would be if they were not entitled to the first and the second declarations.

Appeal allowed.

Solicitors: *Frere, Cholmeley & Co.*; *Sharpe, Pritchard & Co.*, for *Alsop, Stevens, Crooks & Co.*, Liverpool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re LAW GUARANTEE TRUST AND ACCIDENT SOCIETY, LTD. GODSON'S CLAIM

[CHANCERY DIVISION (Neville, J.), December 2, 3, 1914]

[Reported [1915] 1 Ch. 340; 84 L.J.Ch. 510; 112 L.T. 537; 59 Sol. Jo. 234; [1915] H.B.R. 103]

Insurance—Guarantee of debentures—Insurance by guarantor of liability—Payment to guarantor by insurers—Right of debenture-holders to money paid.

In 1901 a company issued debentures secured by a trust deed under which certain property was assigned to a guarantee society as trustees for the debenture-holders. The society also guaranteed payment of principal and interest due on the debentures, and a form of guarantee signed on behalf of the society was printed upon each debenture. The company went into liquidation in 1908, the security thereon became enforceable, and the society went into possession of the property comprised in the trust deed on behalf of the debenture-holders. In December, 1909, the society also went into liquidation, and in 1910 a scheme of arrangement was agreed to by creditors and confirmed by the court. The society had previously insured its liability under the guarantee and were now entitled to payment in full of the insurance money.

Held: while it was true that the society were trustees for the debenture-holders of the mortgaged property, there was no fiduciary relation between the society and the debenture-holders with regard to the insurance money, and, therefore, that money formed part of the general assets of the society and the debenture-holders were not entitled to it.

Notes. As to debt insurance, see 22 HALSBURY'S LAWS (3rd Edn.), 398–402; and for cases see 29 DIGEST 409–414.

Cases referred to:

(1) *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, [1913] 2 Ch. 604; 109 L.T. 152; 29 T.L.R. 776; reversed ante p. 1158; [1914] 2 Ch. 617; 84 L.J.Ch. 1; 111 L.T. 817; 30 T.L.R. 616; 58 Sol. Jo. 704, C.A.; 26 Digest (Repl.) 11, *13*.

(2) *Ashdown* v. *Ingamells* (1880), 5 Ex.D. 280; 50 L.J.Q.B. 109; 43 L.T. 424, C.A.; 5 Digest (Repl.) 1052, *8502*.

Also referred to in argument:

Re Richardson, Ex parte Governors of St. Thomas's Hospital, [1911] 2 K.B. 705; 80 L.J.K.B. 1232; 105 L.T. 226; 18 Mans 327, C.A.; 5 Digest (Repl.) 726, *6285*.

Re Emmett, Ex parte Andrews (1816), 2 Rose, 410; 29 Digest 349, *2824*.

Adjourned Summons for a declaration.

On Mar. 5, 1901, the Bedford Brewery (Plymouth), Ltd., issued a series of 1,000 first mortgage debentures of the company of £100 each. In each debenture they promised to pay to the registered holder thereof the sum of £100 on Dec. 31, 1910, or on such earlier date as it might become payable in accordance with the conditions endorsed thereon, and until payment of such principal moneys to pay to the holder interest at £4 10s. per cent by half-yearly instalments. The debentures were charged upon the company's undertaking and property, and were declared to be subject to the conditions endorsed on the debentures. According to these conditions the principal moneys were repayable (inter alia) when an order should be made by any competent court or an effective resolution should be passed by the company for winding-up. The debenture-holders were also entitled to the benefit of a trust deed dated Mar. 5, 1901, and made between the company and the Law Guarantee Trust and Accident Society whereby certain property of the company was vested in the society as trustees for the debenture-holders and the company agreed to pay the society a sum of £105 per annum in consideration of its services. The society had also agreed to guarantee the debentures, and in pursuance of this arrangment an agreement was printed at the end of each debenture, signed by one of the directors on behalf of the society, and in the following terms:

"The society acknowledges that the above debenture was subscribed for on condition and in part consideration that the society would give the guarantee following, and accordingly the society hereby guarantee to the registered holder of the above debenture the payment of the moneys and interest, but not bonus, to become due under the said debenture in manner following—that is to say: (1) As to the interest. If and whenever the company makes default in the payment of any interest for more than thirty days the society will pay such interest on demand. (2) As to principal. If the company makes default in the payment of the principal moneys or any part thereof the society will pay the amount thereof upon whichever of the days following shall first happen—viz.: (a) On August 30, 1910, above mentioned; or (b) on the day after the securities for the debenture-holders shall have been enforced and completely realised and distributed so far as regards the holder of the above debenture. (3) At any time after the company shall have made default for more than fourteen days in the payment of any of the said principal moneys or interest, the society may, by notice in writing to the debenture-holder, call upon him to transfer to the society the above debenture and all his rights thereunder, and the debenture-holder shall be bound to comply with such demand on payment of the full amount of the principal moneys and interest then owing in respect of such debenture. (4) If the company makes default for more than thirty days in the payment of any principal moneys or interest secured by the above debenture, the debenture-holder must give notice in writing of such default to the society as to interest within six calendar months after the default, and as to principal within twelve calendar months after the default."

By the trust deed the company agreed to pay the society a premium of 15s. per cent. in consideration of this guarantee. After the date of this guarantee the society entered into contracts of reinsurance in respect of the debentures with the Law Accident Insurance Co. and other companies. The question of reinsurance was not referred to in the original proposal for guarantee nor in the debenture bonds, nor had the debenture-holders, according to the evidence, any knowledge of such contracts. In September, 1908, the Bedford Brewery (Plymouth), Ltd., went into voluntary liquidation, and the society appointed a receiver of the company's property in exercise of the powers con-

tained in the trust deed. Thereafter the business was carried on by the receiver, but the profits were not sufficient to pay the interest due on the debentures in full. In December, 1909, the society also went into voluntary liquidation, and two liquidators were appointed. A suspension order was made, and on July 28, 1910, a scheme of arrangement was sanctioned by NEVILLE, J., under s. 120 of the Companies (Consolidation) Act, 1908. By this scheme the payment of all claims was postponed until Dec. 31, 1918, interest at 3 per cent. being allowed on all claims proved and admitted, and it was further provided that on payment of a final dividend in the winding-up the holders of debentures guaranteed by the society should relieve the society from all claims. The claimant, Edmund Probyn Godson, who was the registered holder of all the outstanding debentures of the Bedford Brewery (Plymouth), Ltd., as to which the society were guarantors and trustees under the deed of Mar. 5, 1901, sought a declaration that he was entitled to the benefit of all reinsurances effected by the society in connection with the debentures so held by him.

Martelli, K.C., and *A. Adams* for the claimant.

Maugham, K.C., and *W. A. Greene* (*R. Younger, K.C.*, with them), for the liquidators of the society, were not called on to argue.

NEVILLE, J.—I think in the case of an indemnity (and personally I do not see any distinction between an express contract for indemnity and an implied contract resulting from the relations of the parties) the doctrine of law was that the indemnified person could only sue the indemnifier in respect of matters coming under the indemnity when he had actually had the burden cast upon him and discharged it. In other words, you had to plead payment in an action on the indemnity. That relief was obviously in some cases insufficient, as is pointed out in *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case* (1), both in the court below and in the Court of Appeal, and the result was the introduction of equitable relief. That equitable relief consisted in granting to the indemnified a right against his indemnifer to have the obligation discharged, and this was done by a suit in equity either by the direct payment from the indemnifier to the creditor or in some cases by the provision or appropriation of a fund to meet the liability.

Subject to what I am going to say, I think that exhausted the rights under the contract of indemnity; but it appears from *Ashdown* v. *Ingamells* (2) and from SCRUTTON, J.'s remarks in his judgment in the Court of Appeal in the *Liverpool Case* (1) that, in the eye of the law (and I think this has nothing to do with equity), bankruptcy operated in this respect as a discharge of the debtor's obligations. One can see the reason for it, because, in the case of bankruptcy, the law discharged the debtor from his obligation to the creditor; the creditor got certain consideration for that in that he could prove the debtor's bankruptcy for the amount of his debt and get such dividend as the estate was capable of paying. I do not myself see that any distinction exists there between the case of the creditor actually proving in the bankruptcy and having the right to make the proof, because what discharges the obligation of the debtor is the bankruptcy, and not the proof of the creditor in the bankruptcy. I think that was sufficient to dispose of the case before the Court of Appeal, because, if that were so, then it seems to me obvious that my judgment was wrong and that there was no necessity to resort to equitable relief of any kind. It was the simple question of what was the legal right of the indemnified upon a contract of indemnity. I can draw no distinction between the liquidation of an insolvent company and bankruptcy; in both cases the debts owing to the creditor seem to be discharged. Whether the Court of Appeal purported to decide the case upon that point I am not sure, but I think what undoubtedly they did decide was that the particular contract they had before them (and probably that would apply to that class of contracts) was a contract to pay a defined sum on a particular contingency, and that when that contingency happened the right to recover the amount arose, and that was quite independent of an application of the money or anything but the right of the contractor under the contract that he had entered into. Here again I think from that point of view that was enough to decide the case, contrary to the decision I had given in the court

below. Which of these grounds was the ground upon which the court proceeded I do not think is very material, because I think that either of them would have been sufficient. They say, first of all, under this particular contract you have got a contract to pay on a contingency, and, the contingency having happened, you must pay it. From the other point of view they say you have got a contract of indemnity; the debt has been discharged by operation of law and consequently you are entitled to recover. In either case it is the assertion of legal right and there is no need to resort to any equitable doctrine or any equitable relief at all. On the best consideration which I can give to the judgments of the learned judges in the Court of Appeal, that, I think, is the outcome of their decisions.

If that is so, that decides the present case subject to one point. It might be that although the guarantee society were entitled to recover the money, and the payer of the money had no right to say anything with regard to its application, still when it came into their hands there might be some relation between themselves and the debenture-holders which would make them the trustees for the debenture-holders, so that, instead of dealing with the money as part of their general assets, they would have to apply it for the benefit of the cestuis que trust. But in my opinion, there was no such relation between the parties. True it is that the guarantee society were the trustees for the debenture-holders of the mortgaged property, but they also entered into a guarantee with the debenture-holders for the payment to them by the company issuing debentures, and it seems to me that their relations there were totally independent of the relation of trustees in that they involved no fiduciary relationship to the debenture-holders at all. Consequently, it seems to me that they are entitled to recover the money and apply it to their own use as part of the general assets of the society, and that the debenture-holders have no special claim on it.

Solicitors: *Cree & Son*; *Frere, Cholmeley & Co.*

[*Reported by* W. L. Ambrose, Esq., *Barrister-at-Law.*]

THOMPSON *v.* BRADFORD CORPORATION AND ANOTHER

[King's Bench Division (Bailhache and Shearman, JJ.), April 30, 1915]

[Reported [1915] 3 K.B. 13; 84 L.J.K.B. 1440; 113 L.T. 506; 79 J.P. 364; 59 Sol. Jo. 495; 13 L.G.R. 884]

Highway—Negligence—Misfeasance of highway authority—Widening of roadway—Equivalent to making of new road—Removal of telephone pole by postal authorities—Negligent filling of hole left by removal—Damage to vehicle—Liability of highway authority.

Acting under statutory powers, a corporation widened a road by taking in part of the footpath, and gave notice to the Postmaster-General to remove a telephone pole which stood within the part of the footpath taken in. The Postmaster-General removed the pole, but filled in the hole negligently, and when the road was again thrown open to the public the plaintiff's steam waggon sank axle-deep in the hole and was damaged.

Held: the plaintiff was entitled to damages for negligence (i) against the corporation because turning part of the footpath into a roadway was equivalent to making a new road and the failure of the corporation to see that the road was fit for the traffic intended to use it was an act of misfeasance and not non-feasance; *McClelland* v. *Manchester Corpn.* (1), [1912] 1 K.B. 118 and *Hill* v. *Tottenham Urban District*

Council (2) (1898), 79 L.T. 495 applied; *Steel* v. *Dartford Local Board* (3) (1891), 60 L.J.Q.B. 256 distinguished; and (ii) against the Postmaster-General since he had neglected to exercise the reasonable care with which he was under a duty to do the work, even though he had not, perhaps, been compelled to do it.

Notes. Referred: *Oldham* v. *Sheffield Corpn.* (1927), 136 L.T. 681; *Baxter* v. *Stockton-on-Tees Corpn.*, [1958] 2 All E.R. 675.

As to negligence in the execution of highway works, see 19 HALSBURY'S LAWS (3rd Edn.) 312, and for cases see 26 DIGEST (Repl.) 404 et seq.

Cases referred to:

(1) *McClelland* v. *Manchester Corpn.*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 28 T.L.R. 21; 9 L.G.R. 1209; 26 Digest (Repl.) 428, *1313*.

(2) *Hill* v. *Tottenham Urban District Council* (1898), 79 L.T. 495; 15 T.L.R. 53; 26 Digest (Repl.) 428, *1311*.

(3) *Steel* v. *Dartford Local Board* (1891), 60 L.J.Q.B. 256, C.A.; 26 Digest (Repl.) 419, *1288*

Also referred to in argument:

Cressy v. *South Metropolitan Gas Co.* (1906), 94 L.T. 790; 70 J.P. 405; 4 L.G.R. 1049, D.C.; 25 Digest 483, *78*.

Brame v. *Commercial Gas Co.*, [1914] 3 K.B. 1181; 84 L.J.K.B. 570; 12 L.G.R. 1270; sub nom. *Braine* v. *Commercial Gas Co.*, 111 L.T. 1099; 79 J.P. 55, D.C.; 25 Digest, 491, *117*.

Shoreditch Corpn. v. *Bull* (1904), 90 L.T. 210; 68 J.P. 415; 20 T.L.R. 254; 2 L.G.R. 756, H.L.; 26 Digest (Repl.) 477, *1643*.

Dawson & Co. v. *Bingley Urban Council*, [1911] 2 K.B. 149; 80 L.J.K.B. 842; 104 L.T. 659; 75 J.P. 289; 27 T.L.R. 308; 55 Sol. Jo. 346; 9 L.G.R. 502, C.A.; 26 Digest (Repl.) 431, *1331*.

Appeal against an order of Bradford County Court.

The plaintiff, Mary Ann Thompson, brought an action, as executrix of Isaac Thompson, against Bradford Corporation as the highway authority, and William Smith Tinsley, one of the principal officers in the Post Office Engineering Department, representing the Postmaster-General, for damages caused to the deceased's steam waggon by the defendant's negligence. Under the powers conferred by s. 25 of the Bradford Corporation Act, 1910, the corporation had determined to widen a road known as Horton Bank, which was very narrow, by setting back the kerb and throwing part of the pathway into the roadway. On the edge of the pathway there was a telephone pole which, in consequence of the widening of the road, was left standing in the roadway, and which it was necessary to remove. The corporation accordingly wrote to Mr. Tinsley giving him notice to remove it. On Apr. 3, 1914, Mr. Tinsley's men removed the pole and re-erected it on the new footpath, and filled in the hole. The work was completed on the evening of Apr. 3, and on Apr. 6, the corporation opened the road to traffic. On Apr. 10, the wheel of the deceased's steam waggon, which was of a type in ordinary use in the neighbourhood, sank into the hole where the pole had been, and was considerably damaged. There was nothing in the appearance of the road at the time of the accident to indicate that the hole had not been properly filled in. Evidence was given on behalf of the Postmaster-General that the hole had been filled in and the earth well rammed in the usual way. The county court judge found that the hole had not been filled or rammed in such a way as to make the road safe for the traffic of vehicles such as the deceased's, and he gave judgment for £83 damages against both the defendants: against the corporation on the ground that they had neglected their duty to see that the hole was properly filled in; and against the defendant Tinsley on the ground that he had done the work negligently. The defendants appealed.

Macmorran, K.C., and *T. R. D. Wright* for the corporation.

Harold Murphy for the Postmaster-General.

Waugh, K.C., and *R. Watson* for the plaintiff.

BAILHACHE, J.—In this case there are two appeals in an action brought by the plaintiff as executrix of a man named Thompson, against the Bradford Corporation, as the highway authority, and Mr. Tinsley, representing the Postmaster-General, for damages caused to the deceased's waggon by the negligence of the defendants. The county court judge gave judgment for £83 damages against both defendants, and both defendants appealed on the ground that there was no evidence of negligence on the part of either of them on which the judgment of the county court judge could be upheld.

The facts, which are not in dispute, were as follows. Under powers conferred on them by the Bradford Corporation Act, 1910, Bradford Corporation had full power to do certain street works within their district. No. 13 work, which they had full power to do under s. 25 of the Act, is

> "a widening and improvement of High Street, Great Horton, on the northern side thereof, between Holly Bank Road and a point about 54 yds. westward of that road."

It was that part of the district of the corporation in which this accident happened. The road there consisted of a road and a footpath, and the road became too narrow for the traffic that required to use it, the corporation therefore widened the roadway at the expense of the footpath by setting back the kerb and taking a part of the footpath into the roadway. On the old footpath as it originally stood there were two poles—a telephone pole belonging to the Postmaster-General, and a tramway pole belonging to Bradford Corporation. When the footpath became narrowed by the corporation these poles stood in the road which the corporation were widening for the vehicular traffic, and it became necessary to remove these poles. The corporation thereupon gave notice to the Postmaster-General or to his servant to remove his pole, and his pole was removed by Mr. Tinsley's men on April 3, of last year; their own pole remained a few days later, and that was removed on April 6. So long as these poles were there, they had not thrown open this part of the road for vehicular traffic; obviously, it would have been a very dangerous thing to do. Instead they had enclosed that part with ordinary posts and trestles, which were lighted up at night by lamps. After they had removed their pole on April 6, there was no longer any reason, so far as they knew, to keep these things up, and the whole road was thrown open for traffic by the corporation. Then, four days afterwards, the engine belonging to the plaintiff came along, and the wheel sank up to the axle into the place where the telephone pole had been.

The first question is whether Bradford Corporation are liable for the accident. Counsel for the corporation has reminded us that for mere non-feasance the road authority, i.e., the corporation, are not responsible, and he has cited authorities which establish that principle. We do not wish to say a word against that principle, which is far too well established to be shaken, even if we desired to shake it now. He has further called our attention to the Telegraph Act, 1863, and in particular to s. 15 to s. 19 of that Act and to s. 42. Under s. 15 the duty was cast on the company to remove poles of this description when they were requested to do so by the local authority. By s. 2 of the Telegraph Act, 1868, that duty is now transferred to the Postmaster-General. Section 17 of the Act of 1863 gave the local authority power to supervise the work if they pleased and s. 18 provided that the Postmaster-General if he did the work was to restore the street and keep it in repair—that is the part that had been put out of repair by the work of removal done by him—for a period of six months. By s. 19 the local authority were empowered to do the work themselves if they chose, and to recover the expenses from the Postmaster-General; and then by s. 42 the Postmaster-General was to be liable, if he did the work which the local authority requested him to do, for all accidents which resulted from the fact that the work was done by him in a negligent way. On those sections counsel for the corporation has founded this argument, that whereas here the Postmaster-General does the work at the request of the local authority, the Act of 1863 imposes on him, and on him alone, the duty of doing this carefully, and throws on him, and on him alone, the responsibility for any injury and expense that may result from the work being improperly done. I do not think myself that that is the result of the statute.

It is quite clear, of course, that the statute does impose those liabilities on the Postmaster-General, but I do not think it imposes them on him to the exclusion of any other authority that may be for other reasons liable in respect of the work which has been done by the local authority. I do not think the Act of 1863 has very much to do with this case at all. I think the case here, so far as the Postmaster-General goes, may be treated as a case of a man having done work by request, which possibly he need not have done, but having done it and done it negligently, he is liable, even if it was work he need not have undertaken.

But to go back to Bradford Corporation, the Act of 1863, even if that be the Act under which this work was done—and there is some doubt whether that Act or the Act of 1878 is the proper Act—does not, in my opinion, dispose of or take away any responsibility which the corporation might have come under independently of it. Bearing in mind their non-liability for non-feasance, did the corporation come under any liability in respect of this pole? I think they did, and for this reason that they were making a new road. However, counsel for the corporation contends that it always was part of the road and part of the highway, and I quite agree that the pavement and the roadway together form one highway, and when I speak of a new road I mean that what they were doing here was turning what had been a footpath into a roadway, and to my mind that is equivalent to making a new road. They were altering the character of part of an old road, and, in my opinion, that is making a new road. Now, what is the duty of a highway authority which makes a new road? Surely the duty of a highway authority is to make it so that when they throw the road open to the public for the use of the public it shall be reasonably safe for the purposes for which it is intended to be used. In this case very heavy traffic passes over this road, and, in my judgment, it was the duty of the highway authority, who were making this road and who were intending to throw it open for the traffic, to see that it was reasonably fit for that purpose. It is true that this particular piece of road was unfit by reason of what have been done by the Postmaster-General, but that does not seem to me to matter at all in this case, because I think it is no answer, when a highway authority throws open a new road and that road is in fact unfit, to say: "The unfitness arises because that part of the road which was unfit was not rendered unfit by anything we did, but was rendered unfit by reason of something which someone else did at our request." I do not think that is any answer at all, and in my judgment the corporation are liable on the simple ground that, altering the character of this road, turning it from a footpath into a roadway for heavy traffic, there was an obligation on them to see that when they opened it to the public it was fit for the traffic and fit for the purposes for which it was intended to be used. I think that is in accordance with the judgment of LUSH, J., in *McClelland* v. *Manchester Corpn.* (1), and I think it is in accordance with the judgment of BRUCE, J., in *Hill* v. *Tottenham Urban District Council* (2). The fact that it was a new road—a road devoted to a new purpose as distinguished from an old highway—distinguishes this case from *Steel* v. *Dartford Local Board* (3). For these reasons I think Bradford Corporation were liable.

The Postmaster-General seems to me to be liable on the very simple ground that having done, perhaps voluntarily, a piece of work which he may not perhaps have been compelled to do, he did it negligently, and I understand the law to be that if a person undertakes a piece of work which he need not have done at all, he must do it with reasonable care. The Postmaster-General appears to have neglected his duty in that respect, and on that simple ground, apart from statute, it seems to me he is liable. I think the county council judge was quite right in giving judgment against both Bradford Corporation and the Postmaster-General—in the person of Mr. Tinsley—and this appeal must be dismissed.

SHEARMAN, J.—I agree.

Appeal dismissed.

Solicitors: *Conn & Son*, for *F. Stevens*, Town Clerk, Bradford; *Solicitor to Post Office*; *F. B. Brook*, for *A. V. Hammond*, Bradford.

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

R. *v.* BEACONTREE JUSTICES
R. *v.* WRIGHT AND OTHERS

[KING'S BENCH DIVISION (Lord Reading, C.J., Ridley and Scrutton, JJ.), June 17, 18, 1915]

[Reported [1915] 3 K.B. 388; 84 L.J.K.B. 2230; 113 L.T. 727; 79 J.P. 461; 31 T.L.R. 509; 13 L.G.R. 1094; 25 Cox, C.C. 89]

Food and Drugs—Offence—Justices "having jurisdiction in the place" of the offence—Offence committed in one county division, trial in another—Jurisdiction of justices to issue summons and try in any division—Summary Jurisdiction Act, 1879 (42 & 43 *Vict., c.* 49), *s.* 46 (2)—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict., c.* 63), *s.* 20.

Unless express words in some statute prohibit it, an offence punishable on summary conviction may be tried in any one of the petty sessional divisions of the county in which the offence was committed and trial is not restricted to the division in which the offence was committed. Any justice of the peace for the county may issue a summons in respect of any such offence although not acting for the division in which it was committed, and justices for the county can sit in any petty sessional division in the county to hear and determine the charge.

Justices "having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser," before whom proceedings were required to be brought under s. 20 of the Sale of Food and Drugs Act, 1875, in a county means justices having jurisdiction in the county where delivery was effected.

Notes. The Sale of Food and Drugs Act, 1875, was repealed by the Statute Law Revision Act, 1953. The law on the subject is now governed by the Food and Drugs Act, 1955, and by regulations made or continued under that Act. The comparable section to s. 20 of the 1875 Act is s. 108 (2) of the 1955 Act which provides: "Where a sample has been procured under this Act, any proceedings in respect of the article or substance sampled shall be taken before a court having jurisdiction in the place where the sample was procured."

As to proceedings in relation to the sale of food and drugs, see 17 HALSBURY'S LAWS (3rd Edn.) 589 et seq.; and for cases see 25 DIGEST 101 et seq. For the Food and Drugs Act, 1955, s. 108 (2), see 35 HALSBURY'S STATUTES (2nd Edn.) 189.

Cases referred to:

(1) *R.* v. *Beckley* (1887), 20 Q.B.D. 187; 57 L.J.M.C. 22; 57 L.T. 716; 52 J.P. 120; 37 W.R. 160; 4 T.L.R. 151; 16 Cox, C.C. 331, C.C.R.; 14 Digest (Repl.) 224, *1870*.

(2) *Caistor Rural District Council* v. *Taylor* (1907), 97 L.T. 281; 71 J.P. 310; 5 L.G.R. 767; 14 Digest (Repl.) 224, *1871*.

(3) *R.* v. *Sainsbury* (1791), 4 Term. Rep. 451; Nolan, S; 100 E.R. 1113; 14 Digest (Repl.) 229, *1918*.

(4) *Blankley* v. *Winstanley* (1789), 3 Term. Rep. 279; 100 E.R. 574; 33 Digest 286, *23*.

Also referred to in argument:

Beardsley v. *Giddings*, [1904] 1 K.B. 847; 73 L.J.K.B. 378; 90 L.T. 651; 68 J.P. 222; 53 W.R. 78; 20 T.L.R. 315; 48 Sol. Jo. 352; 20 Cox, C.C. 645; 2 L.G.R. 719, D.C.; 14 Digest (Repl.) 169, *1323*.

R. v. *Broadhurst* (1863), 1 New Rep. 477; 32 L.J.M.C. 168; 27 J.P. 580; 11 W.R. 425; 33 Digest 308, *276*.

Buckler v. *Wilson*, [1896] 1 Q.B. 83; 65 L.J.M.C. 18; 73 L.T. 580; 60 J.P. 118; 44 W.R. 220; 12 T.L.R. 94; 40 Sol. Jo. 146, D.C.; 25 Digest 73, *32*.

R. *v.* BEACONTREE JUSTICES. Ex parte MIDDLETON.

Rule Nisi for a writ of prohibition to the Essex justices acting for the petty sessional division of Beacontree, to prohibit them from further proceeding to hear and determine

an information laid against Ernest Middleton, the applicant for the rule, charging him with having unlawfully sold on Mar. 10, 1915, at Chigwell, Essex, to the prejudice of the purchaser a certain article of food, milk, which was adulterated with at least ten per cent. of added water, and was not of the nature, substance, and quality demanded by the purchaser. The rule was obtained on the ground that the justices in petty sessions assembled for the Beacontree Division had no jurisdiction to hear and determine the summons, as they were not the justices having jurisdiction in the district where the sale actually took place, the petty sessional division of Epping, that the justice who issued the summons had no jurisdiction to do so for an alleged offence outside the district in which he generally acted as a justice, and that there was no jurisdiction for the proceedings to be instituted in Beacontree Division.

On an information laid by an inspector, a summons was issued on Mar. 23, for the applicant to appear before the court of summary jurisdiction sitting at the Court House, Stratford, on Apr. 10, 1915. The justice who issued and signed this summons was at the time an ex officio justice for the county of Essex as chairman of Walthamstow Urban District Council which was comprised in Beacontree Petty Sessional Division, and he acted within and for that petty sessional division, and not in or for Epping Petty Sessional Division. Chigwell, where the offence was alleged to have been committed, was within the petty sessional division of Epping, and not of Beacontree; and Stratford, where the applicant was required to appear was not in the Epping Division but in the Beacontree Division. On Apr. 10, 1915, the applicant appeared before the court of summary jurisdiction at Stratford, when his solicitor objected that the court had no jurisdiction to hear the information. Following an adjournment a notice was sent to the applicant's solicitor that the justices had restored the case to the list for hearing on Apr. 24. The rule nisi for prohibition was obtained. The justices did not appear to show cause but in answer to the rule an affidavit was filed by the chairman of the justices, which stated that in 1881 an arrangement was made between the justices of Beacontree Division and the justices of Epping Division. Under this arrangement, all cases (other than those specially exempted by statute) arising in the districts of Chigwell and some other districts, all in the county of Essex, but outside though adjoining Beacontree Division, be heard at Epping, Waltham Abbey, or Stratford petty sessions for general convenience. The ground for making the arrangement was that there was direct railway communication with Stratford, and that a court was held at Stratford petty sessions every day, thereby enabling a large number of small charges to be dealt with without remand, and avoiding unnecessary delay in the administration of the law. The courts at Waltham Abbey and Epping only sat once a week. This arrangement had worked satisfactorily since 1881, and no question appeared to have been raised previously as to the jurisdiction either by litigants or their advocates. It had been believed that the jurisdiction of the Stratford justices, who were sworn in as justices for the county of Essex, was concurrent and extended throughout the whole of the county of Essex, with the exception of those boroughs in the county which had separate courts of quarter sessions. After the adjournment of the summons the chairman consulted with the clerk to the justices as to the objections taken, and having regard to the authorities was advised that there was no substance in the objections, and therefore instructed the clerk to restore the summons to the list for hearing.

R. v. Wright and others.

Rule Nisi calling on justices of the peace for the county of Essex and one Alfred Stone to show cause why the justices should not proceed to hear and determine an information preferred by Arthur Horsnell against Alfred Stone, charging him with having unlawfully sold, to the prejudice of the purchasers, on Mar. 3, 1915, at the parish of Hornchurch, Essex, a certain article of food, milk, which was adulterated with at least twenty-five parts per cent. of water, and was not of the nature, substance, and quality of the article demanded by the purchasers. The rule was obtained on the ground (i) that the justices were wrong in law in refusing to hear and determine the summons issued on the information; (ii) that the summons was properly and legally issued by the

justice who issued it; and (iii) that the justice had jurisdiction to issue the summons.

On Mar. 3, 1915, the applicant for the rule, an inspector under the Sale of Food and Drugs Acts for the county of Essex, at Hornchurch, a place in the petty sessional division of Romford, took a sample of milk in the course of delivery by Stone, a farmer at Hornchurch, in the county of Essex, to certain purchasers in Romford. He caused an analysis to be made, from which it appeared that two offences against the Sale of Food and Drugs Acts, 1875 and 1879, had been committed. On Mar. 19, 1915, he attended before a justice of the peace for the county of Essex, at the court-house for the petty sessional division of Orsett at Grays, Essex, and presented to him two informations. One charged the defendant, Stone, with having sold to the prejudice of the purchasers a certain article of food, milk, which was adulterated with at least twenty-five parts per cent. of water, and was not of the nature, substance, and quality demanded by the purchasers. The second information was in the same terms, charging that the milk was adulterated with at least eight parts per cent. of water. The inspector also asked to have the summonses made returnable before the justices sitting in and for Romford petty sessional division of the county of Essex, at Romford, on Apr. 8, 1915. The justices issued the two summonses, and made them so returnable. Mr. Williams, who issued the summonses, stated in his affidavit that since his appointment as a justice of the peace for the county of Essex in 1902 he had been in the habit of sitting at the petty sessions for the petty sessional division of Orsett, and that he had not on any occasion sat at the petty sessions for the petty sessional division of Romford. On Apr. 8, 1915, when the summonses came on for hearing at Romford before the justices for the county sitting in petty sessions for the petty sessional division of Romford, counsel for the defendant took the preliminary objection that the summonses were bad in law on the ground that by the Sale of Food and Drugs Act, 1875, s. 20, proceedings had to be taken before the justices in petty sessions assembled having jurisdiction in the place where the milk was actually delivered to the purchasers, and that Mr. Williams, the justice who issued the summonses, had no jurisdiction to issue the summonses under the Act.

The justices were of opinion that the arguments of counsel for the defendant were correct and ought to prevail, and they declined to hear the summonses on the ground of want of jurisdiction to do so.

The Sale of Food and Drugs Act, 1875, s. 20, provides:

"When the analyst having analysed any article shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence, before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner."

The Summary Jurisdiction Act, 1879, s. 46, provides:

"For the purposes of the trial of any offence punishable on summary conviction under this Act or under any other Act, whether past or future, the following provisions shall have effect— . . . (2) Where the offence is committed on the boundary of the jurisdiction of two or more courts of summary jurisdiction, or within the distance of five hundred yards of any such boundary, or is begun within the jurisdiction of one court and completed within the jurisdiction of another court of summary jurisdiction, such offence may be tried by any one of such courts."

C. E. Jones in support of the rule in the first case.
Rowand Harker in support in the second case.

The justices did not appear to show cause against the rules.

LORD READING, C.J.—The fault which is found with the decision of the justices in the first case, and with the proceedings so far as they have taken place, is that it was not the justices sitting in Epping Division, but the justices sitting in Beaconcree Division,

A who heard and determined the case. An application was made to this court for a rule nisi for a writ of prohibition, and it was granted because it was thought that the matter was one of importance that ought to be determined. Now that we have before us the affidavit of the chairman of the justices, we find in it the statement that in 1881, as a matter of convenience between themselves, the justices had arranged certain divisions for the justices of the county, and that certain justices should be the justices for one B petty sessional division and other justices should sit for another petty sessional division, and they state that in consequence of what they had done they were entitled to adjudicate on this matter within Beacontree Division.

The first point that has been raised has not been really pressed by counsel for the applicant. Justices for one petty sessional division of the county can sit in any part of the county unless there are express words of some statute which prohibit it. That is a C principle of general law which has been laid down, and which is to be found in *R.* v. *Beckley* (1) where Lord Coleridge, C.J., said (20 Q.B.D. at p. 190):

> "It is contended that the offence cannot legally be dealt with by magistrates acting in a different petty sessional division from that in which the offence was committed, but there is no such rule of law; for in dealing with an offence committed in the county the magistrates for the county have jurisdiction throughout the county, and D there is nothing in the Vexatious Indictments Act, 1859, to limit their power to hear and determine the case."

A general proposition is there laid down which we think correctly states the law. It has been dealt with in *Caistor Rural District Council* v. *Taylor* (2). There Lord Alverstone, C.J., sitting with Darling and Phillimore, JJ., on a similar question coming E before him, but arising under another Act of Parliament, said (97 L.T. at p. 284):

> "I think that s. 6 of the Division of Counties Act, 1828, which has been referred to, was a section which enabled new divisions to be made and which enabled and directed business to be done in such new divisions; but that does not oust the jurisdiction which the justices in another petty sessional division have got if they are lawfully entitled to hear a case and it is properly brought before them. The F justices are justices for the county, and the case of *R.* v. *Beckley* (1) decided distinctly that justices sitting in and acting for one petty sessional division of a county have jurisdiction to deal with an offence committed in another petty sessional division of the same county."

That states very clearly and well the general propositions of law to be applied.

The passage in Archbold's Quarter Sessions (6th Edn. at p. 14) to which Scrutton, G J., during the argument called attention contains a quotation from *R.* v. *Sainsbury* (3), (4 Term. Rep. at p. 456) by Lord Kenyon to this effect:

> "That the King may grant a commission of the peace for a county and that the jurisdiction of such justices may pervade the whole county cannot be doubted. Neither can it be disputed that he may grant commissions of the peace for any H particular district in the county, and that that sub-division may have justices of its own, exclusive of the jurisdiction of the justices of the county at large; but the latter can only be effected by a non-intromittent clause, prohibiting the county justices from interfering in that district."

And, as was said by the same learned judge in *Blankley* v. *Winstanley* (4) (3 Term. Rep. at p. 287):

I > "The exclusion of county justices from acting in particular districts has always been watched with a jealous eye, and nothing but express words are sufficient to exclude them."

Notwithstanding that we have had a very interesting discussion and search into the original introduction of the terms "petty sessions" and "petty sessional division" and an endeavour to ascertain the origin or creation of petty sessions, it becomes unnecessary for us to pronounce any opinion on the result of that discussion except to affirm the important principles of law which have been dealt with in the two cases to which I

have called attention, supplemented by the quotation from LORD KENYON. That states the general law, and there can be no limitation on the right of the justices of the county to sit in every petty sessional division of the county as a matter of law unless a limitation is found either in the commission, which would not take place if a person is appointed justice for the county, or in express words of the statute.

The real question in this case arises on the second point raised by counsel for the applicant, on which he has insisted, whether or not the words in s. 20 of the Sale of Food and Drugs Act, 1875, do impose a limitation on the jurisdiction of the justices of the county so as to enable only the justices sitting in the petty sessional division of the place where the milk was actually delivered, to adjudicate on this case. In my opinion these words do not amount to such a limitation. I read the words in s. 20 as meaning that any question with regard to jurisdiction of the justices is to be determined by the place of delivery, and no other question is to be brought into consideration. The place of delivery determines jurisdiction, and that means that the place of delivery will determine the county in which the justices have jurisdiction to deal with this matter. It is quite easy to see that part of the transaction of sale or delivery of milk may take place in one county, whereas the actual delivery might take place in another county, and there might be difficult questions arising as to the place where the justices should have jurisdiction to deal with the matter. That is set at rest by s. 20. The first thing to ascertain is the time of delivery to the purchaser, and the next thing to ascertain is the place of such delivery, and when that has been ascertained then only the justices in that county of the place of delivery have jurisdiction to deal with the matter; and the only reason why the words "justices in petty sessions assembled" were introduced was because the justices were to be sitting in court, acting as a court, and not acting elsewhere. Consequently, the well-known phrase "in petty sessions assembled" was used so as to prevent the matter from being dealt with elsewhere, or otherwise than properly where justices are assembled in court.

In my view, the point is an interesting one, and was worthy of discussion to set at rest this matter which has been discussed apparently outside this court and has given rise to some controversy. As a consequence, the decision at which we arrive on this section is the one I have expressed, that the justices of the county may sit where they please for the purpose of determining the matter, so long as the delivery of the milk took place in the county in which they do sit. It may be, and no doubt is, better for the justices of the petty sessional division to be assembled in the petty sessional division of the place where the milk is delivered to the purchaser. However, that is a matter of convenience; but as a matter of law and jurisdiction there is nothing to prevent other justices from sitting, and from sitting in other divisions within the county. That disposes of the first case, and the rule nisi in that case for a writ of prohibition must be discharged.

In *R.* v. *Wright* the point raised is a somewhat different one. It also arose under s. 20 of the Act. In that case the milk was delivered in a place in a certain petty sessional division. The justice to whom application was made for a summons, and who granted the summons, was not a justice for that petty sessional division, but was a justice for another petty sessional division. The summons was returnable in the first petty sessional division where the milk was delivered. When the case came before the justices of that petty sessional division where the milk was delivered, they declined to hear and determine the matter on the ground that the justice to whom the application for the summons had been made, and who had granted the summons, had no jurisdiction to deal with the matter, inasmuch as it could only be a justice for the petty sessional division in the place where the milk was delivered who could grant the summons; i.e., that only in the petty sessional division in which delivery took place could the summons be granted, and that it would only be granted by a justice of that petty sessional division and could not be granted by a justice of any other petty sessional division of the county. In our view that is wrong. A justice of any petty sessional division in the county could deal with this matter. For the reasons which I have already given, and which I indicated in the last case, a narrower meaning is to be attributed to the

words in the section, and, once we have given the different meaning from that contended for in the earlier case, it follows in this second case that the justices were wrong in refusing to hear and determine the matter which was brought before them. The consequence of that must be that the rule nisi for the mandamus to hear and determine this matter must be made absolute. Certainly counsel in support of the rule, who has called our attention to the various authorities and also to the law on the subject, has made good his point and has established to my complete satisfaction that the justices in this case ought not to have refused to hear the case. These cases have turned on the same question, and apparently, in the county of Essex, there has been a controversy about the matter which this decision will set at rest. In the second case the order must be made absolute to hear and determine.

RIDLEY, J.— I agree with the Lord Chief Justice. I have never had any doubt at all as to this, that a justice of the peace for a particular county can act throughout the county and in all the petty sessional divisions which it contains, though as a rule he does act only in one or two of those petty sessional divisions. But I certainly had an impression that a person summoned for an offence triable at petty sessions had a right to be summoned in the petty sessional division where the offence was committed. I now think that was wrong. It has been so far the universal custom, or the almost universal custom, that a person should be summoned in that place where the offence was committed, that it might be easily supposed that there was a right to be summoned in that place where there was not. I do not think that there is such a right unless it is to be found in some statute. In this instance, therefore, the question is whether there is such a statute, and I think, on the construction of s. 20 of the Sale of Food and Drugs Act, 1875, on which counsel in support of the rule in the first case relies, there is no such right. "Petty sessions" is a phrase the origin of which it is difficult to trace. There are sessions described at considerable length in the old books which we have been looking into. I find quarter sessions are called also the general sessions. They were held in some counties sixteen times a year. General sessions were held as many as sixteen times in the year for the convenience of people who resided in the county. They are, generally, held quarterly, however, or four times a year, and so they came to be called quarter sessions. The phrase "petty sessions" has no particular significance as to district; it is merely the word small, or minor, session as compared with the general sessions. As time went on it gradually came to have the significance which we attach to it. It was in the last century that this process began, and the Division of Counties Act, 1828, is perhaps the first Act which uses the phrase. It was used again in the Petty Sessions Act, 1849, and it was also used in an Act of 1847 which speaks of "petty sessions assembled," and the Act of 1849 refers to "petty sessions," and to the districts as "petty sessional divisions." On that enactment Stephen, J., in his History of the Criminal Law, vol. I, at p. 124, says that that phrase must have been rather a popular than a legal phrase at that time; but it has since that time acquired a special meaning, and I think that all now understand what a petty sessional division or district is. That is how the phrase came into being. It was a particular part of the county constituted into a petty sessional division. For that district all justices of the county had a right to act.

The question that troubled me in this case was whether, whilst the justices can act for the whole county, an offender has a right to be tried in the petty sessional division where the offence was committed. The whole of the law relating to summary conviction is the creature of statute and nothing else. There would not, I think, have been such a thing in this country as a summary conviction if it had not been for statutes. There is no common law summary conviction. That is so stated in the law books, and I believe it is correct. If that is so, in order to give to the offender in a petty sessional division the right to say that he has a local venue entitling him to have his case heard in that petty sessional division in which he is charged with having committed the offence, the right must be found in some statute. The common law of this country will not give it to him. Crime is certainly local; but then as regards the venue, i.e., the right to be tried locally, the place where the crime must be tried is limited to the county. I have

never heard of any principle which by itself goes to the length of saying that the doctrine of venue must be pressed so far that an offender in one petty sessional division must be tried only in that division. I think there could not be such a law, and I feel that I was mistaken in supposing that that could be a matter of right which was really only a matter of custom. For these reasons I agree with the Lord Chief Justice.

SCRUTTON, J.—I agree with the judgment of the Lord Chief Justice.

Rule in the first case discharged. Rule in the second case made absolute.

Solicitors: *C. C. Sharman*; *Sharpe, Pritchard & Co.*, for *John H. Goold*, Clerk to Essex County Council.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

R. *v.* LICENSING JUSTICES AND COMPENSATION AUTHORITY FOR THE CITY OF CHESTER. Ex Parte BENNION

[King's Bench Division (Ridley, Rowlatt and Shearman, JJ.) May 18, 1914]

[Reported [1914] 3 K.B. 349; 83 L.J.K.B. 1259; 111 L.T. 575; 78 J.P. 447]

Licensing—Licence—Renewal—Objection—Objections not addressed to holder of licence—Reference to compensation authority—Application for prohibition against proceeding with reference—Jurisdiction to grant.

The licensee of a public-house having died, the house was being carried on by his executors and his daughter applied to the licensing justices for the transfer of the licence to her and for its renewal. The hearing of the applications was adjourned because notices of objection to the renewal had been given to the executors by the chief constable and the clerk to the licensing justices. At the adjourned hearing the licensing justices took applications for transfers first and granted the transfer applied for. After hearing the applicant and the objectors and their evidence they rejected a submission that the objections could not be considered on the ground that the notices had been addressed to the executors and not to the applicant and referred the renewal of the licence to the compensation authority. The applicant applied for a writ of prohibition to prohibit the justices and the compensation authority from proceeding with the reference.

Held: the writ of prohibition was not the proper remedy and would not be granted since once the question of the renewal of the licence was referred to the compensation authority they were bound to deal with the matter under s. 10 (2) of the Licensing (Consolidation) Act, 1910, even if the renewal were so referred without any notice of objection having been given to the holder of the licence.

Notes. Referred to: *R.* v. *West Suffolk Compensation Authority, Ex parte Hudson's Cambridge and Pampisford Breweries, Ltd.*, [1919] 2 K.B. 374.

As to the duty of a compensation authority on a reference to it by licensing justices, see 22 Halsbury's Laws (3rd Edn.) 577; and for cases see 30 Digest (Repl.) 55.

Cases referred to:

(1) *R.* v. *Somersetshire Justices, Ex parte Joyce* (1906), 50 Sol. Jo. 192, D.C.; 30 Digest (Repl.) 55, *417*.

(2) *R.* v. *Tolhurst, Ex parte Farrell, R.* v. *Cox, Ex parte West*, [1905] 2 K.B. 478; 74 L.J.K.B. 652; 93 L.T. 76; 69 J.P. 308; 53 W.R. 619; 21 T.L.R. 533; 49 Sol. Jo. 515, D.C.; 30 Digest (Repl.) 16, *88*.

(3) *Blencowe & Co., Ltd.* v. *Lord Hatherton* (1907), 96 L.T. 817; 71 J.P. 210, D.C.; 30 Digest (Repl.) 16, *91*.

Also referred to in argument.

R. v. *South Shields Justices* (1906), cited in Paterson's Licensing Acts (69th Edn.), p. 670, D.C.; 30 Digest (Repl.) 57, *429*.

Rule Nisi calling upon the licensing justices and the compensation authority for the city of Chester to show cause why a writ or writs of prohibition should not issue to prohibit the licensing justices from proceeding with the reference to the compensation authority, of an application for the renewal of her licence by Sarah Bennion, the applicant for the rule, and to prohibit the compensation authority from further considering such reference. The grounds of the application were that the necessary notice of objection to the application of Sarah Bennion for the renewal of her licence was not given, and that the licensing justices had no jurisdiction to hear evidence in opposition to such renewal or refer the licence for compensation.

The applicant's mother was tenant and licensee of the King's Arms, in the city of Chester, until her death on Dec. 4, 1913. She left a will which was proved by the two executors named therein on Jan. 6, 1914. The King's Arms public-house was an old fully licensed public-house. The executors carried on the business of the King's Arms after the death of the testatrix under s. 65 (7) of the Licensing (Consolidation) Act, 1910. Sarah Bennion, the applicant and present licensee, lived at the house and assisted in carrying on such business, but the owners did not accept her as tenant until February, 1914. On Jan. 8, 1914, two notices of objection in similar terms by the chief constable and the clerk to the licensing justices were left at the King's Arms. These notices were addressed to the legal personal representatives of the late Mrs. Sarah Bennion, of the King's Arms, and required them to attend at the general annual meeting on Feb. 5, The three specified objections were that a fully licensed house in the place was not required, that the licence was unnecessary, and that in the interests of the public the renewal of the licence was not desirable. At the general annual licensing meeting for the city, on Feb. 5, 1914, the applicant was in court accompanied by one of her mother's executors. An inspector on behalf of the chief constable (who was absent through illness) informed the justices in their hearing that he objected to the renewal of certain licences, including that of the King's Arms, and that formal notices of objection had been served. The justices announced that all these cases would be adjourned to Mar. 5, and that the applicants for renewal must then attend. Thereupon the applicant's solicitor applied on behalf of the applicant for a protection order to enable her to sell in the interval, and called the executor to assent to her application which was granted. The applicant continued to sell at the King's Arms under the protection order. On Mar. 5, the justices decided to take applications for transfers at the outset. Among other applications the applicant applied through her solicitor for a transfer of the licence, and after hearing evidence as to notices and character they expressed their willingness to grant a transfer, but no transfer was signed till the close of the meeting. After the applications for transfers had been disposed of the justices proceeded to deal with applications for renewals, and the applicant's solicitor applied for a renewal to her. The chief constable stated that he objected, and evidence was given of the service of the notices of objection left at the King's Arms on Jan. 8, but not of any other service of notices of objection. The chief constable gave evidence on oath to the effect that this licence was not required, and was cross-examined by the applicant's solicitor. At the close of his evidence the solicitor submitted that the justices could not legally hear the objection by the chief constable to the renewal of the licence but were bound to grant the renewal, as the only notices were the notices addressed to the legal personal representatives of the late licensee, and that, as no notice of objection had been served on the applicant or to an application for the renewal of her licence to her, they had no power to refuse the renewal to her unless they further adjourned the

annual licensing meeting. He said also that he wished to put before them reasons why a renewal ought not to be refused. He addressed them on the merits of the case and called the applicant, who was examined and cross-examined as to the amount and class of business done at the house. At the close of her evidence he said that he did not wish to call any further witness. The justices were satisfied that the executor, whose co-executor had died shortly after proving the will, had full knowledge of the notice served on the applicant, and also heard what was said in court on Feb. 5. They were of opinion that sufficient notice had been given to enable the justices to deal with the matter without any further adjournment, and that, if the applicant's solicitor could legally have insisted on a further adjournment, he waived such right by cross-examining the chief constable on the merits of the case, and by addressing the justices and calling evidence on the merits. The justices referred the licence of the King's Arms to the compensation authority for compensation. The applicant obtained rules nisi for prohibition directed to the justices and the compensation authority.

The Licensing (Consolidation) Act, 1910, provided:

"19 (1) Where the licensing justices, on the consideration by them, in accordance with this Act, of applications for the renewal of justices' licences are of opinion that the question of the renewal of any particular old on-licences requires consideration on grounds other than those on which the renewal of an old on-licence can be refused by them, they shall refer the matter to the compensation authority, together with their report thereon. (2) The compensation authority shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to the compensation authority unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the licensing justices), an opportunity of being heard, and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.

"16. . . . (3) Subject to the provisions of this section, the licensing justices shall not, where the holder of a justices' licence applies for the renewal of his licence, entertain any objection to or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of the licence, stating in general terms the grounds on which the renewal is opposed, has been served on the holder thereof not less than seven days before the commencement of the general annual licensing meeting."

G. R. Hill for the justices.
R. M. Montgomery for the applicant.

RIDLEY, J.—In this case it seems to me that prohibition is the wrong remedy. With regard to the facts I cannot see that the points taken before the justices were not good, but I wish to express no opinion on them at present. I am not inclined to say that there was not a good foundation for the objection which was taken, that the transfer had been granted, that it could not be refused and that there could be no recall of it, and that therefore the applicant was the holder of the licence and that she had not received notice of objection to which she was entitled under s. 16 (3) of the Licensing (Consolidation) Act, 1910. At all events the objection would have been well worthy of consideration.

That being the objection taken to the order made by the licensing justices referring the matter to the compensation authority, it appears to me that prohibition is not the proper remedy. The Act of Parliament, after providing in s. 19 (1) that the licensing justices in dealing with applications for renewal of licences shall, in the circumstances there mentioned, refer the matter to the compensation authority, together with their report thereon, goes on in sub-s. (2) to say: "The compensation authority shall consider all reports so made to them." It lies on them on receipt of a report from the licensing justices to consider the matters referred to them, and on the evidence put before them to come to a conclusion whether the premises are to be closed and compensation awarded.

That is the position that the compensation authority occupy. The applicant comes here with a rule for a prohibition and asks this court to prohibit the compensation authority from doing that which the statute says that they shall do. Counsel in support of the rule with much ingenuity submits that the licensing justices who made the order referring the matter to the compensation authority had no jurisdiction to make that order, and that, therefore, the order was to be treated as bad, and the compensation authority are to be prohibited from acting on it. In my opinion that is an unsound view of the remedy by way of prohibition. Prohibition is granted to prevent courts and authorities from proceeding in cases where they have no jurisdiction. Take, for instance, this simple case: Suppose a court has authority given to it by statute to try cases of the value of £100 and no more, and it proceeds to endeavour to try a case of the value of £200, obviously a jurisdiction is being assumed which the court has not got. If the order in a similar way be a clear nullity, I am not going to say that that may not be a case for interference by way of prohibition. One can readily understand such cases: for instance, if a person were to forge an order, that would be really a non-existent order. That class of cases I should put in quite a distinct category from the present case where it appears, as in *R.* v. *Somersetshire Justices, Ex parte Joyce* (1), that the compensation authority have got before them the report from the licensing justices which primâ facie is a good report, and it is a good report unless there be some foundation for the appeal made against it to us on the merits, to which I have already referred.

If that is so, it seems to me that the proper remedy is to get that put right, and not to proceed by way of prohibition against the compensation authority, which cannot do otherwise than act on the report sent to them by the licensing justices in pursuance of the statute. I have not any distinct recollection of *R.* v. *Somersetshire Justices, Ex parte Joyce* (1) but I have no doubt that it is correctly reported in the judgment which has been read to us; and I have no distinct recollection of *R.* v. *Tolhurst, Ex parte Farrell* (2), but neither of them is in the least degree an authority against the view that I have expressed in this case. I am strongly of opinion that prohibition is not the proper remedy in this case, and that in applying for prohibition the applicant has gone outside the boundaries in which that is allowed to be the remedy. For these reasons, therefore, I think this rule must be discharged.

ROWLATT, J.—I am of the same opinion. Section 19 (1) of the Licensing (Consolidation) Act, 1910, provides that when the licensing justices consider that the question of the renewal of an old on-licence requires consideration on grounds other than those on which the renewal of an old on-licence can be refused by them, they should refer the matter to the compensation authority, together with their report thereon. Subsection (2) provides that the compensation authority shall consider all reports so made to them, and have the proceedings before them which the subsection goes on to set forth. The construction of that sub-section seems to me to be that, when the compensation authority get a report they are to proceed on it, and counsel for the applicant did not dispute that. It was conceded by him that the compensation authority had no option, that they must go on and hear it, and that nobody could object to their going on and hearing the matter. But he said that, although they are bound to go on, still, if the reference was made to them without proper notice of objection having been given in the first instance, this court can prohibit them. In other words, what he is saying comes to this, that this court can prohibit a body of justices, the compensation authority, from proceeding with a matter which they could not refuse to proceed with. A more grotesque view of the remedy by prohibition I have never heard of. Prohibition was invented to prevent an inferior tribunal from usurping a jurisdiction which the law did not give to it, and involves the element that the inferior court is doing something not only which it could have refused to do, but which it never ought to have done. To say that it can be prohibited in a case as to which at the same time it is said that it could not have refused to proceed seems to me a mere contradiction in terms. It is very easy to see why this step has been taken and counsel for the applicant with perfect candour admitted it. If the applicant had taken the proper steps to make the licensing justices proceed properly, namely, to grant an adjournment and consider this objection as to

which it was said that no notice was given, she would not have gained much by the delay, except extra expenses, as the justices might conceivably have come to the same conclusion. Therefore, the ingenious plan was adopted of trying to prevent the compensation proceedings from now taking place, so that the provisional licence might enure for the whole year. It is ingenious, but it fails. I express no opinion as to the point which would have arisen if the decision of the licensing justices had been attacked by mandamus, or in some such way as that, because in my judgment it does not arise.

SHEARMAN, J.—I am of the same opinion. It appears to me that the licensing justices in this case made exactly the same slip as was made by the licensing justices in *Blencowe & Co., Ltd.* v. *Lord Hatherton* (3). I think, if the applicant had confined herself to asking the licensing justices to reconsider their decision because she had not been served in the proper manner with the notice, she would have succeeded. But instead of doing that she has taken the step of applying to prohibit the compensation authority from proceeding with the reference. The statute is quite clear on the point. It is quite clear that the licensing justices have referred the question of the renewal of the King's Arms to the compensation authority, and the statute in s. 19 (2) is clear that the compensation authority shall consider all reports sent to them. This report has been sent to them, and it is their duty to consider it. It appears to me that, if the report is a wrong one, the proper remedy and the reasonable remedy was to take the proper step to set aside the report which had been made by the justices, and then the compensation authority indirectly would not have been able to go on. I think it is clear that in a case of this description prohibition will not lie, and I agree in my judgment with the other members of the court.

Rule discharged.

Solicitors: *Davenport, Cunliffe & Blake*, for *W. H. Churton & Son*, Chester; *Chester, Broome & Griffithes.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* ROE

[Chancery Division (Sargant, J.), December 10, 21, 1914]

[Reported [1915] 1 Ch. 235; 84 L.J.Ch. 322; 112 L.T. 581; 79 J.P. 263; 13 L.G.R. 335]

Highway—Nuisance—Quarry adjoining highway—Collapse of wall separating excavation from footpath—Fall of footpath into quarry—Mandatory order to reinstate footpath and wall.

The surface of a public highway vested in the local authority and that of the adjoining land had been level until the owner of the land, or the occupier with his consent, excavated the land to a depth of 45 feet immediately next to the footpath forming part of the highway. To protect the public and the road from the danger of the excavation, the owner or occupier built a wall alongside the footpath which served as a retaining wall for the subsoil of the footpath and as a protection against the danger of the excavation. Part of the wall collapsed and fell into the quarry below it, and with it part of the subsoil and surface of the footpath, making it impassable and a source of danger to persons trying to use it and also a nuisance under s. 8 of the Quarry (Fencing) Act, 1887, liable to be dealt with summarily under the Public Health Act, 1875. In an action by the Attorney-General at the relation of the local authority,

Held: there was a common law obligation on the possessor of a dangerous excavation by the side of the highway to keep it fenced off, whether it was or was not there before his possession began: *Coupland* v. *Hardingham* (1) (1813), 3 Camp. 398, applied; and irrespective of any liability to his landlord: *R.* v. *Watson* (2) (1703), 2 Ld. Raym. 856, and *Tarry* v. *Ashton* (3) (1876), 1 Q.B.D. 314, applied; and a mandatory order would, therefore, be made on the owner or occupier to abate the nuisance by restoring the footpath to its condition before the subsidence and by rebuilding the wall or providing some other reasonable fence to separate the footpath from the quarry.

Notes. The Quarries (Fencing) Act, 1887, was repealed by the Mines and Quarries Act, 1954, of which see s. 151 (2) (c).

Referred to: *Sack* v. *Jones*, [1925] All E.R.Rep. 514; *A.-G.* (*Allen*) v. *Colchester Corpn.*, [1955] 2 All E.R. 124.

As to excavations near a highway and remedies for nuisances on the highway, see 19 HALSBURY'S LAWS (3rd Edn.) 272–273, and 279 et seq.; and for cases see 26 DIGEST (Repl.) 515 et seq. For Mines and Quarries Act, 1954, s. 151 (2) (c), see 34 HALSBURY'S STATUTES (2nd Edn.) 624.

Cases referred to:

(1) *Coupland* v. *Hardingham* (1813), 3 Camp. 398, N.P.; 26 Digest (Repl.) 510, *1877*.

(2) *R.* v. *Watts* (1703), 1 Salk. 357; 91 E.R. 311; sub nom. *R.* v. *Watson*, 2 Ld. Raym. 856; 26 Digest (Repl.) 495, *1791*.

(3) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 26 Digest (Repl.) 495, *1793*.

(4) *Barnes* v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100*.

(5) *Wednesbury Corpn.* v. *Lodge Holes Colliery Co., Ltd.*, [1907] 1 K.B. 78; 76 L.J.K.B. 68; 95 L.T. 815; 71 J.P. 73; 23 T.L.R. 80; 5 L.G.R. 43, C.A.; on appeal sub nom. *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corpn.*, [1908] A.C. 323; 77 L.J.K. 847; 99 L.T. 210; 72 J.P. 417; 24 T.L.R. 771; 52 Sol. Jo. 620; 6 L.G.R. 924, H.L.; 26 Digest (Repl.) 346, *637*.

(6) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 45 W.R. 394; 13 T.L.R. 220; 41 Sol. Jo. 311; 61 J.P.Jo. 164, C.A.; 36 Digest (Repl.) 271, *236*.

(7) *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q.B. 165; 66 L.J.Q.B. 643; 76 L.T. 759; 13 T.L.R. 471; 19 Digest 187, *1377*.

Also referred to in argument:

Reedie v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest 27, *56*.

Hall v. *Duke of Norfolk*, [1900] 2 Ch. 493; 69 L.J.Ch. 571; 82 L.T. 836; 64 J.P. 710; 48 W.R. 565; 16 T.L.R. 443; 44 Sol. Jo. 550; 19 Digest 187, *1378*.

Harrold v. *Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, *577*.

Action for declarations and for a mandatory order requiring the abatement of a nuisance.

The action was brought by the Attorney-General at the relation of Knottingley Urban District Council, Knottingley Urban District Council being themselves also co-plaintiffs with the Attorney-General, against Roe, the owner or occupier of a plot of land being a worked-out quarry which immediately adjoined a footpath vested in the council and repairable by the inhabitants at large.

According to the statement of claim, the surface of the footpath and the surface of a plot of land now owned by the defendant had formerly been on the same level. About 1865 the then owner of the plot of land or the occupier with the consent of the owner, excavated the land to a great depth alongside the footpath for the purpose of quarrying limestone for profit. The date when the excavation reached the edge of the footpath

was long subsequent to the date when the footpath first became a public highway. The result of the working was to leave an excavation 45 ft. deep with perpendicular sides immediately adjoining the south-east edge of the footpath and extending along it for a distance of sixty-five yards. Such excavation was a source of danger and obstruction to persons using the footpath, and a public nuisance by reason of (a) the danger of passengers falling over the edge and (b) the danger of the footpath and the underlying soil slipping into it. For the protection of the footpath, and of persons lawfully using it, the then owner or/and occupier of the quarry erected a wall alongside the footpath. The bottom of such wall was based on a ledge of limestone left ungotten for the purpose, and it served as a retaining wall to the subsoil of the footpath and also above the surface of the path, as a fence wall.

The plaintiffs submitted that it was the duty of the owners and occupiers for the time being of the quarry to erect, and thereafter maintain in good condition the wall or some other equally efficient protection and they had so maintained and repaired the said wall up to 1913. About February, 1913, a portion of the wall 51 ft. long collapsed and fell into the quarry, and at the same time or shortly afterwards, a considerable quantity of the subsoil of the footpath and a portion of the surface slipped into the quarry, leaving a gap in the footpath 50 ft. long and 6 ft. wide, the bottom of which sloped at a steep angle into the quarry. The footpath was impassable and a source of danger to persons trying to use it, and the plaintiffs alleged that its condition amounted to a public nuisance. They contended that the defendant was under an absolute obligation to maintain the wall or otherwise protect the footpath and persons using it. Alternatively they contended that it was his duty periodically to inspect the wall and its foundations and to adopt all proper and reasonable means for strengthening, supporting, and repairing it, and that the fall of the wall was due to his negligence in failing to fulfil such duty. On April 6, 1914, by a letter to the defendant's solicitor the plaintiff council called on the defendant to restore the footpath and afterwards fence it from the quarry and to carry out such work as might be necessary to secure the footpath from being again let down into the quarry, and by a letter of his solicitor dated April 16, 1914, the defendant refused to do any of such work.

The plaintiffs claimed (i) A declaration that it was the duty of the defendant as owner of and in possession the quarry to erect and maintain such wall or other protection as might be necessary to prevent the footpath or the subsoil from slipping into the quarry and to safeguard passengers using it. (ii) A declaration that the existing condition of the footpath amounted to a public nuisance and that the defendant was responsible therefor. (iii) An order that the defendant forthwith abate the nuisance by restoring the footpath and rebuilding the wall or doing such works as might be necessary for the purpose.

Mark Romer, K.C., and *Joshua Scholefield* for the plaintiffs.

The defendant did not appear.

Cur. adv. vult.

Dec. 21. **SARGANT, J.**—This action comes on by way of motion for judgment in default of delivery of defence. It was originally set down as a short cause, but I did not feel myself at liberty to deal with it on that basis or without some examination of the authorities. Accordingly, it has since been fully argued on behalf of the plaintiff and, although I have not had the assistance of any argument on behalf of the defendant I am now in a better position to give judgment.

The plaintiffs claim a declaration as to the duty to maintain and repair, a declaration as to the existing condition of the footpath, and a mandatory injunction compelling the defendant to abate the nuisance by rebuilding the wall and restoring the footpath. By the Quarry (Fencing) Act, 1887, a special obligation is imposed on owners of quarries to fence quarries within fifty yards of a highway, and a quarry not so fenced is liable to be dealt with as a nuisance under the Public Health Act, 1875. But, further than this, it seems clear that there is a common law obligation on the possessor of a dangerous excavation by the side of the highway to keep it fenced off whether the excavation was or was not there before his possession began: *Coupland* v. *Hardingham* (1), a case in which,

as pointed out in *Barnes* v. *Ward* (4), it is clear that the excavation was not in any way part of the highway, but by the side of it. And this being so, the right of the plaintiffs to enforce the obligation is clear: *Wednesbury Corpn.* v. *Lodge Holes Colliery Co.* (5). Again, as regards nuisance on or by the highway, the obligation of the actual occupier is clear whether he is or is not liable to his landlord, if any: *R.* v. *Watson* (2); and *Tarry* v. *Ashton* (3). And in *A.-G.* v. *Tod Heatley* (6) this obligation was enforced by injunction. Cases such as *Greenwell* v. *Low Beechburn Coal Co.* (7), which deals with the obligations between private owners when support has been removed by a predecessor in title, appear to stand on a somewhat different footing. And even there the question of liability was left open in cases where there ought to be a structure to be maintained. For my own satisfaction I required an affidavit to be filed for the purpose of showing what would be the probable cost of rebuilding the wall and restoring the footpath. An affidavit was accordingly made by Mr. Ingle, the county surveyor, and in this he estimates that the cost of rebuilding the wall from the quarry bottom to its original height, i.e. to 4 ft. above the level of the footpath, would be £70 6s., and the cost of filling in the footpath when the wall has been built would be 11s. It appears, therefore, that there would be no real difficulty in abating the present continuing nuisance. The declarations that are asked for appear to represent the state of the law with substantial accuracy, and to constitute the logical foundation for the relief to which the plaintiffs are entitled. But I see no sufficient reason for embodying these declarations in the actual judgment. I merely grant a mandatory order on the defendant forthwith to abate the nuisance complained of in the pleadings by restoring the footpath to its former condition prior to the subsidence in or about February, 1913, and by rebuilding the former wall or providing some other reasonable fence to separate such footpath from the defendants' quarry, and by doing all works reasonably necessary for the purpose aforesaid. The defendant must pay the costs of the action to be taxed.

Solicitors: *Butterworth & Co.*, for *Carter, Bentleys & Gundill*, Pontefract.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re PALACE RESTAURANTS, LTD.

[COURT OF APPEAL (Lord Reading, C.J., and Buckley, L.J.), January, 17, 30, 1914]

[Reported [1914] 1 Ch. 492; 83 L.J.Ch. 427; 110 L.T. 534; 30 T.L.R. 248; 58 Sol. Jo. 268; 21 Mans. 109]

Company—Winding-up—Costs—Taxation—Taxation in the winding-up—Costs incurred before winding-up—Assets of company in hands of solicitors.

Where solicitors to a company in compulsory liquidation submit, on a summons instituted in the matter of the winding-up, to an order for delivery of their bill of costs, the bill, when delivered, may be ordered to be taxed in the winding-up proceedings. This is so, although the bill is in respect of costs incurred before the liquidation and the solicitors are not making a claim against the assets of the company because they have money of the company in their hands more than enough to satisfy their costs.

Semble: If the summons had been intituled in the matter of the Solicitors Act, 1843, and in the matter of the winding-up, and not in the matter of the winding-up only, the judge making the order for the delivery of the bill, though sitting in winding-up, would have power to order the taxation under the Solicitors Act.

Notes. Referred to: *Re Defiant Cycle Co.*, [1955] 2 All E.R. 58.

As to costs in a winding-up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 726–729; and for cases see 10 DIGEST (Repl.) 896–901.

Cases referred to:

(1) *Re Woods, Ex parte Ditton* (1880), 13 Ch.D. 318; 42 L.T. 161; 28 W.R. 402, C.A.; 4 Digest (Repl.) 270, *2464*.

(2) *Re Park, Cole* v. *Park* (1889), 41 Ch.D. 326; 58 L.J.Ch. 547; 61 L.T. 173; 37 W.R. 742, C.A.; 42 Digest 166, *1710*.

(3) *Re Marsh, Ex parte Marsh* (1885), 15 Q.B.D. 340; 54 L.J.Q.B. 557; 53 L.T. 418; 34 W.R. 620; 2 Morr. 232, C.A.; 4 Digest 563, *4982*.

(4) *Re Allingham* (1886), 32 Ch.D. 36; 55 L.J.Ch. 800; 54 L.T. 905; 34 W.R. 619, C.A.; 4 Digest (Repl.) 562, *4958*.

Also referred to in argument:

Re Foss, Bilbrough, Plaskitt and Foss, [1912] 2 Ch. 161; 81 L.J.Ch. 558; 106 L.T. 835; 56 Sol. Jo. 574; 10 Digest (Repl.) 1005, *6908*.

Re Liverpool Household Stores Association, [1889] W.N. 48; 42 Digest 164, *1677*.

Re R. W. Stead, [1910] 2 K.B. 713; 80 L.J.K.B. 1; 103 L.T. 12; 54 Sol. Jo. 618, C.A.; affirmed sub nom. *Stead* v. *Smith*, [1911] A.C. 688; 81 L.J.K.B. 68; 105 L.T. 120; 55 Sol. Jo. 616, H.L.; 42 Digest 205, *2280*.

Re Brabant (1879), 23 Sol. Jo. 779; 42 Digest 164, *1676*.

Appeal from a decision of ASTBURY, J.

C. W. and S. E. Brown were a firm of solicitors, and in July, 1909, Palace Restaurants, Ltd., retained them as their solicitors, and agreed to pay them £250 and all out-of-pocket expenses for their services for three months. Litigation affecting the company was at that time in progress. On Sept. 1, 1909, the company was ordered to be compulsorily wound-up, and the official receiver was appointed liquidator. The solicitors had received a number of sums on behalf of the company amounting in all to £1,271 2s. 4d., but had repaid to the company or the liquidator £800, leaving a balance of £471 2s. 4d. in their hands. Over this sum the solicitors claimed a lien for their costs. No bill of costs had been delivered, and on May 26, 1913, the liquidator took out a summons for an order that the solicitors should render an account of all moneys received by them on account of the company, and a statement of all costs incurred by them as solicitors to the company, and that such costs should be taxed, and the solicitors ordered to pay to the applicant any money found to be due from them to the company. The solicitors raised no objection to the summons, and on June 2, 1913, an order was made by consent that the solicitors should within four days deliver their bills of costs and cash account. No order was made as to the payment of the balance or as to the taxation of the bill of costs. The solicitors delivered their bill of costs and cash account, and a balance of £13 was shown to be due from them to the company. The liquidator then restored the summons of May 26, and asked for taxation of the bill of costs and repayment of the balance. The solicitors opposed this application, contending that the court had no jurisdiction to order these costs to be taxed in the winding-up. The costs, with reference to which the bill was delivered were incurred prior to the winding-up, and the solicitors wished to have the bill taxed under the Solicitors Act, 1843. ASTBURY, J., held that the costs could be taxed in the winding-up and ordered the solicitors to pay to the liquidator the balance, if any, which might appear due on that taxation. The solicitors appealed.

Gore-Brown, K.C., and *C. A. Bennett* for the solicitors.

The Solicitor-General (*Sir S. O. Buckmaster, K.C.*) and *Austen-Cartmell* for the liquidator.

Cur. adv. vult.

Jan. 20, 1914.—**LORD READING, C.J.**—I have had the opportunity of reading the judgment of BUCKLEY, L.J., and I agree with it. Therefore it is unnecessary that I should say anything further.

BUCKLEY, L.J. read the following judgment.—The question is whether upon the application of the official receiver as liquidator in a compulsory winding-up the court

A sitting in winding-up can order taxation of a solicitor's bill of costs against the company for a period before the commencement of the winding-up. The question might arise in either one of two alternatives. First, the solicitor may have no cash account, but may be a creditor for the whole amount of the bill. Under these circumstances he would have to come in and prove in the winding-up. There is no room for doubt but that in that proceeding it would be competent to the court in winding-up to ascertain what is B the amount due to him. Secondly, the question might arise in a case (such as the present) where, having regard to the cash account, there is a balance due from the solicitor. Under these circumstances he might tender no proof, and it would be for the liquidator to enforce against him in a proper manner his liability to pay the amount due from him to the company. If the liquidator brought his action and the solicitor counterclaimed for costs, the judgment would be for the balance to be ascertained by taxation. It C was suggested that, having regard to s. 164 of the Companies (Consolidation) Act, 1908 [Companies Act, 1948, s. 258], the solicitor would not for this purpose be in the position of an ordinary debtor to the company—that the court or the liquidator could, in the winding-up under s. 173 [s. 273 (c) of Act of 1948], call upon him to pay. This argument, I think, is not well founded. The court, under s. 164, or the liquidator, under s. 173, is entitled to call upon a person falling within s. 164 (and the solicitor falls within it D to pay any money to which the company is primâ facie entitled. But, if a dispute is raised whether the company is entitled or not, there is nothing in the section empowering the court or the liquidator to determine that question. If the liquidator asserts against the solicitor that the solicitor is indebted to the company, that must be prosecuted, I think, in the same way as in the case of any other person. It may be, therefore, that the solicitors in the present case, when the liquidator's summons was issued, might E have demurred to the jurisdiction, but they did not do so. An order was taken upon the summons for delivery of a bill, and in submitting to that order the solicitors, I think, submitted to a proper consequential order to give effect to it—that is, an order to tax and an order for payment by such party as the taxation should find to be indebted. The case, therefore, in my opinion, raises the general question whether the court sitting in winding-up can order taxation of a bill due before the winding-up.

F The judge exercising jurisdiction in winding-up derives his authority from ss. 131 and 132 of the Act of 1908 [s. 218 of the Act of 1948]. The jurisdiction is in the High Court (s. 131 (1)), and the court, having jurisdiction under the Act, has for the purposes of that jurisdiction all the powers of the High Court (s. 131 (6)) [s. 218 (6) of the Act of 1948]. The jurisdiction is by virtue of s. 132, assigned from time to time to particular judges of the Chancery Division, but they sit as judges of the High Court and have G all the powers of the High Court. If, therefore, the summons were intituled in the matter of the winding-up and of the Solicitors Act, 1843, I have no doubt that the judge might make an order to tax under the Solicitors Act, 1843. In the present case, however, the summons is intituled in the winding-up only. But the judge has none the less, in my opinion, jurisdiction to order taxation. The solicitor has no right to insist that his bill shall be taxed under the Act or not at all. H This was decided in bankruptcy in the case of a solicitor who tendered a proof in *Re Woods, Ex parte Ditton* (1). If the twelve months under the Solicitors Act, 1843, expired before the death, bankruptcy, or winding-up so that taxation could not be obtained under the Act, the executor, or trustee, or liquidator is still entitled to question and to have the proper amount ascertained: *Re Park, Cole* v. *Park* (2). Whether this is by taxation or moderation, or by a direction to inquire as to particular items, is another I question. In my judgment, the solicitors having submitted to the jurisdiction, the liquidator was entitled to an order to tax this bill in these proceedings, and to a consequential order for payment. The present application does not raise the question whether the one-sixth rule under the Solicitors Act, 1843, applies or not. If it did arise I should have thought that it would be necessary to consider on the one hand the bearing of Ord. 65, r. 27 (38B), and the fact that the summons here is not intituled in the matter of the Act; and on the other hand to notice that the bill in this case was not for a bill of costs incurred by the liquidator, in which case *Re Marsh, Ex parte Marsh* (3) might

apply, but was for costs incurred before the liquidation as in *Re Allingham* (4). The only question, however, which we have to decide is whether an order to tax in these proceedings, and an order for payment, is right, where an order for delivery of a bill was made in these proceedings without objection by the solicitor. In my opinion, it is. I think the appeal should be dismissed with costs.

Solicitors: *C. W. & S. E. Browne*; *Solicitor to the Board of Trade.*

[*Reported by* DOUGLAS D. JONES, ESQ., *Barrister-at-Law.*]

WHEELER *v.* MORRIS

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.), June 17, 18, 1915]

[Reported 84 L.J.K.B. 1435; 113 L.T. 644]

Highway—Negligence—Premises adjoining highway—Shop sun-blind overhanging pavement—Collapse under weight of two men catching supporting arm—Injury to passer-by—Liability of occupier.

A shopkeeper had outside his premises a canvas sun-blind extending over the pavement, with a box at the top and two projecting supports or arms which, when the blind was put back, acted so that it rolled into the box. The blind was one of a well-known sort, of which hundreds had been put up, and it was well constructed, well cared for, and in good condition. Two men jumping up caught one of the projecting arms and by their joint weight forced the screws holding the arm out of the top of the box, bringing the box and blind down and causing the arms to drop, one striking and injuring the plaintiff who was passing by. In an action for damages for personal injuries,

Held: the shopkeeper's duty was not that of an insurer against the blind ever coming down, but was to take such reasonable precautions as a reasonable man would take to avoid a reasonably foreseeable accident; there was no evidence that the accident ought to have been foreseen or had not been reasonably guarded against and no evidence that the structure was a nuisance; and, therefore, the action failed.

Notes. Considered: *Ruoff* v. *Long*, [1916] 1 K.B. 148.

As to the duty to the public in respect of premises adjoining the highway, see 28 HALSBURY'S LAWS (3rd Edn.), 72, 73; and for cases see 26 DIGEST (Repl.) 518.

Case referred to:

(1) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K.B. 331; 72 L.J.K.B. 652; 88 L.T. 825; 19 T.L.R. 552; 47 Sol. Jo. 603, C.A.; 38 Digest (Repl.) 360, *397*.

Also referred to in argument:

Rickards v. *Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 29 T.L.R. 281; 57 Sol. Jo. 281, P.C.; 36 Digest (Repl.) 37, *177*.

Tarry v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 26 Digest (Repl.) 495, *1793*.

Cooke v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

Barnes v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100*.

Engelhart v. *Farrant & Co.*, [1897] 1 Q.B. 240; 66 L.J.Q.B. 122; 75 L.J. 617; 45 W.R. 179; 13 T.L.R. 81, C.A.; 36 Digest (Repl.) 33, *153*.

A *Hadley* v. *Taylor* (1865), L.R. 1 C.P. 53; 13 L.T. 368; 11 Jur.N.S. 979; 14 W.R. 59; 7 Digest (Repl.) 290, *152*.
Pickard v. *Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, *384*.

Appeal by the defendant against an order of a Divisional Court of the King's Bench B (Avory and Rowlatt, JJ.).

The plaintiff claimed in an action in the county court damages for personal injuries sustained by him through the negligence of the defendant or his servants, whereby the plaintiff was injured by a canvas sun-blind and its supports belonging to the defendant falling on his head on April 18, 1914. The county court judge found that the sun-blind which was suspended outside the defendant's premises and overhanging the pavement C in the highway, was brought down by the mischievous act of third persons who, by jumping up and catching hold of one of the projecting arms by which the blind was extended over the pavement, put a strain on the blind as a whole which drew the screws out of the wood forming the top of the box, and thus caused the box and the blind to fall and the projecting rods to drop; and that one of such rods struck the plaintiff, who was lawfully passing along the pavement, and was thereby injured. The judge further found D on the evidence that persons had been known before to act as such third persons had acted, and that similar accidents had happened with similar blinds on previous occasions in consequence of persons jumping up and catching hold of the like projecting blinds. He found also that it had not been proved that reasonable precautions, such as the substitution of bolts and nuts for ordinary screws, would not have obviated the risk of injury to the plaintiff. On these findings he held that the defendant had not discharged E the duty, which, in his opinion, was imposed on him, to have the blind so sufficiently fixed and secured as to prevent its being brought down by persons using the highway, even though the action of such third persons was mischievous, inasmuch as the defendant should have contemplated the possibility of such action and the consequent risk to persons lawfully using the highway by reason of the position of the blind. The defendant appealed to the Divisional Court, which held that there was evidence from which F the learned judge might find negligence on the part of the defendant in having failed to foresee and guard against the consequences of such acts of a third party, and that the defendant was liable for the injury to the plaintiff. The defendant appealed to the Court of Appeal.

Gordon Hewart, K.C. (with him *D. O. Evans*), for the defendant.
G *Arthur Powell, K.C.* (with him *D. L. Preedy*), for the plaintiff.

LORD COZENS-HARDY, M.R.—This is an appeal against an order of the Divisional Court affirming, I think with some hesitation, the decision of the county court judge in the following set of circumstances. The plaintiff was returning from his work on a Saturday early in the afternoon. He had to pass down a road in which there were H blinds overhanging the pavement, the existence of which every person in this court is perfectly familiar with—an ordinary blind, with a box at the top with two supports or arms, which, when the blind is put back, act so that the blind rolls into the box. Two men—not light boys—were there, and, according to the evidence, I think it is reasonably plain that one of them jumped on the back of the other and they both pulled at one of the arms of the blind, and it gave way. The blind fell on the plaintiff, and he was I seriously injured. The question is whether the shopkeeper is liable to the plaintiff in damages for the consequence of this. Counsel for the plaintiff says that the plaintiff was on the highway, as he undoubtedly was; that he was passing along the highway in a perfectly proper manner, and but for the fact of the blind being over the highway this accident would not have happened. He further says that the defendant's liability is none the less because the blind was brought down by the wrongful and mischievous act of two men whose identity has not been established.

In my opinion, this case has been presented in rather the wrong way. The liability in a case of this kind is not a liability of insurance or warranty that the blind will never

come down. The utmost which can be put against the shopkeeper is that he, as occupant, is bound to take such reasonable precautions as a reasonable man would exercise in order to avoid the result of an accident which might be reasonably foreseen. In the present case there is ample evidence to this effect. The blind was one of a well-known sort. Hundreds of them are proved to have been put up by the particular manufacturers who put this up. It was a blind which, according to the undisputed evidence, was well constructed, and had been properly cared for, by which I mean it had been cleaned and painted and had had what was necessary done to it only a month or two before the accident took place. The shopkeeper who had it put up—the shopkeeper who was in the premises before the defendant—swears that it was in good condition. The man who examined it and painted it a month or two before the accident took place swears that the blind was in good condition. It was fastened up to the wall by screws and nails in the manner which is usual, and there is no finding by the county court judge—or, if a finding could be implied, there is no evidence to justify that finding—that there was any lack of reasonable care on the part of the defendant.

The principle of law cannot be better stated, I think, than it was by VAUGHAN WILLIAMS, L.J., in the *McDowall* v. *Great Western Co.* (1), where a plaintiff, when on a highway, was injured by some trucks which had been mischievously set loose by boys on a railway, and it was sought to make the railway company liable for it. He says ([1903] 2 K.B. at p. 337):

> "I do not think counsel for the plaintiff was wrong when he said that, in those cases in which part of the cause of the accident was the interference of a stranger or a third person, the defendants are not held responsible unless it is found that that which they do or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury."

There is not a particle of evidence that anybody in circumstances of this kind would ever think of guarding against the pulling down of the blind by the wrongful act of two grown men. I think it would be altogether extending any of the decisions much too far, and that it would be wrong in principle to hold that this shopkeeper is liable for the consequences of the falling of this blind on to the plaintiff. In my opinion, therefore, this appeal must be allowed.

PICKFORD, L.J.—I am of the same opinion; and, although we are no doubt in the result differing from the judgment of the Divisional Court, one cannot help seeing that that judgment was arrived at with the greatest possible hesitation, and that makes me hesitate less to differ from it.

The case has been put before us in two different ways. One was that the blind was a nuisance to the highway qua blind; and the other was that it was brought down by the mischievous act of third parties jumping on to it and getting hold of it, and that reasonable care had not been taken to provide against that mischievous act which the defendant ought to have foreseen. I do not think that those two ways of putting the case are quite the same, and there is no finding that this blind was a nuisance. I do not see any trace of the county court judge having been asked to find that. And I doubt very much whether the contention would be open here, because the two lines of argument, or the two points—a nuisance to the highway and negligence in not providing against circumstances he ought to have foreseen—are both of them questions of fact, and they are different questions of fact in my opinion.

But I do not wish to decide the first point on that ground, because I can see no evidence whatever that there was any nuisance at all. In the cases to which we have been referred something was put on the highway, or so near the highway or over the highway, in such a way that of itself it was a danger. There is the case of the holes which were near the highway, so near that a person accidently straying will fall into them; and there

is the case of the lamp. The things were of themselves dangerous. The holes were dangerous because they were so near the highway, and the lamp because it was out of repair and would not have come down at all if it had not been out of repair. The present case does not seem to me to give rise to any such questions as those. The blind, according to the evidence, was perfectly properly put up. It was not of itself dangerous at all, and nothing would have happened but for the act of these third persons. Was that an act which the defendant ought to have foreseen? I think that it is perhaps well to look a little carefully at the evidence of how the accident did happen. The first evidence was given by a girl who said that she saw two people walking in front of her, who she would say were men, not boys. She did not see exactly what happened. She saw either one or both of the men jump to the iron of the blind. Another witness was called, no doubt for the defendant, but there is no contradiction of his evidence at all. He said that when he was on the doorstep he saw two men coming along laughing, and the blind came down. [HIS LORDSHIP read that evidence and continued:] It seems to me that the only finding possible on that evidence would be that it was the one man jumping up and the other man jumping on his back and so bringing the weight of the two men at the same time on to the blind which brought it down. The county court judge has not found that in terms. But I do not think that he has found anything to the contrary, and, if he had, with the greatest respect to him, I think that he would have been finding against the evidence.

Is that a thing which the defendant ought to have foreseen? The evidence as to that is that the same girl to whom I have already referred said that she had seen someone jump up at the blind like that before; and a man who was employed by a firm of blind-makers said that he had put up this class of blind hundreds of times. [HIS LORDSHIP read that evidence and continued:] That is the evidence on which it is said that the defendant ought to have anticipated that what happened in the present case would happen. I am bound to say that I doubt very much whether there is evidence that would —I will not say justify a finding—but evidence on which a finding could be based that he ought to have anticipated as an ordinary thing that passers-by would jump up. I certainly think that there is no evidence that the defendant ought to have anticipated that two men at the same time would jump up and put the weight of both of them on the blind at the same moment, which is what happened here. Therefore I am inclined to think that there is no evidence on which it can be said the defendant ought to have anticipated the act of the third person.

If he ought, what was his duty? His duty was to take reasonable precautions against it; not to insure against it, but to take reasonable precautions against it. That is stated in all the cases to which we have been referred. What is the evidence on that point? The only evidence is the evidence of the two men who had actually worked on the blind, and their evidence is to this effect. They described how the blind was erected. It was fastened to a holdfast by screws which did not go through the box although they went into it. The blind box was properly constructed in the opinion of one of the witnesses, and the other man who worked at it said that the blind and box were in perfectly good order, and good for another ten years if painted properly. That is the only evidence. There is no evidence whatever that the attachment was not reasonably secure, and that the attachment was not such as a reasonable person would have put up. There was a suggestion by counsel for the plaintiff that it was easy to make it safe by using a bolt and nut instead of a simple screw. And the county court judge has found that the defendant did not take reasonable precautions, because it was not proved to him that reasonable precautions, such as the substitution of bolts and nuts for ordinary screws, would not have obviated the risk of injury to the plaintiff. He held that the defendant had not discharged the duty which in his opinion was imposed on him to have the blind so sufficiently fixed and secured as to prevent its being brought down by persons using the highway. I do not think that there was evidence to support either of the findings, or that what happened in this case was what ought to have been reasonably anticipated. Even though the defendant might have anticipated somebody jumping up at the blind in some way, I do not think that there was any evidence to show, or on which it could be found, that he ought to have anticipated that two people would

jump at it and bring such a weight as this on it. And I do not think that there is any evidence that, if he anticipated such a thing would occur, he did not take such reasonable precautions as a reasonable man ought to take.

WARRINGTON, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors: *Fielder, Jones & Harrison*; *Burchell, Wilde & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

YOUNG *v.* GENTLE

[KING'S BENCH DIVISION (Lord Reading, C.J., Lord Coleridge and Avory, JJ.), April 28, 29, 1915]

[Reported [1915] 2 K.B. 661; 84 L.J.K.B. 1570; 113 L.T. 322; 79 J.P. 347; 31 T.L.R. 409; 25 Cox, C.C. 23]

Licensing—Offence—Found drunk on licensed premises—Lodger found drunk in bar of premises after closing hours.

At 3 p.m. on a Sunday the appellant engaged a bedroom at a fully-licensed hotel for that night. At 1.20 the next morning which was during closing hours the defendant was found drunk in the bar of the hotel.

Held: the defendant could not be convicted under s. 12 of the Licensing Act, 1872, for the offence of being found drunk on licensed premises as he was there in his capacity of a resident and the premises were not open to the public at the time.

Lester v. *Torrens* (1) (1877), 2 Q.B.D. 403, applied.

Notes. Distinguished: *King* v. *Sim* (1916), 85 L.J.K.B. 1621. Considered: *Trebanog Working Men's Club and Institute, Ltd.* v. *Macdonald*, *Monkwearmouth Conservative Club, Ltd.* v. *Smith*, [1940] 1 All E.R. 454. Referred to: *Lewis* v. *Dodd*, [1918–19] All E.R.Rep. 764; *Evans* v. *Fletcher*, [1926] All E.R.Rep. 173.

As to drunkenness in public places, see 22 HALSBURY'S LAWS (3rd Edn.) 691; and for cases see 30 DIGEST (Repl.) 111–112. For Licensing Act, 1872, see 13 HALSBURY'S STATUTES (2nd Edn.) 157.

Cases referred to:

(1) *Lester* v. *Torrens* (1877), 2 Q.B.D. 403; 46 L.J.M.C. 280; 41 J.P. 821; 25 W.R. 691, D.C.; 30 Digest (Repl.) 111, *808*.

(2) *R.* v. *Pelly*, [1897] 2 Q.B. 33; 66 L.J.Q.B. 519; 76 L.T. 467; 61 J.P. 373; 45 W.R. 504; 13 T.L.R. 319; 41 Sol. Jo. 455; 18 Cox, C.C. 556, D.C.; 30 Digest (Repl.) 111, *809*.

(3) *Thompson* v. *McKenzie*, [1908] 1 K.B. 905; 77 L.J.K.B. 605; 98 L.T. 896; 72 J.P. 150; 24 T.L.R. 330; 52 Sol. Jo. 302; 21 Cox, C.C. 620, D.C.; 30 Digest (Repl.) 95, *712*.

(4) *Warden* v. *Tye* (1877), 2 C.P.D. 74; 46 L.J.M.C. 111; 35 L.T. 852; 41 J.P. 120, D.C.; 30 Digest (Repl.) 94, *706*.

(5) *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703; 23 L.T. 289; 18 W.R. 1056, L.JJ.; 42 Digest 669, *795*.

(6) *Lawson* v. *Edminson*, [1908] 2 K.B. 952; 78 L.J.K.B. 36; 99 L.T. 797; 72 J.P. 479; 25 T.L.R. 11; 53 Sol. Jo. 15; 21 Cox, C.C. 734, D.C.; 30 Digest (Repl.) 95, *713*.

Also referred to in argument:

Redgate v. *Haynes* (1876), 1 Q.B.D. 89; 45 L.J.M.C. 65; 33 L.T. 779; 41 J.P. 86, D.C.; 25 Digest 430, *302*.

Pine v. *Barnes* (1887), 20 Q.B.D. 221; 57 L.J.M.C. 28; 58 L.T. 520; 52 J.P. 199; 36 W.R. 473, D.C.; 30 Digest (Repl.) 106, *783*.

Kessack v. *Smith* (1905), 7 F. (Ct. of Sess.) 75; 30 Digest (Repl.) 96, **386*.

Case Stated by justices for the county borough of Brighton.

An information was preferred on Sept. 21, 1914, by William Benjamin Gentle, chief constable of the borough of Brighton (the respondent) under the Licensing Act, 1872, s. 12, against Charles Young (the appellant) for that he on Sept. 14, 1914, in the county borough of Brighton was found unlawfully drunk on certain premises licensed for the sale of intoxicating liquors by retail there situate and called the Shelbourne Hotel, and in the occupation of one Owen Ward.

Upon the hearing of the information it was admitted or proved that the Shelbourne Hotel was a fully-licensed house situate at Middle Street, Brighton, and was in the occupation of one Owen Ward. At 1.20 a.m. on Sept. 14, 1914, police inspector Fellingham, accompanied by two constables, demanding admission to the hotel, and on entering the bar found the appellant and two other men there with glasses of stout in front of them. The appellant was then drunk. The inspector stated in evidence that the manageress, who was in the bar, said: "They came here like it at eleven o'clock." On Sept. 13, 1914, about three o'clock in the afternoon, the appellant, who was then quite sober, had called at the hotel and saw the manageress employed by Owen Ward and he there and then engaged a bedroom at the hotel for that Sunday night. The appellant contended that as he had on the afternoon of Sept. 13, 1914, bona fide engaged a room at the Shelbourne Hotel he had thereby become a lodger and was not liable to a conviction for being drunk on licensed premises during the early hours of Sept. 14, 1914. The respondent contended that a lodger might be entitled to the privacy of his own room upon licensed premises, but that the appellant was in the public part of Shelbourne Hotel drunk three hours after closing time. The justices were of opinion that if the appellant had been found drunk in his bedroom they would not have felt justified in convicting him, but that as he was found drunk in the bar of a public room of the hotel, although after closing hours, he was guilty of the offence charged.

Wootten for the appellant.
Rowand Harker for the respondent.

LORD READING, C.J.— In the afternoon of Sunday, Sept. 13, 1914, the appellant went to the Shelbourne Hotel, Brighton, and engaged a bedroom there for the night. He was then sober. At 1.20 on the Monday morning the police demanded admission to the hotel. They entered the bar of the hotel, and there they found the appellant and two other persons with glasses of intoxicating liquor in front of them. The appellant was then drunk. Upon these facts the appellant was convicted before the justices of an offence under s. 12 of the Licensing Act, 1872, which provides that

> "Every person found drunk . . . on any licensed premises shall be liable to a penalty not exceeding ten shillings."

The Case Stated raises the question whether the appellant had committed an offence under this section in view of the fact that he was a lodger for that night in the hotel. He was not in the position of an ordinary customer who entered the hotel merely for the purpose of obtaining drink; he was a person who was on those premises which for that night had become his resting place and his home.

It was argued before the justices and before us that a lodger or an inmate of the licensed premises is not a "person" within the meaning of the section, and upon the answer to that argument depends the determination of this case. Undoubtedly the language of the section at the beginning, that is the words "every person," are sufficiently wide to include both the landlord, the inmates of the premises, and the lodger. But it was decided in *Lester* v. *Torrens* (1), that the landlord or the licensed person, if found drunk

on the licensed premises in his own occupation after licensed hours and when the premises are closed to the public, is not committing an offence under this section of the Act. The court came to that conclusion apparently, and certainly partly, because it thought that the premises ceased to be licensed premises once the hour to which it was permitted to be open had come to an end; when once the closing time had come the learned judges seem to have thought that the premises were no longer licensed premises, and must be treated as the private house of the individual who was residing in it. If the court in that case had confined itself to saying that for the purpose of s. 12 of the Act of 1872 regard must be had to those who were on the premises as the private home or residence or sleeping place of the person, one could better understand the decision; but when they said that the premises were not licensed premises after closing time had arrived, the reasoning is undoubtedly fallacious. When that came before another Divisional Court in *R.* v. *Pelly* (2), the court expressed the view that the reasoning of the learned judges in *Lester* v. *Torrens* (1) was wrong, at least in part, but that the conclusion at which they had arrived was right—that is to say, the court expressed the view in *R.* v. *Pelly* (2) that the landlord who was found drunk upon his premises after closing hours had not committed an offence under s. 12 of the Licensing Act, 1872. They drew the distinction between the landlord and the customer.

In *R.* v. *Pelly* (2) they had to deal with a customer who was obviously not the landlord, neither was he an inmate or a lodger, and the court said that if he, the customer, is found drunk on the licensed premises after the closing hours, he may be convicted under s. 12 because he has no right to be there in any private capacity. The customer was not on the premises as his home; he was on the premises for the purpose of obtaining drink, and therefore the court distinguished *Lester* v. *Torrens* (1), and came to the conclusion that the customer was rightly convicted. But it was necessary before they could come to that conclusion that they should express their dissent from the reasoning of the learned judges in *Lester* v. *Torrens* (1), to the effect that licensed premises were no longer licensed premises within the meaning of this section after closing time had arrived, and they do express their dissent from that part of the reasoning. The effect is that *Lester* v. *Torrens* (1) stands as a decision.

In a later case of *Thompson* v. *McKenzie* (3), questions again arose under this section and under s. 13 of the Act of 1872. There a guest had arrived at an hotel after the closing hour and engaged a bedroom. When he did that he was drunk to the knowledge of the hotel manager. He was later on found on the premises by a constable and was found drunk, and it was held that the licensee was properly convicted of permitting drunkenness on his premises, because by reason of these facts he could not discharge the burden which was upon him by s. 4 of the Licensing Act, 1902, to establish that he had taken all reasonable means to prevent drunkenness on the premises. That case has really no bearing on the present case, except that in it *Lester* v. *Torrens* (1) and *R.* v. *Pelly* (2) were referred to and discussed. Lord Alverstone, C.J., in giving his judgment, made this observation in reference to those cases ([1908] 1 K.B. at pp. 908, 909):

> "It is true that it has been held in *Warden* v. *Tye* (4) that the licensed person cannot be convicted under s. 13 of permitting himself to be drunk on his premises, and in *Lester* v. *Torrens* (1) it was held that neither can he be convicted under s. 12 of being found drunk on his premises after the closing hour. Nor can a lodger, or other person who is lawfully on the premises after the closing hour, be convicted because he is found drunk on the premises under s. 12. This seems to be involved in the decision in *R.* v. *Pelly* (2)."

Then he says (ibid. at p. 909):

> "But it is one thing to say that the drunken lodger cannot be convicted himself under s. 12, it is another thing to say that the licensed person cannot be convicted under s. 13 of permitting him to be on the premises."

It is quite clear, therefore, that in that case what the court was dealing with was the offence of the licence-holder premitting drunkenness, and they said that that offence was committed. They did not express dissent from the views and conclusions of the court

in *Lester* v. *Torrens* (1) or in *R.* v. *Pelly* (2), but indeed the Lord Chief Justice approved the conclusion and went so far as to deal with this very case. It is true that it is only a dictum, but he did say ([1908] 1 K.B. at pp. 908, 909):

> "nor can a lodger, or other person who is lawfully on the premises after the closing hour, be convicted because he is found drunk on the premises under s. 12."

If that dictum is a true statement of the law, then it would be clear that this conviction cannot stand.

I want to call attention further to the Licensing Act, 1902, s. 1, because it has a bearing on the case we are now considering. I refer to the Act of 1902 for the reason that it has been said by James, L.J., in *Re Cathcart, Ex parte Campbell* (5) (5 Ch. App. at p. 706):

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them."

The legislature repeated in s. 1 of the Licensing Act, 1902, the words which are to be found in s. 12 of the Licensing Act, 1872, and added something to them, but the words were repeated almost ipsissima verga. By that section

> "If a person is found drunk in any highway or other public place, whether a building or not, or on any licensed premises"

so far the words are the words of s. 12 of the Act of 1872

> "and appears to be incapable of taking care of himself, he may be apprehended and dealt with according to law."

So that there, many years after *Lester* v. *Torrens* (1) and some years after *R.* v. *Pelly* (2), the legislature deliberately used the same language which had received the interpretation not only of a court of competent jurisdiction, but a court of co-ordinate jurisdiction with the present court, and we are not entitled at this date to consider this question as if it were res integra. We must decide it in accordance with the decision of the courts of co-ordinate jurisdiction which have already dealt with it, and if we come to the conclusion that *Lester* v. *Torrens* (1) in its conclusions is good law it binds us. I come to the conclusion that *Lester* v. *Torrens* (1) is a binding authority, and that it has stood ever since the year 1877. There have been licensing statutes passed since that date and no alteration has been made in the language, and, whatever view might be taken if we could consider this question as res integra we are bound by the earlier authorities, and we must therefore follow *Lester* v. *Torrens* (1).

It is worthy of observation that if we were to affirm this conviction the result would certainly be to change what has hitherto been adopted as the practice of the law and considered to be the law since 1877, if not before; because it would result in this—that if the landlord is not to be exempt from the operation of s. 12, and a lodger also if found drunk on the premises is committing an offence under s. 12, it would necessarily follow (as has been quite rightly admitted) that a person who is residing at an hotel (a not unfamiliar state of things at the present day), and who is drunk in the room which he habitually occupies and in which he resides, is committing an offence and might be summoned. It would further follow that if he was incapable he might be apprehended, and it would further follow (as has been pointed out), under s. 81 of the Licensing (Consolidation) Act, 1910, that the police would have the right at any time to enter the premises, and then, finding him in bed drunk and incapable, would have a right to remove him from that place and to take him to the police station. It is not for me to express any view as to whether or not that might not be a very salutary state of things; at any rate, it seems to me that it must depend on the law as enacted by statute, and as interpreted by the cases, and if we were so to hold we should be going very much further than the law has hitherto been expounded or declared. Therefore, I come to the conclusion that we must follow *Lester* v. *Torrens* (1), and, if so, it has been conceded, and rightly conceded, that there is

no distinction to be drawn between the case of the lodger and the case of the landlord: the lodger and inmate of the house must stand in the same position. In reality it seems to me that *Lester* v. *Torrens* (1) is to be supported upon the ground that the persons of the class that I have mentioned are there in their private capacity—that is to say, in their capacity of residents in the private house notwithstanding that it happens to be licensed premises. In any event that decision binds us, and the decision of the justices is wrong. The appeal must be allowed and the conviction must be quashed.

LORD COLERIDGE, J.—If this case were free from authority the argument in favour of upholding the conviction would be strong. It is conceded that licensed premises do not necessarily cease to be licensed premises after closing time. The appellant was found on licensed premises after closing time; he was found drunk and he is a person who is a lodger, and the legislature in this section of the Act makes no special exemption in favour of his position as a lodger, whereas when another class of offence—the offence of being found on the premises after the closing hour—is alluded to in the Act of 1872; that Act in s. 25 (now s. 62 of the Act of 1910) exempts the lodger specifically. It exempts the inmate, the servant, the lodger, and the bona fide traveller from the penalty imposed by that section, which says that if a person is found on licensed permises after closing hours it shall be an offence; but the legislature does not make any exception in favour of these certain classes of persons in regard to the offence of being found drunk upon the premises under s. 12. The reason may be what my Lord has alluded to, that it was thought unnecessary in the Act of 1902 to do so inasmuch as an interpretation had been put upon the words in s. 12 "every person" by subsequent decisions. The act of the landlord in permitting drunkenness differs essentially from the act complained of in this particular case of the individual lodger being found drunk on the premises.

Warden v. *Tye* (4), which held that a landlord could not be convicted of permitting himself to get drunk on his licensed premises, left it open as to whether or not the landlord could be convicted of being found drunk upon those premises. Then followed *Lester* v. *Torrens* (1). That decided that the landlord could not be convicted under s. 12 if found drunk on his licensed premises after closing hours, and the ground of the decision was that "licensed premises" within the meaning of s. 12 were premises that were open to the public during licensed hours. But the reasoning for that decision has not been adopted by the subsequent decisions, though the decision itself has been upheld upon the view that the landlord, being a person entitled to be upon the premises, and the house being in that sense his private house, could not be guilty of the offence of being found drunk after closing hours in his own house, which qua himself and his position of landlord was not licensed premises within the meaning of s. 12. In *R.* v. *Pelly* (2) the court held that a customer did not come within the exemption, and that if a customer was found drunk upon licensed premises after closing hours, the customer could be convicted of being found drunk on licensed premises. The reason is that he had no right to be there, and that he was not in the position of a landlord, a lodger, a bona fide traveller, or an inmate; and although it may be that the grounds of the decision in that case were obiter, and the case could be supported without reference to the specified persons, yet still it was a court of great authority, and it purported to interpret for the future the meaning of the language in s. 12. Similarly, the case of *Lawson* v. *Edminson* (6) decided that it was permitting drunkenness under s. 13 if guests were found drunk in the licensed premises after closing hours, but that did not affect this question, because, although the remarks of BIGHAM, J., are very general when he said that it was immaterial whether the men found drunk on the premises were guests or not, or whether they entered the premises before or after closing hours, they were in fact drunk on licensed premises. That was said only in view of the question of the licence-holder permitting drunkenness on the premises, and not in regard to his being found drunk himself. There may be strong reasons, which my Lord has pointed out, for adhering apart from custom and practice, to the decisions on s. 12 of these courts of competent jurisdiction. I base my decision simply upon the ground that they have so decided, and I am not in a position in any way to qualify or alter their decision. In these circumstances the conviction in this case cannot be upheld.

AVORY, J.—I am of the same opinion. It is to be observed that the justices in this case have convicted solely upon the ground that the appellant was found drunk in the bar of a public room of the hotel after closing hours, and they say expressly that if he had been found drunk in his bedroom they would not have felt justified in convicting him. It is apparent from that finding that the justices adopted a view of the law which has just been pronounced in this court, but that in this particular case they found, or thought that they had found, a distinction in the fact that the appellant was found drunk in the bar of the licensed premises and not in a private room of his own for the time being. It appears to me that that distinction cannot be justified. The whole of the premises are licensed in such a case as the present. The bedroom of the lodger is a part of the licensed premises, and after the house is closed, for the purpose of this section I think it can make no difference whether the person who is found drunk is found in the bar, or in the billiard room, or in his own room.

I regret with the other members of the court that it is not open to us to construe this s. 12 according to its plain and natural meaning. I think it would have been much more satisfactory if the section had originally been construed in this way, that the words "every person" mean every person and include every person, and that the words "licensed premises" mean licensed premises, whether at night time or in the day time. There can be no question that they are licensed premises during the night as much as during the day, and for some purposes it has been held that they are licensed premises during the night as well as during the day. I venture to go further, and regret that when the legislature were consolidating the Licensing Acts in 1910 they did not refer to the law as it was in the time of King James I, and make it an offence for anybody to be found drunk anywhere, whether in his own private house or elsewhere. Probably it was the repeal of the statute of James which has led to that foolish phrase, which has grown into use, that a man has a right to get drunk in his own house. But it is not open to us, as has been pointed out, to construe this section according to its plain and natural meaning. The courts have put upon it limitations, and the judgment of LUSH, J., in *Lester* v. *Torrens* (1), coupled with the judgment of HAWKINS, J., in *R.* v. *Pelly* (2), have confirmed and approved of the law upon this subject and the practice of the courts in administering it ever since the year 1877. In *Lester* v. *Torrens* (1) LUSH, J., said (2 Q.B.D. at pp. 405, 406):

> "I think, looking at the collocation of words, that 'licensed premises' for the purposes of the section, must mean premises open to the public during licensed hours, or during the time when the premises are a quasi public place. It seems to me that the innkeeper, if drunk on his own premises while they are open, is as much amenable to the penalty as if he was found drunk on the highway. It is clear, however, that the section does not apply to a person, not being an innkeeper, found drunk in his own private house. If the innkeeper lived next door to the licensed premises, he might be drunk in his own house without being liable. Why should he be liable if he lives on the licensed premises and gets drunk at a time when they are not open, because during certain hours of the day they are open to the public? When they are closed, they are as much his private house as a house in which he lives next door."

It is quite clear that these observations would apply equally to a lodger.

HAWKINS, J., in *R.* v. *Pelly* (2) in dealing with *Lester* v. *Torrens* (1), said ([1897] 2 Q.B. at p. 35):

> "all that was proved was that while using them as his private dwelling he was found in a state of intoxication. Under those circumstances, the court said that the Act could not mean that the landlord was to be subject to a penalty if he were found drunk while using the premises solely as his private dwelling."

These two cases taken together appear to establish the proposition that a person while using the premises, where they are licensed premises in the sense that a licence has been granted to them, as his private dwelling cannot be convicted under s 12 if fou nd drunk thereafter closing hours. I also agree that this view, if not confirmed, at all events

makes it impossible for the court now to take a contrary view, when we look at the amendment of the law in 1902 providing that a person found drunk under conditions specified in s. 12 of the Act of 1872 may be apprehended. For these reasons I agree that the decision of the justices must be reversed.

Appeal allowed. Conviction quashed.

Solicitors: *C. R. Sawyer & Withall*, for *J. C. Buckwell & Webb*, Brighton; *Sharpe, Pritchard & Co.*, for *H. Talbot*, Town Clerk, Brighton.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

TARRANT *v.* WOKING URBAN DISTRICT COUNCIL

[King's Bench Division (Lord Coleridge, Avory and Atkin, JJ.), June 10, 1914]

[Reported [1914] 3 K.B. 796; 84 L.J.K.B. 314; 111 L.T. 800; 79 J.P. 22; 12 L.G.R. 1293]

Street—New street—Byelaw—Stipulation as to width—Diminution of width after construction completed—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 157.

By s. 157 of the Public Health Act, 1875: "Every urban authority may make byelaws . . . with respect to the level, width, and construction of new streets." A byelaw made under s. 157 provided: "Every person who shall construct for use as a carriage road a new street intended to form the principal approach or means of access to any building shall comply with" certain requirements as to the width of the carriageway and footways.

Held: after the construction of a new street had been completed no offence was committed against the byelaw by a subsequent diminution of the width of the carriageway or the footways below the minimum required by the byelaw.

Semble. Section 157 of the Public Health Act, 1875, does not authorise the making of a byelaw which would make an alteration in the original width of a street an offence.

Notes. The Public Health Act, 1875, s. 157, has been repealed by the Highways Act, 1959. See now ss. 157 and 167 of the Act of 1959.

As to the construction of new streets and byelaws concerning the same, see 19 Halsbury's Laws (3rd Edn.) 401 et seq.; and for cases see 26 Digest (Repl.) 546 et seq. For the Highways Act, 1959, s. 157, see 39 Halsbury's Statutes (2nd Edn.) 581, 592.

Cases referred to in argument:

R. v. *Sheil* (1884), 50 L.T. 590; 49 J.P. 68, D.C.; 26 Digest (Repl.) 542, *2151*.

Roberts v. *Richards* (1890), 54 J.P. 693 D.C.; 26 Digest (Repl.) 548, *2196*.

Hendon Local Board v. *Pounce* (1889), 42 Ch.D. 602; 61 L.T. 465; 38 W.R. 377; 26 Digest (Repl.) 548, *2192*.

Daw & Son v. *L.C.C.* (1890), 59 L.J.M.C. 112; 62 L.T. 937; 54 J.P. 502; 6 T.L.R. 289, D.C.; 26 Digest (Repl.) 579, *2410*.

Bromley Local Board v. *Lloyd* (1892), 66 L.T. 462; 56 J.P. 278; 9 T.L.R. 306; 26 Digest (Repl.) 548, *2194*.

Gozzett v. *Maldon Sanitary Authority*, [1894] 1 Q.B. 327; 70 L.T. 414; 58 J.P. 229; 38 Sol. Jo. 185, D.C.; 26 Digest (Repl.) 551, *2217*.

St. George's Local Board v. *Ballard*, [1895] 1 Q.B. 702; 64 L.J.Q.B. 547; 72 L.T. 345; 59 J.P. 182; 43 W.R. 409; 11 T.L.R. 263; 14 R. 295, C.A.; 26 Digest (Repl.) 551, *2215*.

A *Devonport Corpn.* v. *Tozer*, [1903] 1 Ch. 759; 72 L.J.Ch. 411; 88 L.T. 113; 67 J.P. 269; 52 W.R. 6; 19 T.L.R. 257; 47 Sol. Jo. 318; 1 L.G.R. 421, C.A.; 26 Digest (Repl.) 551, *2219*.

A.-G. Dorchester Corpn. (1906), 94 L.T. 682; 70 J.P. 281; 22 T.L.R. 480; 50 Sol. Jo. 438; 4 L.G.R. 675, C.A.; 38 Digest (Repl.) 44, *222*.

B *A.-G.* v. *Gibb*, [1909] 2 Ch. 265; 78 L.J.Ch. 521; 101 L.T. 16; 73 J.P. 343; 7 L.G.R. 754; 26 Digest (Repl.) 538, *2122*.

Kirby v. *Paignton U.D.C.*, [1913] 1 Ch. 337; 82 L.J.Ch. 198; 108 L.T. 205; 77 J.P. 169; 57 Sol. Jo. 266; 11 L.G.R. 305; 26 Digest (Repl.) 309, *274*.

Case Stated by Woking, Surrey, justices.

At a court of summary jurisdiction sitting at Woking, Robert Mossop, clerk to the C Woking Urban District Council, the respondents, preferred informations against Walter George Tarrant, the appellant, that he, between June 16 and July 31, 1913, unlawfully and within the district of the respondents (i) constructed for use as a carriage road a new street, known as Hockering Road, intended to form the principal approach and means of access to certain buildings, so that the width of the carriageway was less than two-thirds of the entire width of such street, and so that the footway on each side of D such street was of a width less than one-sixth of the entire width of such street, contrary to byelaw No. 7 of the byelaws made on Sept. 13, 1905, by the respondents acting as the urban sanitary authority, and confirmed by the Local Government Board on Oct. 16, 1905, and contrary to the form of the Public Health Act, 1875, in such case made and provided; (ii) constructed a new street known as Hockering Road without providing that one end at least thereof should be open from the ground upwards to the full width E of such street contrary to byelaw No. 8 of the byelaws and statute; and (iii) laid out and constructed a street known as Hockering Road, and executed other work to which the byelaws relating to new streets and buildings in the district applied and received from the respondents' surveyor a notice in writing, dated Nov. 13, 1913, specifying that, by erecting piers and gates at the western end of the street, he had not provided that one end at least of such street should be open from the ground upwards to the full F width of such street, and had thereby contravened byelaw No. 8 of the byelaws, and requiring the appellant within fourteen days after the receipt of such notice to remove the piers and gates, and the appellant did not within the time specified by such notice comply with the requirements thereof, contrary to byelaw No. 112 of the byelaws and statute.

The following facts were admitted or proved: The byelaws were made by the re- G spondents under s. 157 of the Public Health Act, 1875, and duly confirmed by the Local Government Board on Oct. 6, 1905. The acts of the appellant which were alleged and which were held to have been infringements of byelaws Nos. 7 and 8 were that he had, on a date between June 16 and July 31, 1913, erected piers and gates across the western end of Hockering Road, which was a road intended to form and in fact did form the principal approach to the houses abutting thereon. The act or omission of the appellant H which was alleged, and which was held to have been an infringment of byelaw No. 112, was that, after receipt of a notice in writing from the respondents' surveyor, dated Nov. 13, 1913, requiring him to remove the piers and gates, he had failed to remove the same. The piers erected by the appellant were four in number, and their total size was such that, at the western end of Hockering Road, the carriageway was occupied by the piers to the extent of 8 ft. 8 in. and the footway to the extent of 8 in., leaving the width of the I road available for use as a carriageway when the gates were open 18 ft. 8 in., and as a footway 6 ft. only when the gates were open. The gates were four in number, two of which extended across the full width of the roadway, and the other two across the full width of the footways on each side of the carriageway. Hockering Road was laid out and constructed in the years 1904 and 1905 by certain persons known as the Smallpiece Trustees, the predecessors in title of the appellant, under and in accordance with plans submitted by the predecessors in title of the appellant to and approved by the respondents in 1906. It was 40 ft. in width, with a carriageway of the width of 26 ft. 8 in. and a footway

of 6 ft. 8 in. The whole of the road was laid out and constructed by the appellant's predecessors in title not later than June, 1905. It terminated at its eastern end in an arable field. By an agreement dated Oct. 1, 1909, the appellant agreed to purchase certain land called the Hockering Estate, including the whole of Hockering Road from the Smallpiece Trustees. By an indenture dated Aug. 2, 1911, the estate was conveyed to the appellant, but the portion of the road on which the piers and gates had been erected was not included in such conveyance, and that portion of the road had never, in fact, been conveyed to him, although under the agreement the appellant had power to call for such a conveyance. An extension of Hockering Road was laid out and constructed by the appellant in accordance with plans submitted to and approved by the respondents between May and November, 1910. On Nov. 18, 1910, the appellant agreed to purchase the adjoining estate, called Round Hill Estate, and, in order to develop that estate, he constructed, in accordance with plans deposited with and approved by the respondents in February, 1911, an extension of Hockering Road terminating in a highway on the eastern boundary of the Round Hill Estate. No portion of Hockering Road had ever been dedicated to the public, and the expense of the upkeep of the road had been entirely defrayed by the appellant. The neighbourhood generally was of a residential character, and the appellant had erected several houses standing back from the road. Through traffic, including heavy motor lorries, had made use of the road as a short cut between the highways surrounding the Hockering Estate and Round Hill Estate, and the appellant, at the request of the residents on the estates, erected in June and July, 1913, the piers and gates complained of.

On behalf of the respondents it was contended that the appellant, by erecting the piers and gates in question infringed byelaw No. 7 as regards the width of the carriageway, and byelaw No. 8 in not providing a proper entrance at one end of Hockering Road. The appellant infringed byelaw No. 112 in that, after he had been served with formal notice of his breach of byelaw No. 8, he had not complied with the notice and was liable to an additional penalty as for a continuing offence against the byelaw by reason thereof. On behalf of the appellant it was contended that the erection of the piers and gates was no evidence of the construction of a new street by him, that byelaws Nos. 7 and 8 only applied to a person constructing a new street, and that there was no evidence of his constructing Hockering Road at the dates alleged in the informations. He had not constructed Hockering Road, or that part of it alleged to have been constructed contrary to the byelaws, and he had not constructed any part of it contrary to the byelaws. Hockering Road, or that part of it which was alleged to have been constructed contrary to the byelaws, had not been constructed by the appellant, but by other persons, and was bought by him after it had been constructed, and it was not, and there was no evidence that it was, a new street or constructed as a new street by him. In the facts and circumstances of the case, he was entitled to erect the piers and gates and they were not an infringement of the byelaws. Byelaw No. 112 did not create a separate offence, but only made the continuance of an offence against the other byelaws a continuing offence for which there might be a further penalty.

The justices were of opinion that the appellant, by erecting the piers and gates, had constructed a new street within the byelaws and statute, and, in so constructing the new street and in not removing the piers and gates after he had received notice so to do, he was guilty of the offences alleged in the informations. They accordingly convicted the appellant on each of the informations. The appellant appealed.

By the byelaws of the Woking Urban District Council:

"7. Every person who shall construct for use as a carriage road a new street intended to form the principal approach or means of access to any building, shall comply with the following requirements: (a) He shall construct the carriageway of such street so that the width thereof shall be two-thirds of the entire width of the street. (c) He shall construct on each side of such street a footway of a width not less than one-sixth of the entire width of such street. . . .

"8. Every person who shall construct a new street shall provide that one end, at

least, of such street shall be open from the ground upwards to the full width of such street."

Macmorran, K.C., and *Latter* for the appellant.
Moresby for the respondents.

LORD COLERIDGE, J.—The question that we have to consider is whether the justices were right in convicting the appellant on the facts stated by them in the Special Case, of an offence under byelaws 7 and 8 of the byelaws drawn up for use in the urban district of Woking. In 1905, a portion of Hockering Road, which ran from east to west, was laid out and constructed as a new street. The plans were approved, there being no infringement of the byelaws at that time, and the street was constructed in accordance with those plans. In 1910, there was a slight intermediate extension, and in 1911 a further extension of the road was made. On each occasion plans and drawings were deposited, approved and carried into effect without any violation of the byelaws. Therefore, in 1911, Hockering Road had, by three separate processes, been joined together into one road, and at that time all the byelaws had been adhered to, and there was no sort of suggestion that any offence had been committed. In 1913, two years after the last portion of the road had been laid out and constructed, the appellant placed certain gates across one end of Hockering Road, the road not having been dedicated to the Public but still remaining a private road. The question before the justices was whether, by the erection of these gates and gate posts, which undoubtedly did limit the passage way of the road in question to an extent which would, primâ facie, have been an infringement of byelaw 7, and which possibly would have made it at that time, when the road was originally laid out, an offence against byelaw 8, the appellant constructed Hockering Road at the point in question as a new street. If he had done so, the only question which would arise would be whether the supposed violation of the byelaw in 1913, would be too late, and whether it could be then said that the matter had been concluded in 1911 and that it could not be a continuing offence under the byelaws. But the main question is whether or not in 1911 the Hockering Road was constructed as a new street or was in course of construction as a new street, and whether the erection of these gates and gate posts was a violation of byelaw 7.

There is no question that, if there had been a byelaw saying that no one shall obstruct the passage of a new or an old street, there would be an offence against such byelaw. But the question is whether the erection of piers and gates is, in the existing circumstances, the construction of a new street. We are clearly of opinion that there is no evidence on which the justices could decide that that portion of the road where the gates were constructed was a new street in 1913. The byelaws certainly seem to contemplate a particular time when a new street shall be completed, especially when you have regard to byelaw 115, which provides that:

> "Every person who shall lay out or construct a street shall, within a reasonable time after the completion of the laying out or construction of such a street, deliver or send, or cause to be delivered or sent, to the surveyor of the council at his or their office, notice in writing of the completion of the laying out or construction of such street, and shall at all reasonable times, within a period of seven days after such notice shall have been so delivered or sent, afford such surveyor or his duly appointed assistants free access to such street for the purpose of inspection."

That clearly has in view the construction of the street at the time it is laid out, and, when it has been completely laid out and constructed, it is difficult to see that it contemplates anything as an infringement of the byelaws that takes place after that date. In these circumstances, it is difficult to see how a matter of this sort can be an infringement of the byelaws unless the offence takes place at the time and is subsequently a continuing offence, which it may be if the law so regards it. In this case the particular portion of the road on which the gates were placed was completely laid out in 1905, and even the two additional pieces of road were laid out and constructed and finished in accordance with the byelaws in 1911, and it is impossible under these circumstances for us to hold that an erection of gates in 1913 across a road which was laid out and constructed in

1905 was a construction of a new street so as to bring the reduction of the passage width of the road into violation of the provisions of byelaw 7. For these reasons, we are of opinion that this conviction cannot stand and must be quashed.

AVORY, J.—I am of the same opinion. Counsel for the respondents has endeavoured to support the decision of the justices on the only ground on which it can be supported—namely, that there was a finding of fact by the justices, that the whole of Hockering Road coloured brown, yellow, pink and green on the plan, was one continuous street from public highway to public highway, and was a new street within the meaning of the byelaws. He contended that that was a finding of fact with which this court could not interfere. I very much doubt whether, if it had been necessary, the court might not have interfered, seeing that that finding of fact, is to my mind, quite inconsistent with the statements of fact in other parts of the Special Case. I doubt whether it was competent for the justices to find as a fact that, in 1913, the whole of the portions coloured brown and pink was one new street at that time. Even if counsel had been right in saying that we were bound by that finding of fact, we should still have to decide as a question of law whether the appellant, by any act that he has done, can be said to have constructed a new street in 1913. The only act that he has done which is alleged to amount to the construction of a street is the erection of these piers and gates at one end only of the road. It appears to me to be almost a contradiction in terms to say that a man who has obstructed an existing street is thereby constructing a new street. Even if it is not, in my opinion, this street coloured brown, on the facts as found by the justices, including the portion at the point where the gates are now erected, was constructed in 1904 and 1905. It was constructed by persons other than the appellant, and, although it may be advisable that the attention of the legislature or of those who have the power of making byelaws shall be directed to the advisability of making a byelaw providing that when once a street has been constructed in accordance with byelaws it shall not be altered without the consent of the local authority so as not to be in accordance with those byelaws, we have no right here to say that the existing byelaws have to be constructed in such a way as to give effect to such a provision. Therefore, in my opinion, the justices were wrong in the conclusion they came to, and the appeal ought to be allowed.

ATKIN, J.—I agree. In my opinion, the finding that the roadway was a new street within the meaning of the byelaws and the Public Health Act, 1875, is an irrelevant finding if all it means is that, before the erection of the gates in question, this street was a new street. The only question that appears to be relevant is whether this act of the appellant was a laying out or a construction of a roadway so as to create a new street. The justices have found facts which I think amount to this, that the alteration of the street was an alteration of such a kind that, if the street was then constructed so as to be a new street, it would be a breach of the byelaws. But it appears to me that the effect of the alteration by the erection of these gates and gateposts does not amount to the construction of a new street. In other words, there appears to be under the byelaw power in the land owner who owns the soil of the roadway to make alterations in the street which would not have been permitted if they had been made at the time when the street was originally constructed. Whether there ought to be a byelaw to prevent such alterations being made is a question of expediency for the legislature, and it must be remembered that these streets are not public highways and that the landowner still owns the soil and presumably has the right, subject to his contractual obligations, to prevent this road from being continued to be used as a road or street in the future. In these circumstances, I agree with what my brothers have said. I think that there is no evidence here of the construction of a new street, and that, therefore, this conviction was wrong.

Appeal allowed.

Solicitors: *C. W. M. Price*; *Robert Mossop*, Woking.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]